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CHARLES F. WALLS, JR., APPELLEE, V. LARRY J. HORBACH, APPELLANT.

JOHN DUIN, A MINOR, BY AND THROUGH DAVID DUIN, HIS FATHER AND NEXT FRIEND, APPELLEE, V. LIVESTOCK PRESS COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLANTS.

203 N. W. 2d 490

Filed January 12, 1973. Nos. 38526, 38656.

Depositions and Discovery: Insurance: Trial: Evidence: Statutes. A statutory interpretation, effective March 1, 1973, is adopted as follows: A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

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

Joseph S. Daly and Thomas J. Walsh and Michael R. O'Malley of Walsh, Walentine, Wolfe & Miles, for appellants.

Michael McCormack of McCormack, Cooney & Mooney and John T. Carpenter of Matthews, Kelley, Cannon & Carpenter, for appellees.

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

SMITH, J.

In two cases the district court adjudged defendants Livestock Press Company and Larry J. Horbach in contempt of court for refusal to answer pretrial interrogatories. The interrogatories requested information about the terms of any policies of insurance against the respectively alleged liabilities. On appeals by Livestock

and Horbach the contentions are that the court (1) erred in overruling objections to the interrogatories and (2) usurped the legislative function by materially changing rules of discovery.

Our statutory sections, patterned after pre-1970 Rules 26(b), 26(d), and 30(b), Federal Rules of Civil Procedure, have not been amended. See, §§ 25-1267.02 and 25-1267.38, R. R. S. 1943. In 1964 we decided that they did not ordinarily authorize disclosure of information about liability insurance policies. Three judges dissented. See Mecke v. Bahr, 177 Neb. 584, 129 N. W. 2d 573 (1964). No one asserts manifestation of a legislative intention, except one by silence, on the subject since 1964.

Decisions of other courts are divided. The federal controversy was resolved in favor of disclosure by amendments of rules in 1970. Opinions of commentators reflect the judicial division. See, 2A Barron and Holtzoff, Federal Practice and Procedure, § 647.1, p. 78 (Wright, Rev. Ed., 1961); Davis, "Pretrial Discovery of Insurance Coverage," 16 Wayne L. Rev. 1047 (1970); 2 Long, The Law of Liability Insurance, §§ 25.02 to 25.04, p. 25-3 to 25-16 (1972); 4 Moore's Federal Practice, par. 26.62, p. 26-335 (2d Ed., 1972); Wilkerson, "Rule 26-The Procrustean Bed," 5 Land and Water L. Rev. 153 (1970); 8 Wright & Miller, Federal Practice and Procedure: Civil § 2010, p. 85 (1970).

Mecke v. Bahr, *supra,* is prospectively overruled, effective March 1, 1973. Our reasons are summarized as follows: ". . . (T)he question resolves itself to whether such information is relevant to the subject matter of the action. . . . (T)he requirement of relevancy . . . should be construed liberally and with common sense, rather than in terms of narrow legalisms. . . . The insurance policy is unique in that it is virtually the only fact bearing on the collectability of the judgment which plaintiff must ascertain from defendant or not at all. . . . Knowledge as to defendant's insurance permits a

more realistic appraisal of a case and . . . leads to settlement of cases which otherwise would go to trial." 2A Barron and Holtzoff, op. cit., § 647.1, pp. 80 to 82. See, also, Mecke v. Bahr, *supra* (White, C. J., dissenting); 8 Wright & Miller, op. cit., § 2010, p. 85.

We interpret the statutory provisions by adopting the language of Rule 26(b)(2), Federal Rules of Civil Procedure: "A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement." Our interpretation shall become effective March 1, 1973.

The contention that our conclusion in the setting of the Mecke interpretation usurps the legislative function is troublesome. See Atkins, ". . . Proposed Amendments . . . Relating to Discovery of Insurance Coverage . . .", 1968 Proceedings, A.B.A. Ins., Negl. & Comp. L. 575 at 579; Fournier, "Pre-Trial Discovery of Insurance Coverage and Limits," 28 Fordham L. Rev. 215 at 232 (1959); Comment, 35 Tenn. L. Rev. 35 at 69 (1967). We are nevertheless not persuaded. True, ". . . stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula. . . ." Helvering v. Hallock, 309 U. S. 106 at 119, 60 S. Ct. 444, 84 L. Ed. 604, 125 A. L. R. 1368 (1940). "It is at best treacherous to find in . . . (legislative) silence alone the adoption of a controlling rule of law." Girouard v. United States, 328 U. S. 61 at 69, 66 S. Ct. 826, 90 L. Ed. 1084 (1946). See, also, Wahoo v. Netha-

way, 73 Neb. 54, 102 N. W. 86 (1905); State v. Hill, 47 Neb. 456 at 539, 540, 66 N. W. 541 (1896) (per Post, C.J.).

Our overruling opinion being prospective, effective March 1, 1973, the judgments of contempt were erroneous. They are reversed and the causes remanded with directions to dismiss the proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, C. J., participating on briefs.

NEWTON J., dissenting..

I respectfully dissent from the majority opinion. We are here dealing with the identical statutes considered and construed in Mecke v. Bahr, 177 Neb. 584, 129 N. W. 2d 573. Since the decision was made in that case in 1964 the Legislature has not seen fit to amend these statutes. It must therefore be recognized that the Mecke v. Bahr, *supra,* construction of the statutes met with the approval, and complied with the intent, of the Legislature.

For this court to now completely reverse, under identical circumstances, a rule of construction which appears to have met with legislative approval over a span of 8 to 9 years is an obvious invasion of the legislative function. Any change should be brought about by legislative act.

WILLIAM SWEARINGEN, APPELLEE, V. CECIL SLOGGETT, APPELLANT.
203 N. W. 2d 442

Filed January 12, 1973. No. 38528.

1. **Trial: Instructions.** When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given.
2. **Appeal and Error.** An assignment of error relating to an instruction to the jury will not be considered by this court unless it was included in the motion for new trial.
3. **Appeal and Error: Instructions: New Trial.** Instructions objected to must be specifically designated by number in a motion

for a new trial in order for such alleged error to be considered on appeal. Otherwise, such instructions will be taken as the law of the case.

Appeal from the district court for Lancaster County: ORVILLE L. COADY, Judge. Affirmed.

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

Bauer, Galter & Scott, for appellee.

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

MCCOWN, J.

This is an action for personal injuries sustained in an automobile accident. Plaintiff obtained a jury verdict for $10,000. Defendant has appealed from the order overruling his motion for a new trial. The only issues on this appeal involve the giving of allegedly erroneous instructions to the jury.

Defendant's arguments are directed at three specific instructions. Instructions numbered 4 and 5 involve respectively loss of profits and the consideration of certain municipal ordinances. Both of these instructions, together with others, were discussed by the court with counsel prior to submission. The defendant requested certain instructions and the substance of the requests were made a part of instructions Nos. 4 and 5 and given to the jury. No objections were made by the defendant to either instruction No. 4 or 5. It is quite clear that defendant's counsel not only failed to object to those instructions but actively participated in discussing them and presented requests which were incorporated into them. When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given, Martinez v. Hoveling, 184 Neb. 560, 169 N. W. 2d 428.

The defendant also assigns error in giving Instruction No. 4-A. This instruction was not submitted by the court to counsel nor discussed with them but was in-

cluded as a separate numbered instruction. Whether inadvertent or not, the instruction erroneously included loss of future earnings as an element of damage when that element was not pleaded or proved. We do not reach the issue of whether the instruction as given was misleading or prejudicial. The motion for new trial did not assign as error the giving of instruction No. 4-A, nor did it contain any claim of error as to the substance of the instruction. An assignment of error relating to an instruction to the jury will not be considered by this court unless it was included in the motion for new trial. Zager v. Johnson, 175 Neb. 866, 124 N. W. 2d 390; Jensen v. Priebe, 163 Neb. 481, 80 N. W. 2d 127.

Instructions objected to must be specifically designated by number in a motion for a new trial in order for such alleged error to be considered on appeal. Otherwise, such instructions will be taken as the law of the case. Duplex Mfg. Co. v. Atlas Leasing Corp., 184 Neb. 294, 166 N. W. 2d 732.

Under the circumstances here, the defendant is not in a position to challenge the giving of the instructions complained of. The judgment is affirmed.

AFFIRMED.

PATRICIA BAILEY, APPELLEE, V. RUTH WILLIAMS, APPELLANT.
203 N. W. 2d 454

Filed January 12, 1973. No. 38531.

1. **Appeal and Error: Motions, Rules, and Orders.** An order overruling a motion for judgment in accordance with a motion for a directed verdict may be reviewed on appeal although no verdict was returned by the jury.
2. **Physicians and Surgeons: Negligence.** A physician is required to exercise the care, skill, and diligence that physicians and surgeons in the same neighborhood and similar communities, engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients.

3. ———: ———. A physician is required to use reasonable skill and care in diagnosing the condition of a patient.
4. ———: ———. Malpractice may consist of a lack of skill or care in making the diagnosis as well as in the treatment of the ailment.

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

David A. Johnson, for appellant.

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellee.

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

BOSLAUGH, J.

This is an appeal in an action for malpractice. At the first trial the jury was unable to agree. The trial court declared a mistrial and ordered a new trial. The defendant appeals from the order overruling her motion for judgment in accordance with her motion for a directed verdict made at the close of the evidence and granting a new trial. Appellate review of such an order is authorized by section 25-1315.03, R. R. S. 1943, although no verdict was returned. In re Estate of Fehrenkamp, 154 Neb. 488, 48 N. W. 2d 421.

The plaintiff is 43 years of age. The defendant is a licensed physician who was practicing medicine in Omaha, Nebraska, in 1968. On Friday or Saturday, July 12 or 13, 1968, the plaintiff telephoned the defendant and stated that she had "severe pain" under her stomach. The defendant said it was "flu" and prescribed Darvon and Lomotil. On Tuesday, July 16, 1968, the plaintiff was feeling worse and called at the defendant's office. The defendant took a brief history and again prescribed drugs to alleviate the symptoms. There is a dispute as to whether the defendant made an examination of the plaintiff's abdomen at that time.

On Wednesday, July 17, 1968, the plaintiff again

called the defendant's office but did not reach her until about 11 a.m. In the meantime the plaintiff had taken an enema. The defendant told the plaintiff she would send out some suppositories and a stronger prescription. At noon the plaintiff was taken to the hospital by her brother. At the hospital she was examined by an intern and another physician and a tentative diagnosis of a perforated bowel was made. An operation performed that afternoon disclosed a ruptured appendix.

The only issue here is whether the evidence presented a question for the jury. In determining the issue the evidence must be considered most favorably to the plaintiff, every controverted fact must be resolved in her favor, and she is to have the benefit of every inference that can reasonably be drawn from the evidence.

The petition alleged that the defendant was negligent in failing to make a reasonable physical examination of the plaintiff; in failing to make a correct diagnosis of the plaintiff's illness; and in failing to give proper treatment after having undertaken the care of the plaintiff.

A physician is required to exercise the care, skill, and diligence that physicians and surgeons in the same neighborhood and similar communities, engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients. Meyer v. Moell, 186 Neb. 397, 183 N. W. 2d 480. A physician is required to use reasonable skill and care in diagnosing the condition of a patient. In re Estate of Johnson, 145 Neb. 333, 16 N. W. 2d 504. Malpractice may consist of a lack of skill or care in making the diagnosis as well as in the treatment of the ailment. Mangiameli v. Ariano, 126 Neb. 629, 253 N. W. 871.

The evidence established that a physician exercising ordinary skill and diligence would have obtained an adequate history from the patient and performed a

proper examination. The evidence was in conflict as to whether these requirements had been performed and also presented an issue of proximate cause. Since these were questions for the jury, it is unnecessary to consider the record further at this time.

The judgment of the district court ordering a new trial is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE. V. JERRY STEVENS, APPELLANT.
203 N. W. 2d 499

Filed January 12, 1973. No. 38533.

Criminal Law: Trial: Time. Although statutory requirements for a speedy trial in a criminal prosecution refer only to indictments and informations, the references may encompass complaints.

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

Charles Ledwith and Claude D. Shokes, for appellant.

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

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

SMITH, J.

Defendant in Omaha municipal court was convicted of petit larceny and sentenced to imprisonment for 10 days. On appeal to district court a jury found him guilty, and the court sentenced him to imprisonment for 30 days. Defendant appeals. We are told that he was denied his statutory right to a speedy trial.

The progress of the case in district court was as follows:

May 27, 1971 - Bond approved for appeal to district court.
June 1, 1971 - Request filed by defendant for a jury trial.
July 21, 1971 - Stipulation by counsel to continuance of case to jury panel of August 9.
February 8, 1972 - Motion by defendant to dismiss for denial of speedy trial.
February 9, 1972 - Trial.

An accused who is not brought to trial within 6 months is on timely motion to be discharged. In computation of the 6-month period many time frames are excluded. See, §§ 29-1207, 29-1208, and 29-1209, R. S. Supp., 1972. The State impliedly concedes that the trial in district court occurred after expiration of the 6-month period. It contends, however, that the statute is not applicable to a prosecution on complaint.

Although statutory requirements for a speedy trial expressly refer only to indictments and informations, the references may encompass complaints. Abbott v. State, 117 Neb. 350, 220 N. W. 578 (1928) (by implication). See, also, Black's Law Dictionary, "Complaint," p. 356 (4th Ed., 1951). Inclusion of complaints has been our practice over the years, and nothing in the new statute suggests change. See, State v. Lewis, 177 Neb. 173, 128 N. W. 2d 610 (1964); Abbott v. State, *supra*; Glebe v. State, 106 Neb. 251, 183 N. W. 295 (1921).

The district court erred in overruling defendant's motion to dismiss. The judgment is reversed and the cause remanded with directions that defendant be discharged.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER, J., dissenting.

I respectfully dissent. As the opinion states, the statute refers only to indictments and informations. I do not agree that the statute was intended to encompass complaints.

BARBARA J. HALVERSON, APPELLEE, V. ROBERT J. HALVERSON, APPELLANT.
203 N. W. 2d 452

Filed January 12, 1973. No. 38535.

1. **Contempt.** Contempt proceedings are in their nature criminal, and no intendments will be indulged in to support a conviction.
2. **Contempt: Divorce: Evidence.** Before a person may be said to be in contempt of court for failure to pay amounts fixed in a decree of divorce for the support of children, the evidence must disclose not only the failure to comply with the decree but also that the failure was willful.

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

James E. Schneider, for appellant.

Murphy, Pederson & Piccolo, for appellee.

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

SPENCER, J.

Defendant appeals a 30-day jail sentence on a finding of contempt for failure to comply with the district court's order to pay child support and costs. We reverse.

The decree of divorce entered December 6, 1968, approved a property settlement agreement providing that defendant pay $50 per month for each of three children: Shirley, then age 16; Trudy, age 5; and Robert J., age 3. Shirley married and left the home in June 1970. The affidavit for citation for contempt of court, filed September 1, 1971, alleged defendant was in arrears on child support payments in the approximate amount of $4,150 and court costs of $276. Defendant filed a joint answer and an application for modification of the support decree.

Hearing was held on March 6, 1972. Counsel for both the parties understood the hearing would embrace the application for modification as well as the citation

for contempt. Counsel did not make opening statements. The trial court assumed because no answer had been filed to the application for modification that only the contempt proceeding was being tried. It was not until both parties rested that he learned they had assumed the application for modification was also being heard.

From the date of the divorce decree to the filing of the citation for contempt the child support payments total $4,250. The decree allowed plaintiff an attorney's fee of $250 and costs of $26, making a total of $4,526. Of this amount plaintiff concedes that she has received $3,100. This leaves a balance due on child support and costs at the time of the filing of the affidavit for contempt of $1,426.

Plaintiff is a lab technician at Sutherland Hospital, earning $450 per month. She remarried October 2, 1971, to her present husband. Defendant, who is 41 years of age, remarried January 17, 1971. At the time of this marriage his present wife had two children, 8 and 10 years of age. Defendant owns no property except a 1965 Chevrolet Impala, mortgaged to a finance company for $700, which had been set off to him in the divorce decree.

Defendant was hospitalized in the Veterans Administration Hospital in Denver, Colorado, in the fall of 1970, for a period of 1 month. His disability appears to be a paralysis problem producing numbness in the right hand, right leg, and knees. He was again hospitalized in the fall of 1971 for at least 30 days for the same disability. Exhibit 2, a letter from a doctor at the Veterans' facility, reads as follows:

"Mr. James E. Schneider
P. O. Box 865
306 West 4th Street
North Platte, Nebraska 69101

In reply
refer to: 554:112
HALVERSON, Robert J.
506 26 71 24
C 17 602 717

"Dear Mr. Schneider:
"This is just a brief note concerning Mr. Halverson's medical condition.
"As you know, Mr. Halverson was seen, examined, and extensively studied at the Veterans Administration Hospital, Denver, Colorado, on two separate occasions, the date of his last discharge being October 6, 1971. The exact diagnosis in this patient is impossible, although we are certain that he has a progressive, neurologic disease, resulting in a permanent disability of approximately 50%. The disability consists of marked weakness in the right arm and right leg, with a specific weakness in the fingers of the right hand. Although it is difficult to say, as I mentioned previously, the etiology of this neurologic problem, we are fairly certain that this will be slowly progressive in nature. I wish I could be more specific concerning the exact diagnosis, but it is impossible at this time to do so.
"We are going to re-evaluate Mr. Halverson during the early part of 1972 and hopefully we will have more information at this time.

"Sincerely yours,
David A. Thompson, M. D. (sgd.)
DAVID THOMPSON, M. D."

Defendant, who has a seventh-grade education, has spent most of his employed years as a truck driver, although on occasion he has worked at digging ditches and at common labor. During the year 1971, he earned $1,885.37 as a truck driver. When he entered the hospital in September 1971, his present family was given an ADC grant by the Lincoln county welfare department in the amount of $144.50. Upon his return home he was given a disability grant from welfare of $33.75 for December 1971, and January 1972. This grant was discontinued when he was transferred to the Vocational Rehabilitation Service in January 1972.

At the time of the hearing defendant was driving a truck owned by Cliff Hagan, under an arrangement by

which he was to use all earnings to license the truck, pay on the back payments due on the truck, and keep up the current payments. The agreement provided when the payments were current he would then receive anything remaining over payments and expenses. On the basis of this arrangement the Vocational Rehabilitation Service made a maintenance grant to defendant of $196 per month, expiring June 30, 1972. This was done in the hope that he could earn enough with the truck by that time to bring the truck payments current and thereafter provide for his own needs.

The plaintiff herein was receiving ADC payments before her present marriage. These payments were terminated when a brother of the defendant died, and the children as insurance beneficiaries received an amount in excess of ADC qualification requirements. The record would indicate that the defendant was current on his child support payments until he entered the hospital in 1970.

Contempt proceedings are in their nature criminal, and no intendments will be indulged in to support a conviction. Frye v. Frye (1954), 158 Neb. 694, 64 N. W. 2d 468. When plaintiff rested defendant moved to dismiss the citation on the grounds that there was no proof beyond a reasonable doubt that the defendant had the ability to pay the support required of him. The plaintiff adduced no evidence on that question. There was no showing as to whether or not the defendant had the ability to work or whether out of earnings or profits he was able to make the payments required. Defendant's motion should have been sustained at that stage.

The evidence now in the record on the earnings and the ability of the defendant to make the payments required was adduced by the defendant. The rule is well settled in this jurisdiction that before a person may be said to be in contempt of court for failure to pay amounts fixed in a decree of divorce for the support of

children, the evidence must disclose not only the failure to comply with the decree but also that the failure was willful. Frye v. Frye (1954), 158 Neb. 694, 64 N. W. 2d 468.

We reverse the conviction for contempt and remand the cause to the trial court for hearing on the application for modification of the child support payments. Considering the fact that both parties have remarried, we direct attention to section 28-446.03, R. S. Supp., 1972, which became effective May 13, 1971.

REVERSED AND REMANDED.

WHITE, C. J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND JOSEPH CASE, APPELLANT.
203 N. W. 2d 492

Filed January 12, 1973. No. 38548.

1. **Indictments and Informations: Probation and Parole.** Technical formality and preciseness of charge are unnecessary in a proceeding for revocation of probation.
2. **Evidence: Probation and Parole.** The finding that the defendant has violated the terms of his probation need not be established beyond a reasonable doubt but must be established by clear and satisfactory evidence.

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.

McCOWN, J.

The defendant, Raymond Joseph Case, appeals from

an order of the district court revoking his probation and imposing a 2 to 5 years sentence on his original burglary conviction.

On October 12, 1971, following a guilty plea, the defendant was convicted on a charge of burglary. December 10, 1971, defendant was placed on 2 years probation. January 20, 1972, the defendant was charged with a violation of the terms of his probation by receiving property stolen in a burglary which occurred in Omaha, Nebraska, on January 6, 1972.

The evidence at the revocation hearing, at which the defendant was represented by counsel, established that the defendant was riding as a passenger in an automobile which had been used as a ram to break into a business establishment less than 2½ hours earlier. The car was driven by the defendant's brother who testified that he had broken into the business establishment by himself. Subsequently, the police discovered a vending machine coinbox which had been concealed under the dashboard of the automobile. The defendant's fingerprint was found on the coinbox. The coinbox had been stolen in the burglary of January 6. Defendant's brother testified that he was the one who concealed the coinbox. He attempted to explain the presence of defendant's fingerprint as the result of picking up the box without any guilty knowledge.

After a full hearing, the district court found the defendant guilty of a violation of the probation order. The court found that at the time and place charged the defendant did in fact conceal property of value with the intent to defraud the owner thereof. Thereafter, the district court imposed an indeterminate sentence of not less than 2 nor more than 5 years in the Nebraska Penal and Correctional Complex.

The defendant in this court contends, in effect, that when the evidence is insufficient to sustain a direct original criminal conviction, it is insufficient to sustain a revocation of probation. We disagree. The two pro-

cedures cannot be so easily equated, nor do they balance each other in the scales of justice. A revocation of probation does not require all the formalities of criminal procedure required for an original conviction of crime. Technical formality and preciseness of charge are unnecessary. State v. Ward, 182 Neb. 370, 154 N. W. 2d 758.

The finding that the defendant has violated the terms of his probation need not be established beyond a reasonable doubt but must be established by clear and satisfactory evidence. Phoenix v. State, 162 Neb. 669, 77 N. W. 2d 237.

While much of the evidence was circumstantial, that does not destroy its probative force nor neutralize all proper inferences which might be drawn from it. Even if it be assumed the evidence here was insufficient to establish beyond a reasonable doubt that the defendant was guilty of burglary or receiving stolen property, nevertheless it was clearly sufficient to establish a violation of the conditions of probation.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN L. MCCOWN, APPELLANT.
203 N. W. 2d 445

Filed January 12, 1973. No. 38567.

1. **Criminal Law: Searches and Seizures: Fees.** The failure of a magistrate to collect the fee for issuing a warrant does not affect the validity of the warrant.
2. **Criminal Law: Searches and Seizures.** The failure to comply strictly with post service statutory proceedings will not invalidate a search conducted pursuant to an otherwise valid warrant in the absence of a clear showing of prejudice.
3. ———: ———. The return and filing of a search warrant is a ministerial act and any failure therein does not void the warrant.
4. **Criminal Law: Witnesses: Trial.** Immunity has historically been a governmental investigative tool for offenses which could not be

investigated or proved otherwise. It is solely a governmental prerogative.

5. **Criminal Law: Continuances.** A request for a continuance or a recess is addressed to the sound discretion of the trial judge.
6. **Evidence: Trial.** Where an inference is so usual, natural, or instinctive as to accord with general experience, its statement is received as substantially one of a fact—part of the common stock of knowledge.

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

Dalke, Carlson & Thompson, for appellant.

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

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

SPENCER, J.

Appellant, John L. McCown, was convicted of the crime of burglary and sentenced to a term of not less than 18 months nor more than 3 years in the Nebraska Penal and Correctional Complex. We affirm.

McCown was charged was burglarizing the Beatrice Hide Company. He was implicated, along with Spiv Salts, by one Harold Haynes who had confessed to the burglary. The articles taken included several new steel traps, some of which were found at the McCown residence.

The burglary occurred sometime subsequent to June 4, 1971, and prior to June 11. Harold Haynes confessed on July 23, 1971. That same day Captain Luckeroth of the Beatrice police department secured a search warrant based upon an affidavit alleging substantially the information given him by Haynes. McCown had stayed behind in his automobile while the other two broke into the building. When they returned to the car they told McCown that there were some animal traps in the building. At his request they returned to the building and got the traps. They then went to the McCown home,

where they divided the loot. Appellant took most of the traps. Before Captain Luckeroth made the affidavit, he had identified the McCown house and car. Affiant personally checked to determine that the identified car was registered to McCown. Based on the affidavit and Luckeroth's sworn testimony, the county judge issued a warrant authorizing the search of appellant's premises as well as his automobile.

Appellant's home, car, and garage were searched pursuant to the warrant. The officers found traps, some new and some old, in the garage. They seized approximately 40 of the new traps. An inventory was made in the presence of Mrs. McCown, and a copy was left with her. As the officers were driving away they observed appellant walking down the street and immediately arrested him. Another inventory was made at the jail while the appellant was apparently locked in a cell in another area. Later that same day the police found a witness, Eugene Thornburg, who stated that he could identify some traps which he had sold to appellant earlier in the year. The witness was taken to the McCown residence. The officer spoke with Mrs. McCown, telling her the witness was there to see if any of the traps remaining in the garage were some that he had given to the appellant. The officer did not have the search warrant with him, but no traps were seized on this visit.

At the hearing on September 16, 1971, the affidavit on which the search warrant had been based was identified by the deputy clerk of the district court. She testified it had been filed in her office that same day by the secretary for the county judge. The warrant with the return and the inventory had been filed in the district court on July 26, 1971. Appellant moved to quash the search warrant and to suppress the evidence seized pursuant to it. This motion was denied.

When the prosecution called Haynes he refused to testify on the ground that his testimony might incriminate him. The State moved to grant Haynes immunity

from prosecution and require him to testify. The court took judicial notice of the action pending in the same court, charging Haynes with breaking and entering, and sustained the motion. Haynes' testimony fully supports and elaborates upon the information contained in the affidavit for the search warrant.

On July 23, 1971, during the course of the investigation, a statement was taped by Haynes and later reduced to writing. During Haynes' testimony, the appellant moved for its production for examination by appellant's counsel. He requested a 10-minute recess to examine the statement for impeachment purposes. The court recessed the proceedings and then denied the motion for a recess.

The traps stolen from the Beatrice Hide Company were new, still in boxes, unused, and not rusty. Appellant, who was a trapper, testified that he had obtained the traps from Eugene Thornburg in February of 1971; that the traps taken from his garage were fairly new but had been used; and that by looking at a trap it was not possible to tell whether it was new or used if it had been properly cared for. Captain Luckeroth was allowed to testify over objection that the traps seized had never been used.

After the jury had retired for deliberation, the following inquiry was received from the jury: "1. What was the testimony of John McCown as to the condition of the traps in plaintiff's Exhibit #5. (new or used?) 2. What was the testimony of Willard Bittings as to the condition of the traps in plaintiff's Exhibit #5. (new or used?) 3. What was the testimony of Donald Luckeroth's as to the condition of the traps in plaintiff's Ex. #5. (new or used?) Larry J. Hasenkamp." After a long conference with the attorneys, the court indicated the portions of the testimony that would be ordered read to the jury. Appellant had no objection to the portion to be read, but did request the addition of certain testimony of his own which he felt should be

read to help explain the questions asked.

In reading the testimony of Bitting, the court reporter included the testimony that the traps "are practically new." This portion of his testimony had been stricken and the court reporter omitted to show the objection, the motion to strike, or the ruling. In reading the testimony of Captain Luckeroth the court reporter inadvertently commenced reading at a point that was prior to the point agreed to in chambers. He read a question asking Luckeroth if he had an opinion as to whether the traps had been used. Luckeroth answered "Yes." The next question was: "And what is that opinion?" An objection to that question was sustained on the ground that insufficient foundation had been laid. Two further foundational questions were asked and answered and then Luckeroth's opinion that the traps had not been used was admitted over the appellant's objection.

Appellant's first assignment of error involves the validity of the search and seizure because of certain alleged variances from statutory procedure. Section 29-816, R. R. S. 1943, requires that "all other papers" in connection with the issuance of a search warrant shall be filed with the clerk of the district court for the county in which the property was seized. Section 29-812, R. R. S. 1943, requires that any court issuing a search warrant shall receive a fee of $2 for the services connected therewith, including the taking of necessary acknowledgments and the filing of the return.

The search warrant was issued July 23, 1971. The return and inventory were filed in the district court for Gage county on July 26, 1971. The affidavit, however, was not filed until September 16, 1971. Appellant contends this late filing invalidates the search warrant. Section 29-814, R. R. S. 1943, reads in part: "A warrant shall issue only on affidavit sworn to before the judge or magistrate and establishing the grounds for issuing the warrant. If the judge or magistrate is

satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property to be seized and naming or describing the person or place to be searched."

Appellant also attempts to void the warrant because the magistrate issuing it took sworn testimony and failed to charge the statutory fee for issuing the warrant. The sworn testimony before the magistrate is not recorded so we have no record of it. There is little doubt, however, that the affidavit standing alone shows probable cause for the issuance of the warrant. The failure of the magistrate to collect the $2 fee does not affect the validity of the warrant. Whether the magistrate may be held accountable for the fee when it is not collected is not involved herein.

The issue presented is whether or not the failure to comply strictly with post service statutory proceedings will invalidate a search conducted pursuant to an otherwise valid warrant in the absence of a clear showing of prejudice. We hold it will not. The return and filing of a search warrant is a ministerial act and any failure therein does not void the warrant. See Evans v. United States, 242 F. 2d 534 (6th Cir., 1957), certiorari denied 353 U. S. 976. There has been no showing of prejudice herein.

Appellant further argues that the last search was invalid because the warrant once served was fully executed and had no further life. Nothing was seized on this search. Further, the witness who accompanied the officer gave no testimony respecting his examination of the traps at the McCown garage. The State argues it was a continuation of the initial search and not an independent search requiring an additional warrant. We find this search did not prejudice appellant's rights. There is no way it could have invalidated the initial search and seizure.

Appellant asserts that section 29-2011.01, R. S. Supp.,

1972, is unconstitutional in that it violates equal protection rights of the appellant. The statute provides whenever any person refuses to testify in a criminal prosecution for the reason that the testimony may tend to incriminate him, he may be compelled to do so by order of the court. When he does so he is granted transactional immunity. Appellant urges that this statute gives the prosecution an advantage over the defense because he does not have a similar right. This he contends is tantamount to a denial of the equal protection of the laws. There is no merit to appellant's contention.

Mr. Justice Powell, writing for the majority in Kastigar v. United States (1972), 40 L. W. 4550, 406 U. S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212, said: "The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence. The power with respect to courts was established by statute in England as early as 1562, and Lord Bacon observed in 1612 that all subjects owed the King their 'knowledge and discovery.' * * * The first Congress recognized the testimonial duty in the Judiciary Act of 1789, which provided for compulsory attendance of witnesses in the federal courts. MR. JUSTICE WHITE noted the importance of this essential power of government in his concurring opinion in Murphy v. Waterfront Comm'n, 378 U. S. 52, 93-94 (1964):

" 'Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. See Blair v. United States, 250 U. S. 273. Such testimony constitutes one of the Government's primary sources of information.' "

The United States Supreme Court has on several occasions characterized immunity statutes as essential to

the effective enforcement of various criminal statutes. As Mr. Justice Frankfurter observed, speaking for the Court in Ullmann v. United States (1956), 350 U. S. 422, 76 S. Ct. 497, 100 L. Ed. 511, such statutes have "become part of our constitutional fabric * * *."

History has demonstrated that immunity statutes are essentially necessary for the investigation of many offenses. Without them it would be practically impossible to enforce some of our criminal statutes. Immunity statutes are intended for those offenses where the only persons capable of giving useful testimony are those implicated in the crime. Immunity has historically been a governmental investigative tool for offenses which could not be investigated or proved otherwise. It is solely a governmental prerogative. Appellant is in no different position than any other individual charged with a crime. It seems elemental that equal protection of laws is applicable only as between persons or citizens, natural or artificial.

Appellant next assigns as error the denial of his counsel's request for a recess in order to examine a statement made by his accomplice, Haynes, for impeachment purposes. Section 29-1912, R. S. Supp., 1972, is a comprehensive statute for discovery in criminal matters. The name of the witness Haynes was endorsed on the information so that McCown knew Haynes was to be a witness against him. He had ample notice and opportunity to obtain the requested information previous to the trial. A request made during the trial is addressed to the sound discretion of the trial court. While we believe the request should have been granted, we do not consider it an abuse of discretion. We cannot see how McCown on the record could have been prejudiced by its refusal.

Appellant urges the trial court committed prejudicial error in giving an additional instruction to the jury after the jury had begun its deliberations. He refers to the reading of testimony to the jury in excess of

the testimony the court reporter had been instructed to read, and the inclusion of testimony which had been stricken from the record. The practice of reading portions of the evidence to the jurors after they have been deliberating, while sanctioned by the statute, is fraught with some danger. Barton v. Shull (1903), 70 Neb. 324, 97 N. W. 292. Here, the court conferred with attorneys for approximately 2 hours before the testimony was read to the jury. Appellant had no objection at that time to the testimony to be read.

The question we need to consider is whether or not the additional testimony read could have been prejudicial to the defendant. Appellant made no objection to the reading of the stricken testimony. He explains this by saying he did not realize at the time the court reporter read such testimony in the judge's chambers that such testimony had been stricken after objection. We are unable to see any way McCown could have been prejudiced by this testimony.

Appellant also urges that if the court was determined to give a further instruction to the jury by having the court reporter read certain portions of the testimony to the jury, it was prejudicial error not to honor his request to have certain portions of his own testimony germane to the request also read to the jury. The court properly denied this request "for the reason that the testimony does not directly relate to the condition of the traps on Exhibit No. 5 of the plaintiff, and in the opinion of the court is not a proper segment of testimony as requested by the questions submitted by the jury."

Appellant's next assignment of error relates to allowing Captain Luckeroth to testify that in his opinion the traps on plaintiff's exhibit No. 5 never had been used. The witness had engaged in the occupation of trapping for a period of 7 or 8 years in Pawnee county and the surrounding area. He was familiar with both new and used traps and had purchased and used traps of the same type as those involved. Even though the

question was phrased in a form calling for an opinion, in reality the answer did not express an opinion of the type which traditionally has been considered an improper invasion of the fact-finding province of the jury. The witness was testifying from his general experience with animal traps. As to whether the traps were new or used is a matter readily ascertainable by any person with ordinary powers of observation. It is not necessarily a subject requiring expert testimony. As stated in Frazier v. Anderson (1943), 143 Neb. 905, 11 N. W. 2d 764: " 'Where an inference is so usual, natural, or instinctive as to accord with general experience, its statement is received as substantially one of a fact—part of the common stock of knowledge.' "

Appellant, on cross-examination of Captain Luckeroth, adduced the following testimony: "Q Referring to plaintiff's Exhibit No. 6, do you have an opinion as to whether or not those traps have been used? A Yes. Q Have they been used? A No." Here, McCown's counsel was eliciting a similar opinion from the witness. Additionally, appellant's counsel asked the witness Bitting whether one of the traps looked "like it's been used." Even if the testimony were considered as opinion evidence, McCown could not have been prejudiced by it.

Appellant next complains of the misconduct of the prosecuting attorney called as a defense witness. The county attorney testified that as a result of the alleged burglary in this matter, he had filed a complaint against Spiv Salts but dismissed the case before filing an information. On cross-examination the county attorney asked himself: "* * * why did you dismiss the charge against Mr. Spiv Salts in the County Court * * *?" His answer was: "That none of these stolen items were found in his possession and testimony from an accomplice is not enough under the law of the State of Nebraska to get a conviction." Appellant contends this was misconduct on the part of the county attorney be-

cause later testimony developed that Harold Haynes' wife was present when he brought the guns and traps into the house. We infer that what the county attorney was saying was that since the only evidence he had against Salts would have been that of Haynes and his wife, he doubted that he could obtain a conviction. Whether this is true or not, we fail to see how the statement could have prejudiced McCown.

Appellant next contends that his sentence was excessive. He received a term of not less than 18 months nor more than 3 years. The penalty for burglary ranges from 1 to 10 years. § 28-532, R. R. S. 1943. There is nothing in the record to show the sentence was not a legitimate exercise of the court's judicial discretion. On the record, we must assume he considered the nature and circumstances of the crime and the history, character, and condition of the offender.

Appellant's last assignment of error is that although no one of the several errors assigned is in itself sufficient to warrant a reversal, all of them in the aggregate establish that the defendant did not have a fair trial. It would be unusual to have a perfect trial or one absolutely free of error. While it is possible so many nonprejudicial errors may creep into a trial in the aggregate they deprive a defendant of a fair trial, this case is not one of them. On the record, the appellant had a fair trial. The jury found him guilty and his conviction should be affirmed.

AFFIRMED.

Note: Dissenting opinion appears *post* p. 576, 204 N. W. 2d 85.

STATE OF NEBRASKA, APPELLEE, V. LEO A. WEIDENFELLER, APPELLANT.
203 N. W. 2d 784

Filed January 12, 1973. No. 38587.

Sentences: Appeal and Error. Unless an abuse of discretion ap-

pears, a sentence within statutory limits will not be disturbed on appeal.

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

Paul E. Watts, for appellant.

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.

MCCOWN, J.

The defendant was convicted of sodomy and sentenced to 1 to 2 years imprisonment. The sole basis for the appeal is that the sentence is excessive.

The defendant was 44 years old. His prior record revealed only minor traffic violations. The charge of sodomy on which he was convicted here was with a 14-year-old boy. As a part of a plea bargain, another count involving sodomy with an 11-year-old boy was dismissed. The defendant's statements and the presentence investigation report indicate similar conduct with another boy who was 12 years old. The charge on which defendant was convicted was not a single isolated incident. The opinion of the psychiatrist and psychotherapist for the defendant was that there would be no recurrence of the defendant's criminal conduct. No evidence was introduced by the State.

The defendant contends that he should have been granted probation. Probation is a favored sentencing alternative, particularly for first offenders, and some of the criteria for granting probation are present here. Nevertheless, the nature and circumstances of the crime, the age of the minor involved, and the evidence of similar conduct with other minors, make it impossible to find that the sentencing court abused its discretion. The maximum allowable sentence was 20 years and the sentence of 1 to 2 years imposed was at the lower level of

the statutory limits. There was no abuse of discretion. Unless an abuse of discretion appears, a sentence within statutory limits will not be disturbed on appeal. State v. Morosin, 187 Neb. 521, 192 N. W. 2d 165. The judgment is affirmed.

AFFIRMED.

JOHN R. GRAHAM, APPELLEE, V. SIMPLEX MOTOR REBUILDERS, INC., A CORPORATION, APPELLANT, IMPLEADED WITH TAKIN BROTHERS FREIGHT LINE, INC., A CORPORATION, APPELLEE.
203 N. W. 2d 494

Filed January 19, 1973. No. 38309.

1. **Negligence: Trial.** It is prejudicial error within the meaning of the comparative negligence statute to submit to the jury issues that are irrelevant and for which there is no proof.
2. **Negligence: Buildings.** It is not negligence to maintain, under appropriate circumstances, different levels and approaches to places of business.
3. **Negligence: Trial.** Generally, it is error to submit a general allegation of negligence to the jury.
4. **Negligence: Pleadings.** The enumeration of specific acts of negligence should state the ultimate acts of negligence and not the conclusion of the pleader.

Appeal from the district court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded with directions.

Theodore J. Stouffer and Michael F. Kinney of Cassem, Tierney, Adams & Henatsch, for appellant.

Alfred A. Fiedler of Weinberg & Fiedler, for appellee Graham.

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

WHITE, C. J.

This is a negligence action in which the plaintiff sus-

tained injuries as a result of a fall which occurred while he was working on the defendant's loading dock as an employee of a third party. The district court entered judgment on a jury verdict for the plaintiff in the sum of $4,500. We reverse the judgment of the district court and remand the cause for a new trial because of error in the instructions.

Plaintiff, John R. Graham, was a truck driver employed by Takin Brothers Freight Line in Omaha, Nebraska. His duties in that capacity embraced the picking up and delivering of freight, including loading and unloading, at various points around the City of Omaha.

The evidence shows that on January 16, 1968, the plaintiff was driving a 20-foot pickup truck for his employer when he was dispatched to the defendant's shop for the purpose of picking up a rebuilt engine. Upon arrival, plaintiff backed the truck up to the west end of the defendant's loading dock. The evidence shows that this dock is approximately 20 feet long and about 4 feet wide with the length running from east to west, and it is roughly 2 feet lower than the bed of the truck the plaintiff was driving at the time. On this particular day the dock was covered with ice, snow, and slush, and no sand or gravel appeared to have been spread for the protection of workers who were concededly invited to use the dock in connection with the prosecution of the defendant's business. In addition, several trash barrels had been placed on the dock.

It is clear that the defendant maintained a steel plate on the dock for use by truckers to bridge the gap between their truck beds and the surface of the dock in loading. This plate was about 2 feet wide and 4 feet long and weighed about 60 pounds. The plaintiff was familiar with the plate, and had used it several times before. It was necessary for him to use it in the loading operation and he testified, without dispute, that he would not have picked up the engine nor attempted to load it had the plate not been there for his use in

putting it on the truck. The plaintiff drove his truck to the dock, stopped it, got out, walked around the front end, and climbed up on the loading dock. He went over to the steel plate and bent down to pick it up. The plate was wet and had ice and slush on it, but the plaintiff testified that it looked loose to him. The fact was that the plate was stuck in the ice and would not give, and the plaintiff's feet slipped in the slush and ice when he exerted himself in the attempt to pick it up, thinking it was loose, when in fact it was frozen stuck. He fell backward toward the south and struck his head, back, and neck on the corner of the defendant's building before falling to the floor of the dock. As a result of the fall the plaintiff sustained the injuries for which this suit was brought. The trial court, in its instructions, submitted to the jury the issue of trash barrels on the loading dock. In the plaintiff's petition it was alleged: "In placing trash barrels and large drums on said loading dock leaving only a small dangerous surface for Plaintiff to walk on while attempting to unload his truck." It was clearly error to submit this alleged act of negligence. The record is bare of any evidence that the placement of these trash barrels or drums had any causal connection with the accident whatsoever. The accident occurred in the small space immediately present and surrounding the location of the steel plate, as we have previously set forth in the facts. There is no evidence, either directly or by inference, that the trash barrels had anything at all to do with either the plaintiff's actions or the discovery and location of the steel plate. Nor is there any evidence that the narrowing of the space on the dock from the placement of the trash barrels or any impediment to the plaintiff's movement around the dock either proximately caused or contributed to the accident. It is prejudicial error within the meaning of the comparative negligence statute to submit to the jury issues that are irrelevant and for which there is no proof. Allen

v. Clark, 148 Neb. 627, 28 N. W. 2d 439; McKinney v. County of Cass, 180 Neb. 685, 144 N. W. 2d 416.

The district court also submitted to the jury the issue, alleged in the plaintiff's petition, concerning the height of the dock. The plaintiff alleged that the defendant was negligent, "In failing to construct said loading dock of a sufficient height that it would be flush with the bottom of a truck." Again, there is no evidence in the record, or any reasonable inference, that the construction of the dock at a different level than the truck was the proximate cause of the accident. The erection or maintenance of a loading dock which is not of sufficient height to be flush with the bottom of a particular truck is not negligence in or of itself. We state the obvious when we observe that such a condition is obvious and a necessary function of the loading dock operation. The very purpose of the steel plate was to make the necessary adjustment to correlate with the varying height of the truck bottoms in the ordinary course of the defendant's business. It is neither alleged nor suggested that the furnishing and contemplated use of the steel plate to adjust the difference in height was in any sense negligence of and by itself. No authority is cited that would sustain such an allegation of negligence as being the proximate cause of an accident such as occurred in this case. To place such a requirement on the defendant in the ordinary course of business here would be tantamount to making him an insurer of the plaintiff's safety and would constitute an unreasonable and burdensome imposition by an inviter owner. We have quite recently rejected the same contention with reference to claimed negligence in maintaining different levels and approaches of places of business. The rule is well established that it is not negligence to maintain, under appropriate circumstances, different levels and approaches to places of business. Gorman v. World Publishing Co., 178 Neb. 838, 135 N. W. 2d 868. See, also, Lund v. Mangelson, 183 Neb. 99,

158 N. W. 2d 223. It was the defendant's duty to the plaintiff to maintain the dock in a reasonably safe condition. But the defendant was not an insurer of the safety of the plaintiff. The inviter did furnish the steel plate for the purpose of facilitating loading and unloading of merchandise at the dock. The plaintiff was familiar with the operation, had been to this dock before, and was experienced in lifting and using the steel plate. From the particular facts present in this case, it must be said as a matter of law that the defendant's action in maintaining a loading dock at a different level from the truck bed was not negligence and it was error for the court to permit the jury to so find.

In another instruction the district court permitted the jury to find for the plaintiff if it found that the defendant was negligent "in otherwise failing to observe that care and caution required of reasonable, prudent persons under the circumstances." The giving of this general instruction permitted the jury to speculate and set up its own standards of duty on the part of the defendant and permitted it to find, if it did, that the defendant was negligent in permitting merely the existence of a dock with ice, snow, and slush on it. It is undisputed that the plaintiff was fully aware of the ice, snow, and slushy condition on the dock, and the defendant was under no duty to alert the plaintiff to any alleged dangerous condition of the actual accumulation of snow and ice which was open and obvious to him. Crawford v. Soennichsen, 175 Neb. 87, 120 N. W. 2d 578; Nance v. Ames Plaza, Inc., 177 Neb. 88, 128 N. W. 2d 564. It is error to submit a general allegation of negligence to the jury. In point is the instruction contained in the case of Raile v. Toews, 165 Neb. 184, 84 N. W. 2d 199. In that case the court submitted to the jury the following instruction: "* * * to exercise every reasonable precaution for their safety, and to exercise ordinary care in providing sufficient light at

night so that workmen could see dangerous moving objects, in warning them of danger, and in avoiding an accident, if possible, as should a person of ordinary prudence under like circumstances." Such an instruction, as we have pointed out, allowed a jury to speculate as to any precaution which might occur to it as a reasonable one which the defendant did not exercise. It is obviously prejudicial because it does not limit the jury to consider only those reasonable precautions that were within the issues of negligence presented. We have stated that this type of pleading and instruction has been condemned by this court on many occasions. The enumeration of specific acts of negligence should state the ultimate acts of negligence and not the conclusion of the pleader. See, Ripp v. Riesland, 176 Neb. 233, 125 N. W. 2d 699; McClelland v. Interstate Transit Lines, 139 Neb. 146, 296 N. W. 757; Marquardt v. Nehawka Farmers Coop. Co., 186 Neb. 494, 184 N. W. 2d 617.

The defendant contends that it was entitled to a directed verdict because the plaintiff was guilty of contributory negligence as a matter of law and should be found to have assumed the risk of the accident as a matter of law. We disagree. The defendant has ably and succinctly set out the applicable law in the State of Nebraska with reference to contributory negligence and the doctrine of assumption of risk in cases of this nature. However, and without repeating these authorities, they are not applicable to the facts in this case. The plaintiff's testimony is as follows:

"Q. Now what position were you in when you went to pick up this steel plate?
"A. I had bent over to pick it up. It looked loose when I bent to pick it up. My feet slipped under the plate and I fell upon my back.
"Q. How did this plate appear?
"A. It looked loose.
"Q. And what end of the plate did you try to pick up?

"A. The one closest to the truck.
"Q. When you started to lift it what did you find?
"A. It was wet and I just all of a sudden slipped.
"Q. Was the plate stuck in the ice?
"A. Yes, it wouldn't come up or give.
"Q. And what did you do when it wouldn't give?
"A. I fell down.
"Q. Could you see that it was stuck?
"A. No, sir.
"Q. Was it apparent to you that it was stuck?
"A. No, sir.
"Q. Was it laying right on the dock?
"A. Yes, sir."

For our purposes we must assume the truth of this testimony. Flanagin v. DePriest, 182 Neb. 776, 157 N. W. 2d 389; Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610. The defendant's argument is predicated on the proposition that the condition of the steel plate and the ice and snow was open and obvious and that, therefore, the defendant, in maintaining the loading dock, owed plaintiff no duty. This is obviously not the fact we have presented in this case. The defendant did have, as the defendant concedes, a duty to furnish a reasonably safe place for the invitee-plaintiff to work on in the performance of his business. The plaintiff did not know that the steel plate was stuck in the ice and thus required an extra heavy amount of exertion to loosen it and to put it in place on his truck. The question of whether he knew, or should have known, of this condition at the time he attempted to lift the steel plate was clearly a question for the jury. The jury could find that the plaintiff reasonably concluded the steel plate was loose and not affected by the ice and snow and, therefore, it could be lifted safely as it had been in the past into the proper loading position. It could reasonably find that there was no knowledge of an open and obvious danger and that, therefore, the plaintiff could not be guilty of assumption of a risk

under the circumstances. We come to the conclusion that the questions of negligence, contributory negligence, and assumption of risk were for the jury.

The defendant further contends that there was insufficient evidence of future pain and suffering and further disability to go to the jury. We do not deem it necessary to recite the detailed evidence in this respect. We have examined it, and it is clear that there was sufficient evidence on these elements to make a jury question.

For the reasons stated above, the judgment is reversed and the cause remanded to the district court for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

DONALD J. VIETZ, APPELLANT, V. TEXACO, INC., A FOREIGN CORPORATION, ET AL., APPELLEES.

203 N. W. 2d 513

Filed January 19, 1973. No. 38463.

1. **Negligence: Evidence.** Negligence is a question of fact which may be proved by circumstantial evidence, but the facts and circumstances proved, together with the reasonable inferences that may be drawn from them, must indicate with reasonable certainty the negligent act complained of.
2. ———: ———. Where several inferences may be drawn from the facts proved, which inferences are opposed to each other but are equally consistent with the facts proved, the plaintiff may not sustain his position by a reliance alone on the inferences which would entitle him to recover.

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

Merritt E. James, for appellant.

Cline, Williams, Wright, Johnson & Oldfather, Fredric H. Kauffman, Kenneth Cobb, and Nelson, Harding, Marchetti, Leonard & Tate, for appellees.

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

BOSLAUGH, J.

The plaintiff, Donald J. Vietz, was injured on March 21, 1968, when he was struck on the shoulder by an overhead door at the filling station where he was employed. The door closed suddenly when one of the two coil springs used to hold the door in a raised position broke unexpectedly. The principal defendants are Texaco, Inc., the owner of the station, and Yant Equipment Co., Inc., which had performed maintenance work on the door.

The trial court dismissed the action at the close of the plaintiff's evidence. The plaintiff appeals contending that the trial court erred in dismissing the action.

The second amended petition alleged that the defendant Texaco was negligent in failing to maintain the door in a safe condition; and in failing to replace the overhead springs and door which were defective. The defendant Yant was alleged to have been negligent in failing to replace the springs which were weak, of improper size, and inadequate; and in overtightening the springs so that they were weakened and dangerous.

The door which injured the plaintiff was approximately 10 feet wide, 9 feet high, and weighed 300 pounds. There were rollers on the sides of the door which ran in tracks fastened to the building. Cables attached to each side of the door were fastened to drums on a shaft located above the doors. The shaft was spring-loaded so that a part of the weight of the door was carried by the springs when the door was in a closed position. The springs were approximately 24 inches long and 3½ inches in diameter.

The building was constructed in 1958 and leased to Henry Knaub, the plaintiff's employer, in December of that year. The building had two overhead doors. After about 2 years some difficulty developed with respect to

the overhead doors. There was difficulty with both doors but there seemed to be more trouble with the north door, which was the door that injured the plaintiff. Apparently the building had settled unevenly with the result that the overhead doors would not raise and lower properly. When the north door was closed there was a space of 1 inch to 1½ inches between the door and the floor at the north edge. When the north door was raised it would bind when the bottom of the door had been raised about 7 feet. This was caused by a misalignment at a joint in the track. To assist in raising the door the springs had been tightened. This caused the north spring to "buckle" or become "wavy."

The plaintiff testified that after the door had passed through the place where it would bind, "it would slam real fast, and then the return spring would kick it back down." Knaub testified that there were times when the springs would be so tight that the door would come out of the bind "like a shotgun blast and bounce back and go back into a bind."

The lease between Texaco and Knaub provided that the lessee would maintain the building in good repair. There was evidence which indicated that Texaco assumed and performed the duty to repair the building. There was an issue as to whether this was gratuitous, but for the purpose of this opinion we assume the evidence was sufficient to sustain a finding that Texaco was obligated to maintain the building, including the overhead doors, in good repair.

The actual repairs were made by employees of the defendant Yant. Yant was an independent contractor, so any negligence of Yant or its employees would not be imputed to Texaco. There was evidence of complaints to Texaco about the operation of the doors but the plaintiff did not contend that Texaco was negligent in selecting Yant to make the repairs.

The evidence is that upon request Yant would send one or more of its employees to make repairs. So far

as the north overhead door was concerned, these repairs consisted of tightening the springs. There is no evidence that the springs were weak, of improper size, or inadequate. There was no evidence that the springs had been overtightened except from inferences that might be drawn from the testimony concerning the operation of the door and attempts by the plaintiff to testify directly that the springs had been overtightened. These latter statements were properly excluded as conclusions by a nonexpert witness except insofar as they related to conversations which were admitted for the limited purpose of proving notice.

The plaintiff testified that after the accident the north spring on the north door looked like it was broken in two places. The spring itself was not produced. Apparently it was never examined, tested, or otherwise examined prior to the accident or afterwards. There is no evidence as to the cause of overhead door spring failures. The evidence indicates that the spring which broke had been in use for 10 years. A witness who had been in the overhead door business for about 20 years and who examined the door at the plaintiff's request approximately 3 years after the accident, testified that the springs then in place were the proper size; that the door worked good for an old door; and that the door was slightly out of adjustment "but a little tightening on the spring would fix it."

Negligence is a question of fact which may be proved by circumstantial evidence, but the facts and circumstances proved, together with the reasonable inferences that may be drawn from them, must indicate with reasonable certainty the negligent act complained of. McAlexander v. Estate of Lewis, 167 Neb. 524, 93 N. W. 2d 632, 77 A. L. R. 2d 575. Where several inferences may be drawn from the facts proved, which inferences are opposed to each other but are equally consistent with the facts proved, the plaintiff may not sustain his position by a reliance alone on the inference which

would entitle him to recover. Norcross v. Gingery, 181 Neb. 783, 150 N. W. 2d 919; Haynes v. County of Custer, 186 Neb. 740, 186 N. W. 2d 483.

The controlling question in this case is what caused the spring to break. It is common knowledge that all metals that are flexed may break eventually. The plaintiff's theory was that the spring broke because it had been negligently overtightened. There is no evidence to support this theory other than the testimony as to the operation of the door during the 10 years that the spring was intact. An inference might be drawn from this evidence that the spring had been overtightened but it is not the only inference that could be drawn from the evidence. It may well be that the spring broke because it was worn out and not because of any negligent act of the defendants. The evidence did not show with reasonable certainty the negligent act complained of.

The motion to dismiss the action was properly sustained. The judgment of the district court is affirmed.

AFFIRMED.

KENNEY F. DEANS, APPELLEE, V. CLYDE R. WEST ET AL., APPELLANTS, SCOTTS BLUFF COUNTY, NEBRASKA, APPELLEE.

203 N. W. 2d 504

Filed January 19, 1973. No. 38516.

1. **Zoning: Time: Counties.** Timely objection by a litigant with standing may nullify zoning regulations purportedly adopted by a county board that has not adopted a comprehensive development plan conformable to statute.
2. **Zoning: Boundaries: Counties.** Where the location and boundaries of a county zoning district can be determined only from an official zoning map or maps, the maps must contain sufficient information to permit a person of ordinary intelligence to locate on the map any specific legally described tract of land, and to determine with reasonable accuracy and precision the boundaries of any zoning district.

3. **Zoning: Notice: Statutes.** An official zoning map or zoning plan adopted by a county board as a part of county zoning regulations which incorporate the map by reference, must be published in book or pamphlet form or in a legal newspaper as required by section 23-114.03, R. R. S. 1943.
4. **Zoning: Notice: Boundaries: Statutes.** Failure to comply with the statutory requirements for publication of the official county zoning map prevents the zoning regulations, of which the map is a part, from becoming valid, effective, or enforceable, at least where the boundaries of the zoning districts can only be determined from the map.

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

Holtorf, Hansen, Kortum, Kovarik & Nuttleman, for appellants.

James R. Hancock, for appellee Deans.

Marvin L. Holscher, for appellee Scotts Bluff County.

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

MCCOWN, J.

This is an action to enjoin the construction and operation of a mobile home court on the ground that this use of the property is in violation of county zoning regulations of Scotts Bluff County. The district court sustained plaintiff's motion for summary judgment and enjoined the defendants from use of the land as a mobile home court and from any further building thereon without a building permit. The defendants have appealed.

Plaintiff and defendants are the owners of adjoining tracts of land located in the southwest quarter of Section 10, Township 22 North, Range 55 West of the 6th P.M., Scotts Bluff County, Nebraska. Defendants' land is an irregular-shaped tract of approximately 11½ acres. Both plaintiff's and defendants' properties are "near to and north of the City of Scottsbluff."

On October 5, 1970, the Scotts Bluff County board adopted county zoning and subdivision regulations which purported to establish some 12 zoning districts. On August 17, 1971, the Scotts Bluff County planning commission denied a request to rezone defendants' land to a "Mobile Home District" classification. Notice of appeal to the board of county commissioners was filed. On September 13, 1971, the minutes of the county board show that the board accepted the opinion of the county attorney that the county planning and zoning authority was not legally constituted and determined that a hearing should not be held on the defendants' appeal. Commencing on September 17, 1971, the defendants began construction of a mobile home park on their land. At approximately the same time, the planning commission and county board commenced procedures for adoption of a comprehensive development plan for the county and the adoption of the same zoning regulations and subdivision regulations purportedly adopted in the fall of 1970. On October 12, 1971, the county planning commission adopted a comprehensive development plan and again adopted the zoning and subdivision regulations and recommended that the county board adopt them. On October 13, 1971, the county board set a public hearing on the matters, and published notice. Following the public hearing on October 26, 1971, the county board unanimously adopted the comprehensive development plan and the zoning and subdivision regulations. The zoning and subdivision regulations were published in loose-leaf pamphlet form, but the official zoning map was not published as a part of the pamphlet or in any other way. A copy of the official zoning map was filed with the county clerk.

The zoning and subdivision regulations adopted by the county board on October 26, 1971, were identical to the regulations purportedly adopted in 1970, except for the cover and identifying and transmittal documents. The regulations established 12 zoning districts, one of

which was a mobile home district. There is no mobile home district on the official zoning map. The regulations provided that the boundaries of the districts "are hereby established as shown on the Official Zoning Map," which was adopted by reference. The regulations also provided: "The Official Zoning Map shall be identified by the signature of the Chairman of the County Board attested to by the County Clerk, and bearing the seal of the county under the following words: 'This is to certify that this is the Official Zoning Map referred to in Section 2 of Resolution # —— of Scotts Bluff County, Nebraska', together with the date of the adoption of this regulation." The official zoning map in evidence, exhibit 2, is not identified as required by the regulations nor is it certified and its title is "Proposed Zoning Plan."

The regulations themselves do not identify nor set out the boundaries of any district and the location and boundaries of a zoning district could only be determined by reference to an official zoning map. The regulations do set out various rules for interpretation where uncertainty exists as to the boundaries of districts as shown on the official zoning map. These rules, however, apply only when the boundaries approximately follow streets, highways, alleys, platted lot lines, city limits, railroad lines, or shore lines. They can be applied only by reference to the official zoning map in any event.

On the basis of the pleadings, affidavits, and exhibits, the plaintiff and defendants both moved for summary judgment. The district court found that the zoning and subdivision regulations adopted in 1970 and 1971 and exhibit 2, the official zoning map, were valid enactments and a valid exercise of the zoning power of Scotts Bluff County, and granted the injunction prayed for by the plaintiff.

The first issue with which we are faced involves the validity of the proposed zoning and subdivision regulations adopted October 5, 1970. The record establishes

that no comprehensive development plan was adopted by the county board prior to October 26, 1971. Section 23-114.03, R. R. S. 1943, which became effective May 22, 1967, provides: "Zoning regulations shall be adopted or amended by the county board only after the adoption of the county comprehensive development plan by the county board * * *."

In Bagley v. County of Sarpy, *ante* p. 393, 202 N. W. 2d 841, we held that timely objection by a litigant with standing may nullify a rezoning resolution by a county board that has not adopted a comprehensive development plan conformable to statute.

Three and a half years without adopting a comprehensive development plan was clearly unreasonable and the zoning and subdivision regulations purportedly adopted in October of 1970, before a comprehensive development plan was adopted, were therefore invalid. This failure may well be the basis for the county attorney's advice to the board which led to the adoption of a comprehensive development plan on October 26, 1971, and the attempted readoption of the zoning and subdivision regulations.

While one crucial defect of failing to adopt a comprehensive development plan was remedied in 1971, other defects remained. The first of these involves the "official zoning map" which was apparently the same both in 1970 and in 1971. That map covers the entire County of Scotts Bluff, an area of approximately 36 miles by 21 miles. There is no showing of any section numbers nor of any township or range identification. The scale of the map is shown only by a comparison of 1, 2, and 3 miles to 4,000, 8,000, 12,000, and 16,000 feet. There is no measure of scale by the inch. A rough guess would approximate it at 5,000 feet to the inch.

The zoning judisdiction of Scottsbluff and of Gering, both of which are first class cities, is shown on the map as 1 mile beyond the city limits, although the zoning jurisdiction of the City of Scottsbluff as of June 7, 1967,

extended 2 miles beyond the city limits.

There are apparently 20 separate zoning districts marked on the map, and the boundary lines of every one of them in one or more places depart from roads or other boundaries referred to in the regulations, without any means of determining where those boundaries are fixed, and with no indication of courses or distance.

The official zoning map is marked "Proposed Zoning Plan" and is not identified or certified as required by the regulations. Probably the most damning commentary on the insufficiency of the map is the fact that it is impossible to locate either the plaintiff's or defendants' property on it, even though both properties carry a complete legal description in the pleadings. It cannot even be determined whether the defendants' property is inside or outside the 2-mile zoning jurisdiction of the City of Scottsbluff. Neither is there any affirmative evidence that the City of Scottsbluff is not exercising, or has not exercised, control over the 2-mile zoning area outside its city limits by the adoption or amendment of a zoning ordinance. If the defendants' property is within the 2-mile zoning jurisdiction of the City of Scottsbluff and the city has adopted or amended a zoning ordinance with respect to the territory outside the corporate limits and inside its zoning jurisdiction, then the city is exercising control and any county zoning regulations are superseded. See § 23-114, R. R. S. 1943.

The statutes authorize the county board to divide a county into districts and to adopt uniform regulations. The statutes refer only to "an official map or maps indicating the districts * * *." Obviously, the sufficiency of any map must be determined in conjunction with the zoning regulations of which it is a part. Where the boundaries of the zoning districts as fixed by the county board are fully and accurately specified and described in the zoning regulations, a map is simply a supplementary graphic representation. In this case however,

the regulations do not locate any district nor describe the boundaries of any district. The location and boundaries of a zoning district can be determined only from the map. In such a case, an official zoning map or maps must contain sufficient information to permit a person of ordinary intelligence to locate on the map any specific legally described tract of land, and to determine with reasonable accuracy and precision the boundaries of any zoning district. If interpretative rules contained in any zoning regulations are insufficient to determine particular zoning boundaries with precision, then courses and distances should be specified on the map. Exhibit 2, the official zoning map here, is inadequate in many respects. It is also not identified and certified as required by the regulations. It does not meet the requirements of an official zoning map for purposes of county zoning regulations.

Section 23-114.03, R. R. S. 1943, provides in part: "An official map or maps indicating the districts and regulations shall be adopted and within fifteen days after adoption of such regulations or maps, they shall be published in book or pamphlet form or in a legal newspaper published once in and of general circulation in the county. Such regulations shall also be spread in the minutes of the proceedings of the county board and such map or maps filed with the county clerk."

In this case, the regulations were published in book or pamphlet form but the official zoning map was not published as a part of the pamphlet or in any other way, although a copy of it was filed with the county clerk. It is undisputable from the record that without the official zoning map it could not be ascertained from the zoning regulations what regulations and restrictions were prescribed or what uses were permitted for any given parcel of land in the zoning area. Under almost identical statutory language, this court has held that any map, plat, or zoning plan attached to, made a part of, or referred to, in a zoning resolution must be pub-

lished in book or pamphlet form or in a newspaper as required by statute. See Board of Commissioners v. McNally, 168 Neb. 23, 95 N. W. 2d 153. That case makes it clear that a statutory provision such as this requiring that an official zoning map adopted by a county board shall be published in book or pamphlet form or in a legal newspaper is mandatory. That case also held that a failure to comply with the statute and publish the map prevents the zoning from becoming valid, effective, or enforceable. An official zoning map, adopted by a county board as a part of county zoning regulations which incorporate the map by reference, must be published in book or pamphlet form or in a legal newspaper as required by section 23-114.03, R. R. S. 1943. Failure to comply with the statutory requirements for publication of the official county zoning map prevents the zoning regulations of which the map is a part from becoming valid, effective, or enforceable, at least where the boundaries of the zoning districts can only be determined from the map. The zoning regulations and map involved here were invalid and conferred no rights and imposed no duties or obligations.

The decree granting plaintiff an injunction against defendants was erroneous. The defendants' motion for summary judgment should have been granted and the cause dismissed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

JERRY E. KOZAK ET AL., APPELLANTS, V. STATE OF NEBRASKA, GAME AND PARKS COMMISSION, APPELLEE.
203 N. W. 2d 516

Filed January 19, 1973. No. 38525.

1. **Ejectment: Evidence.** The plaintiff in ejectment must prevail, if at all, upon the strength of his own title and not upon the weakness of his adversary's title.

2. **Ejectment: Evidence: Deeds.** In an action of ejectment, when the plaintiff's testimony shows defendant in possession of the disputed lands under a claim of ownership, plaintiff must then recover on the superiority of his title, and, if he relies on a record or paper title, he must show a regular chain of title from the government, or from some grantor in possession, or from a common source from which each of the litigants claims.
3. **Deeds: Vendor and Purchaser.** The effect of an exception is to exclude from the operation of the conveyance the interest specified and it remains in the conveyor unaffected by the conveyance.
4. ———: ———. A right or interest reserved in a duly recorded conveyance will be effective as against all who deraign title through the grantee, although the reservation is not expressed in subsequent deeds. Similarly, the fact that subsequent deeds contain no language showing exceptions made in a former deed within the chain of title does not abrogate or destroy such exceptions.

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

Donald E. Benton of Witte & Donahue, for appellants.

Herman Ginsburg of Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee..

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

SPENCER, J.

This is an appeal from the sustaining of appellee's motion for a summary judgment dismissing the ejectment action filed by the appellants and overruling appellants' motion for summary judgment. We affirm.

In 1886, the Chicago, Kansas and Nebraska Railway Company extended its right-of-way through southeastern Nebraska in Pawnee and Gage counties. The railroad purchased part of the right-of-way and the remainder was condemned. The right-of-way, consisting of 14.13 acres taken out of the south half of Section 3, Township 3, Range 8, Gage County, Nebraska, was condemned. The property involved herein is that por-

tion taken out of the southwest quarter of Section 3. The Chicago, Rock Island and Pacific Railroad Company succeeded the Chicago, Kansas and Nebraska Railway Company, and used the land for railway purposes until September 1968, when it conveyed all its right-of-way by deed to the State of Nebraska, Game and Parks Commission.

At the time of the condemnation, L. L. Kirby was the owner of Section 3. Thereafter, on August 27, 1894, said L. L. Kirby conveyed the entire section "subject to the right of way aforesaid" by deed to James H. Kirby and Justus A. Kirby. Subsequently, Justus A. Kirby acquired his cotenant's interest and became the owner of the entire section " 'subject to the right of way of C. K. and N. Railway across said premises.' " Thereafter, Justus A. Kirby conveyed the southwest quarter of Section 3 to Joseph Kozak " 'subject to right of way heretofore granted to C. R. I. and P. R. R. Co.' " Thereafter, Joseph Kozak and wife conveyed the southwest quarter to Mary Kozak with no reference to the railroad right-of-way. By deed dated July 9, 1945, Mary Kozak and her husband conveyed the same property to Ladd J. Hubka, but this deed contained the following "except the railroad." This deed further specified the amount of land conveyed was 154 acres. Thereafter, Ladd J. Hubka and wife conveyed the property to Jerry E. Kozak and Julia Kozak, husband and wife, by deed again containing the following "except railroad right of way."

This action is one for ejectment so there is no burden on the defendant to show title, but the plaintiffs must show title in themselves. They cannot rely upon any weakness in the defendant's title. The rule in this state is enunciated in Reams v. Sinclair (1911), 88 Neb. 738, 130 N. W. 562: "* * * the plaintiff in ejectment must prevail, if at all, upon the strength of his own title, and not upon the weakness of his adversary's."

The parties stipulated that for the purpose of this

action the defendant claims ownership of the land involved herein and the right to possession of the same. In Runkle v. Welty (1907), 78 Neb. 571, 111 N. W. 463, this court held: "In an action of ejectment, when the plaintiff's testimony shows defendant in possession of the disputed lands under a claim of ownership, plaintiff must then recover on the superiority of his title, and, if he relies on a record or paper title, he must show a regular chain of title from the government, or from some grantor in possession, or from a common source from which each of the litigants claims."

Appellants admit that the deed from Mary Kozak and husband to Ladd J. Hubka contained the following description: "* * * to-wit: The SW¼ except the railroad, of Section 3, Township 3, Range 8, Gage County, Nebraska, 154 acres, more or less." They further admit that the deed from Ladd J. Hubka and wife to Jerry E. Kozak and Julia Kozak contained the following description: " 'The SW¼, except railroad right of way, Section 3, Township 3, Range 8, Gage County, Nebraska.' " Appellants further admit that by deed dated September 20, 1968, the Chicago, Rock Island and Pacific Railroad Company conveyed to State of Nebraska, Game and Parks Commission, the real estate involved herein, as follows: " 'All of grantor's abandoned railroad right of way described as being in the SW¼ of Section 3, Township 3, Range 8, Gage County, Nebraska, * * *.' " Appellants further admit that by deed dated June 19, 1969, Jerry E. Kozak and Julia Kozak, husband and wife, purported to convey to Julia Kozak the "SW¼ of said Section 3, Township 3, Range 8, Gage County, Nebraska."

It is to be noted that as described above, from the first conveyance of the southwest quarter, the conveyance has been subject to or excepts the railroad right-of-way. We interpret this language in the light of Elrod v. Heirs, Devisees, etc. (1952), 156 Neb. 269, 55 N. W. 2d 673, in which we said: " 'An exception is

said to be a withdrawal from the operation of the grant, of some part of the thing granted; while a reservation is of some new thing issuing out of what is granted. Thus, where real estate is granted, a portion thereof may be excepted from the terms of the conveyance, * * *. If the exception be valid, the title to the thing excepted remains in the grantor, the same as if no grant had been made. * * * an exception in a deed is nothing more than a qualification, by which some part of the estate is not conveyed, which would have passed to the grantee but for the exception.' * * *

"In Restatement, Property, § 27, p. 80, it is said concerning an exception that: '* * * The effect of an exception is to exclude from the operation of the conveyence the interest specified and it remains in the conveyor unaffected by the conveyance.' "

The rule is thus summarized in 23 Am. Jur. 2d, Deeds, § 268, p. 303: "A right or interest reserved in a duly recorded conveyance will be effective as against all who deraign title through the grantee, although the reservation is not expressed in subsequent deeds. Similarly, the fact that subsequent deeds contain no language showing exceptions made in a former deed within the chain of title does not abrogate or destroy such exceptions."

Appellants premise their action herein on their contention that the railroad acquired only an easement by condemnation, and not fee title. It is not necessary for us to consider the nature of the interest acquired by condemnation. If it was less than a fee interest, applying the rule in Elrod v. Heirs, Devisees, etc., *supra*, appellants have not established sufficient title in themselves to maintain this action. The ruling of the trial court was correct for the reason that appellants must recover on the strength of their own title, and not on any apparent weakness that may exist in the title of the State of Nebraska, Game and Parks Commission.

AFFIRMED.

SMITH, J., participating on briefs.

WHITE, C. J., dissenting.

I would reverse. It is certainly true, as the majority holds, that the plaintiff in an ejectment action must recover, if at all, on the strength of his own title rather than the weakness of his adversary's title. But I would hold that the plaintiffs herein have sufficient title to the disputed strip to prevail, having acquired that title as the successors in interest to the fee simple formerly held by Mary Kozak.

When the C., K. & N. Railway condemned the land in question in 1886, it thereby acquired a mere easement, and the fee simple title remained in the original owner, L. L. Kirby. See, Roberts v. Sioux City & Pacific R.R. Co., 73 Neb. 8, 102 N. W. 60 (1905). The continuity of fee title to the quarter is thereafter clearly unbroken until the deed here in controversy was executed. That deed, from Mary Kozak, granted to Ladd J. Hubka "The SW¼ except the railroad * * * 154 acres, more or less." The majority holds that the fee title to the land underlying the right-of-way did not pass by this conveyance. I would hold that it did.

To begin with, one must inquire into the probable intent of the grantor, Mary Kozak. It cannot seriously be contended that, in conveying the quarter, she purposely withheld from her grantee the irregular strip of land on which the railroad had its track. In Barker v. Lashbrook, 128 Kan. 595, 279 P. 12 (1929), the court construed a deed which conveyed 120 acres "Less one acre in southeast corner for school purposes and 3.81 acres taken by the Kansas City, Wyandotte & Northwestern Railway, containing 117.19 acres, more or less." In holding that this language was sufficient to vest fee title to the entire 120 acres in the grantee the court said: "A reservation is always construed more strictly than a grant * * * and it is difficult to conclude that businesslike people, able to own, sell and buy land, could reasonably have had in mind, at the time of the sale and purchase the leaving of a long, narrow strip of

land through the 120-acre tract that was to remain the absolute property of the grantor in the happening of a very possible contingency." *Id.* at 598.

Similarly, it cannot have been the intention of the grantee, Ladd J. Hubka, to accept such a tract. In Shell Petroleum Corp. v. Ward, 100 F. 2d 778 (5th Cir., 1939), the court was presented with a deed which by its terms conveyed "* * * 162.00 acres of land save and except therefrom 5.6 acres taken up by the rights of way of the Neches Canal Company lateral, making 156.4 acres herein and hereby conveyed." Holding that this conveyed the entire 162 acres the court said: "If construed as appellees would have it, a result both unreasonable and clearly unintended would have been produced. For it is inconceivable that Gregory, plaintiffs' grantee, would have bought a tract of land split into two tracts by a small narrow strip * * *. If construed as appellant contends it should be, every part of the deed would be harmonized and reconciled, and a result would be produced both reasonable and without doubt, in accordance with what the parties to the deed intended." *Id.* at 780.

The construction of such language so as to except from the conveyance a strip of land such as that involved here is not only contrary to the probable intent of the parties, but also violates public policy. As far back as 1895 Justice Taft said in Paine v. Consumers' Forwarding & Storage Co., 71 F. 626, (6th Cir., 1895): "The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots. And modern decisions are even more radical in this regard than the older cases."

In Bowers v. Atchison, Topeka & Santa Fe Ry. Co., 119 Kan. 202, 237 P. 913, the court noted: "Experience

revealed that separate ownership of long, narrow strips of land distinct from the territory adjoining on each side was prolific of private dispute and public disturbance, and public policy became an important factor in the interpretation. Therefore it became settled doctrine that a deed of land abutting on a road passes a moiety of the road, unless intention not to do so be clearly indicated."

In short, courts have chosen, whether for reasons of public policy or because of the probable intent of the parties, to construe these types of clauses not as reservations, but as limitations. Jennings v. Amerada Petroleum Corp., 179 Okla. 561, 66 P. 2d 1069 (1937). In cases with language seemingly far more clear than that here in question courts have nonetheless held that the grantor has parted with the entire estate. The additional language is recognized as merely that of acknowledgment of a prior estate. As to the specification of a lesser acreage (in this case, 154 rather than 160) the court in Barker v. Lashbrook, *supra,* pointed out that: "The most apparent purpose of such statement of acreage excepted for the purpose named and statement of acres remaining was to *protect the grantor against the warranties of the deed* and to indicate that the railroad held the dominant estate to the three acres and she only the servient estate thereto, leaving only one hundred and seventeen acres free from a dominant right of the railroad company." (Emphasis supplied.) Cases reaching similar results are numerous. See, Penn v. Holland (Tex. Civ. App., 1937), 105 S. W. 2d 351, where the deed provided: "* * * save and except three (3) acres of land out of said tract, the same having been conveyed by me to the Houston Galveston Electric Railway Company."

The same arguments apply, a fortiori, to the language contained in the plaintiffs' deed from Ladd J. Hubka. It grants to them "The SW ¼, except railroad right of way." This language clearly manifests no intent on

the part of the grantor to reserve the servient estate. Rather it conveys the fee, acknowledging a dominant estate in the railroad.

Thus in September of 1968 the state of the title to the quarter section here in controversy was: Fee simple in Jerry and Julia Kozak (grantees of Ladd J. Hubka) subject to a right-of-way in the Rock Island Railroad (successor to the C., K. & N.). When, on September 20, 1968 the Rock Island attempted to convey its right-of-way to the Game and Parks Commission, the right-of-way immediately reverted to the Kozaks and merged with their fee. If a railroad attempts to alienate such a right-of-way for any purpose other than railroad operation the right at once reverts to the owner of the servient estate. Roberts v. Sioux City & Pacific R. R. Co., *supra.* Such reversion is expressly not subject to the statutes abolishing rights of reverter and similar future interests. § 76-2,104, R. R. S. 1943. Therefore, subsequent to September 20, 1968, the entire fee title was vested in the Kozaks, subject to no prior estates or rights. Their title being good, they should prevail.

BOSLAUGH and NEWTON, JJ., join in this dissent.

PUTNAM RANCHES, INC., APPELLEE, V. JAMES M. CORKLE, APPELLANT.
203 N. W. 2d 502

Filed January 19, 1973. No. 38560.

1. **Statutes.** Courts are to construe and apply the Uniform Commercial Code liberally to promote its underlying purposes and policies.
2. **Statutes: Replevin: Contracts.** Under the Uniform Commercial Code the remedy of replevin is not available to a buyer of goods that have not been identified to the contract.

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

Charles Rick Johnson and Rodney J. Palmer, for appellant.

William W. Griffin and Dudley R. Herman, for appellee.

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

SMITH, J.

Putnam Ranches Incorporated brought replevin for possession of 30 Holstein milk cows that its assignor had purchased from defendant, James M. Corkle. At the close of all the evidence a verdict for Putnam Ranches was directed. Corkle appeals. He asserts that as a matter of law the district court ought to have ordered return of the replevied cows to him and in addition submitted the issue of his damage to the jury. Constitutionality of the replevin statutes is neither raised nor considered.

Corkle and L. D. Putnam testified to different versions of their agreement. Both men conceded the following facts. In the negotiations they looked at two Corkle herds with which Corkle had intermingled Holstein cows. Corkle was to choose the specific cows which were to be culls. Of the cows chosen some had brands and some had ear tags, but no evidence specifically identified them by brand, ear tags, or other datum.

According to Corkle, he transported the 30 cows to his corrals near O'Neill for delivery to Putnam. He was corroborated by his daughter-in-law. On the morning of September 9, 1967, and after payment of the price, $5,700, Putnam telephoned Corkle's daughter-in-law that he would pick up the cattle in the pen. That afternoon someone other than Dan or Bill Putnam picked up the cattle. L. D. Putnam denied that he or any one for him or his family partnership picked up the cows until the replevin.

Putnam testified he was to leave the cows in possession of Corkle until a problem concerning Bang's

disease in Corkle's herds was removed. Putnam was to receive part of the calf crop which the parties agreed would be 12 steer calves a year. He never received any of the crop, although on several occasions he asked Corkle about delivery of the cows and the steer calves.

The transaction was evidenced by a form bill of sale that on September 9, 1967, transferred the property in 30 Holstein cows, age 3, to L. D. Putnam and Sons. The bill set out the date and the fact of delivery but no brand, mark, or other specific description of a cow.

Over 3 years after the transaction, a dispersion sale of farm equipment, dairy cattle, and other livestock was advertised to be held by Corkle November 18, 1970. At the beginning of the cattle sale, the sheriff executed an order of replevin in this action by seizing 30 cows. The cows bore the registered brands of Corkle or his son and daughter-in-law. Putnam could not show a right to those specific cows.

Courts are to construe and apply the Uniform Commercial Code liberally to promote its underlying purposes and policies. See § 1-102(1), U. C. C. The remedy of replevin is not available to a buyer of goods that have not been identified to the contract. See § 2-716(3), U. C. C.

Plaintiff in a replevin action has the burden of producing evidence and persuading the jury. He must recover on the strength of his right to the property and not upon the weakness of the interest of the defendant. First Nat. Bank v. Provident Finance Co., 176 Neb. 45, 125 N. W. 2d 78 (1963).

Without the Putnam version of the transaction the evidence was insufficient to support a finding that he had not taken possession of the cows on September 9, 1967. The telephone conversation between Corkle's daughter-in-law and Putnam, the removal of the cattle after the conversation, and the failure of Putnam to complain of nondelivery until 1970 conclude the question.

A jury might reasonably believe Putnam's version of the agreement. In that event, however, replevin would not be available, for the evidence was insufficient to support a finding that any cow had been identified to the contract.

The judgment is reversed and the cause remanded with directions to order return of the replevied cows to Corkle and for a determination of damage. See § 25-10,104, R. R. S. 1943.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RICHARD V. KEITH, APPELLANT.
203 N. W. 2d 500

Filed January 19, 1973. No. 38568.

1. **Trial: Evidence: Criminal Law.** The trial court may in its discretion permit the introduction of evidence in rebuttal that is not strictly rebuttal evidence.
2. **Indictments and Informations: Witnesses: Criminal Law.** The failure to endorse on the information the names of witnesses called by the State is not grounds for a reversal of conviction in the absence of prejudice.

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

Frank B. Morrison, Sr., and Stanley A. Krieger, for appellant.

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

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

NEWTON, J.

The defendant was convicted of burglary. All assignments of error are based on the admission of evidence in rebuttal pertaining to checks made for fingerprints.

We affirm the judgment of the district court.

On direct examination, the prosecution did not introduce any evidence regarding fingerprints or attempts made to lift fingerprints at the scene of the crime. It was brought out on cross-examination of prosecution witnesses that the premises burglarized had been examined for fingerprints. There was no testimony on this subject by defense witnesses, but, in rebuttal, the State introduced evidence regarding the lifting of fingerprints at the scene of the crime, their subsequent examination, and the conclusion of experts that due to smudging and overlaying, it was impossible to determine whether they were or were not prints of the defendant. The names of two of these witnesses had not been endorsed on the information.

It would appear that the prosecution had knowledge of the reference to fingerprints in ample time to have introduced this evidence in its case-in-chief. It does not appear to be proper rebuttal evidence. We recognize, however, that the trial court may in its discretion permit the introduction of evidence in rebuttal that is not strictly rebuttal evidence. See, § 29-2016 (4), R. R. S. 1943; State v. Howard, 184 Neb. 461, 168 N. W. 2d 370.

Section 29-1602, R. R. S. 1943, requires the endorsement on the information of the names of witnesses for the State, other than rebuttal witnesses. The purpose is to inform the defendant of the names of persons who will testify against him and give him an opportunity to investigate regarding their background and pertinent knowledge. If the testimony of unendorsed witnesses is not damaging to the defendant, there can be no prejudice. In the present instance, the testimony objected to did not in any manner tend to show defendant's guilt. On the contrary, it indicated that no evidence of his guilt could be adduced by reason of fingerprints. Such evidence is essentially immaterial and neither harmful nor beneficial to either party. The failure to

endorse on the information the names of witnesses called by the State is not grounds for a reversal of conviction in the absence of prejudice. See, Waite v. State, 169 Neb. 113, 98 N. W. 2d 688; State v. Adels, 186 Neb. 849, 186 N. W. 2d 908.

No reversible error appearing, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY ROBERT SIX, APPELLANT.
203 N. W. 2d 508

Filed January 19, 1973. No. 38579.

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

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

C. F. Fitzke and James T. Hansen, for appellant.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and John P. Regan, for appellee.

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

WHITE, C. J.

The sole question involved in this case is whether a sentence of 2 years to the Nebraska Penal and Correctional Complex for a crime of forgery is excessive. We affirm the judgment and sentence of the district court.

The appellant was originally charged and pled guilty to the crime of forgery. He was placed on probation. The sentence involved in this case was imposed because of the appellant's violation of the conditions of his probation. The record reveals that during the period of

his probation the appellant pled guilty to a charge of driving while under the influence of alcoholic liquor in Scotts Bluff County, Nebraska; further shows that he did not submit reports to his probation officer for the months of January, February, and March of 1972; and that he moved from the State of Illinois to the State of Wyoming without the permission, knowledge, or consent of his probation officer. Although able to do so, the appellant has not paid for the costs of the prosecution or made any attempt to make restitution, all in violation of the conditions of his probation. Besides the conviction for drunk driving, the appellant violated a specific condition of his probation (number 3) requiring that he not drink alcoholic liquor of any nature whatsoever, nor enter into any place where alcoholic liquor was sold or consumed. The evidence also shows that the appellant admitted driving a motor vehicle while his driver's license was suspended as a result of the charge of drunken driving. The evidence conclusively shows the appellant's lack of respect and almost total disregard for the terms and conditions of his probation, coupled with the commission of two additional criminal acts during the term of probation. The record also shows that the district court treated the appellant perhaps too leniently because it did extend his probation for a period of 3 months for a previous violation of the conditions of probation. The statute, section 28-601, R. R. S. 1943, provides for a penalty for forgery from 1 to 20 years. We observe that the sentence imposed is close to the minimum.

We have examined the other contentions of the appellant and they are without merit. Where a sentence has been imposed within statutory limits, it will not be disturbed in the absence of an abuse of discretion. No such abuse appears.

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

AFFIRMED.

SIDNEY EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. SCHOOL DISTRICT OF SIDNEY, IN THE COUNTY OF CHEYENNE, STATE OF NEBRASKA, ALSO KNOWN AS SIDNEY PUBLIC SCHOOLS, A POLITICAL SUBDIVISION, APPELLANT.
203 N. W. 2d 762

Filed January 26, 1973. No. 38457.

1. **Legislature: Statutes.** When the Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it will be presumed that it does so with full knowledge of the preexisting legislation and the judicial decisions of this court construing and applying it.
2. **Schools and School Districts: Court of Industrial Relations: Administrative Law.** When a school district refuses to recognize an employees' association authorized to act for it, it has exhausted all remedies under the Teachers' Professional Negotiations Act, and the Court of Industrial Relations acquires jurisdiction.
3. ———: ———: ———. Employees covered by the Teachers' Professional Negotiations Act must await exhaustion of that act before invoking the jurisdiction of the Court of Industrial Relations, but this does not deny them the right to invoke that jurisdiction.

Appeal from the Court of Industrial Relations. Remanded for further proceedings.

Wilson, Barlow & Watson, for appellant.

Crosby, Pansing, Guenzel & Binning and Theodore L. Kessner, for appellee.

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

SPENCER, J.

This appeal is from an order of the Court of Industrial Relations ordering School District of Sidney, hereinafter referred to as District, to recognize Sidney Education Association, hereinafter referred to as Association, as the representative of its members, and directing it to undertake good faith negotiations with Association on

terms and conditions of employment in accordance with the Industrial Relations Act.

On September 7, 1971, pursuant to the provisions of the Nebraska Teachers' Professional Negotiations Act, hereinafter referred to as TPNA, the appellee by letter requested recognition as the bargaining representative of the certified employees of District. The text of the letter read:

"The Sidney Education Association represents a majority of the certified school employees of your District on matters of employment relations.

"To implement the provisions of the Nebraska Teacher's Professional Negotiations Act, Section 79-1287 to 79-1295, you are requested to:

"1. Recognize the Sidney Education Association as the representative of the certificated employees of your District in their professional and employment relations.

"2. Meet and confer with the Negotiation Committee of the Sidney Education Association regarding employment and professional relations with certificated employees in the following areas:

"(a) Salaries
"(1) Salary-Index Schedule
"(2) Salary Base
"(b) One full hour of free planning time for elementary certified employees
"(c) Comparable compensation for extra-curricular-activity sponsors
"(d) Fringe benefits
"(1) Income-Protection Insurance
"(2) Family plan Health, Accident, and Major Medical Insurance
"(3) Life Insurance
"(e) Class size

"Pursuant to law, your written decision on the following requests should be made within 30 days of the date hereof and mailed or delivered to: Mr. Wilburt

Higuchi, President of the Sidney Education Association, Sidney, Nebraska.

"Upon acceptance of the requests to negotiate, we will cooperate with you in scheduling the first negotiation meeting, which is to be held within 21 days after your acceptance.

"We look forward to good faith negotiations with the Board of Education on each of the items set forth above within the framework of the Nebraska Teachers' Professional Negotiations Act."

A special meeting of the board of education was held on September 22, 1971. By a four to two vote, the board declined to recognize Association as the representative of the certificated employees of District. On October 1, 1971, District notified Association of its decision to decline recognition, and set out section 79-1290, R. S. Supp., 1969, therein.

Association then sought relief in the Court of Industrial Relations, petitioning that court to render orders necessary and appropriate to resolve its dispute with District. District filed a special appearance, challenging the jurisdiction of the Court of Industrial Relations, which was overruled. District then filed an answer, reserving the special appearance. The Court of Industrial Relations found it had jurisdiction because the TPNA had been exhausted without resolution of the dispute. On January 28, 1972, that court ordered District to recognize Association, and to undertake good faith negotiations in accordance with the Industrial Relations Act. District perfected this appeal.

Association argues section 79-1290, R. S. Supp., 1969, prevents the entry of any order requiring it to bargain with District. It contends further that the Court of Industrial Relations is without jurisdiction because the remedies provided by TPNA have not been exhausted.

Section 79-1290, R. S. Supp., 1969, provides as follows: "Notwithstanding the provisions of sections 79-1287 to 79-1296, no board of education or school board

of any public school district in the state shall be required to meet or confer with representatives of an organization of certificated school employees unless a majority of the members of such board determines to recognize such organization. Any such recognition shall be and remain in effect for a period of one year."

Section 48-810, R. S. Supp., 1969, provides as follows: "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 48-801, R. S. Supp., 1969, provides in part as follows: "Industrial dispute shall include any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or refusal to discuss terms or conditions of employment; * * *."

Section 48-837, R. S. Supp., 1969, provides as follows: "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."

It is apparent that there appears to be a conflict between some of the provisions set out above. It arises because the TPNA (section 79-1290, R. S. Supp., 1969) provides no school board shall be required to meet or confer with representatives of an organization of certificated teachers unless a majority of the board determines to recognize such organization. Section 48-837, R. S. Supp., 1969, however, provides public employees *shall* have the right to organize and be represented by their organization. It would appear that if the employees have the right to be represented collectively then it must be assumed that if the employer refuses to deal with the association their remedy must be in the Court of Industrial Relations.

It cannot be maintained that teachers and their employers are not within the purview of Chapter 48. Section 48-801 (5), R. S. Supp., 1969, defines employees as including any person employed by any employer, as defined in sections 48-801 to 48-823. Section 48-801 (4), R. S. Supp., 1969, states: "Employers shall mean any political or governmental subdivision of the State of Nebraska * * *." Section 48-810, R. S. Supp., 1969, expressly provides that following exhaustion of the TPNA, teachers come within the protection of the Industrial Relations Act. See School Dist. of Seward Education Assn. v. School Dist. of Seward (1972), 188 Neb. 772, 199 N. W. 2d 752.

The Legislature did not place any limitation or restriction upon the right to negotiate terms and conditions of employment when it amended the Court of Industrial Relations Act in 1969. It simply placed a proviso requiring exhaustion of the TPNA before the exercise of the right to invoke the jurisdiction of the Court of Industrial Relations.

The Legislature did not say Class III, IV, and V school districts were excluded from that legislation, nor

did it hedge in any way the general rights granted to public employees to negotiate collectively or to deny that right to the certificated employees of those three classes to first seek their relief under TPNA. By so doing, the Legislature was retaining the special act relating to employees in these districts. It had been in operation for only 2 years and was operating satisfactorily in certain areas.

The Legislature chose to let the machinery for permissive negotiation for Class III, IV, and V school districts established by TPNA stand, but clearly, by amending the Court of Industrial Relations Act without repealing TPNA, it did not intend to deny the teachers employed by those school districts the rights granted to all other public employees. "When the Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it will be presumed that it did so with full knowledge of the preexisting legislation and the judicial decisions of this court construing and applying it." Airport Authority of City of Millard v. City of Omaha (1970), 185 Neb. 623, 177 N. W. 2d 603.

Unquestionably, the provisions of TPNA make collective negotiations under that legislative enactment discretionary with District. Just as clearly, collective negotiations are permissive under that act. What the Legislature did was give the TPNA the first opportunity to adjust any differences between certificated employees and Class III, IV, and V school districts. When the provisions of TPNA were exhausted without settlement, then the Industrial Relations Act became operative as to those school districts.

We are, therefore, faced with the question as to whether the remedies provided by TPNA were exhausted before the action herein was filed with the Court of Industrial Relations. We determine there had been exhaustion sufficient to give that court jurisdiction. By declining to recognize Association, District exhausted

the provisions of TPNA without resolution of the dispute.

What is the dispute? Section 48-801, R. S. Supp., 1969, defines an industrial dispute to "include any controversy concerning * * * *representation of persons* in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or refusal to discuss terms or conditions of employment; * * *." (Italics supplied.) Here, it is the right of the teachers to join and be represented by Association in negotiations of the terms and conditions of their employment as set out in the letter to District. District argues the dispute was the right of Association to represent certificated employees, which under the TPNA it had a right to refuse. It exercised that right. However, the dispute still exists. Section 48-837, R. S. Supp., 1969, enacted in 1969, unequivocally grants teachers the right to negotiate collectively through their association. District, by its action prevents that representation and prevents negotiation on terms and conditions of employment. To construe the statutes to deny employees of the classes involved remedies afforded to all other public employees would raise a question as to the constitutionality of the act.

The pertinent question is whether the Industrial Relations Act, as amended in 1969, grants the Court of Industrial Relations authority to require a school district to deal with an employee's organization. The following extracts from School Dist. of Seward Education Assn. v. School Dist. of Seward (1972), 188 Neb. 772, 199 N. W. 2d 752, are appropriate herein: "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 sec-

tion 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, * * *.'"

In the Seward case, the School District had recognized the Seward Education Association as the representatives of the certificated employees. Here, District refused to do so. Under section 48-810.01, R. R. S. 1943, and section 79-1290, R. S. Supp., 1969, it cannot be compelled to do so. By this action it has exhausted all remedies under TPNA, and the Court of Industrial Rela-

tions has acquired jurisdiction. Negotiation with District is now at an end, and Association may present all problems on terms and conditions of employment to the Court of Industrial Relations. Unless we so hold, we are faced with the question as to whether section 48-810.01, R. R. S. 1943, and section 79-1290, R. S. Supp., 1969, were repealed by implication.

In Stoller v. State (1960), 171 Neb. 93, 105 N. W. 2d 852, we said: "In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions of the same statute, or in different statutes, the last in point of time or order of arrangement prevails." Where, however, it is possible to harmonize apparently conflicting statutes, that must be done if possible. The construction we have placed on these statutes does just that. Every public employee is given the right to form and be represented by an association in collective negotiation of the terms and conditions of his employment. The Court of Industrial Relations has been authorized to protect that right. School districts included in TPNA cannot be required to meet or confer with employee associations. Those employees covered by the TPNA must await exhaustion of that act before invoking the court's jurisdiction, but this does not deny them the right. Rather, the right remains to be exercised if satisfaction has not been obtained by the exhaustion of TPNA.

If District refuses to recognize or negotiate with Association under the present law, it cannot be compelled to do so. The situation is then the same as if an impasse had been reached in negotiation and the problems are for solution by the Court of Industrial Relations.

The judgment is remanded to the Court of Industrial Relations for further proceedings in accordance with this opinion.

REMANDED FOR FURTHER PROCEEDINGS.

NEWTON, J., dissenting.

The opinion submitted by Spencer, J., holds, in substance, that sections 48-810.01 and 79-1290, R. S. Supp., 1969, do not conflict with other provisions of Chapter 48, article 8, R. S. Supp., 1969. It is stated that the Court of Industrial Relations has the power to settle any controversy over wages or working conditions and, in so doing, is not compelling the school district to enter into any contract but is simply settling a dispute. This is an obvious fallacy. Section 48-819, R. R. S. 1943, makes the orders of the court binding upon all parties and failure to comply is punishable by contempt proceedings. When the court sets wages or working conditions in any case, it is thereby compelling the school district to comply by entering into contracts with the members of the labor organization involved on the terms fixed. When contracts are thus extended to all members of the organization, it requires a very fine splitting of hairs to hold that no contract has been entered into with such labor organization. In truth and in fact, such organization has obtained its contract by court order and sections 48-810.01 and 79-1290, R. S. Supp., 1969, are rendered meaningless. These statutes cannot be reconciled with other sections of Chapter 48, article 8, R. S. Supp., 1969. They are diametrically opposed and unless given their clear meaning must be considered to have been repealed by implication.

It must be borne in mind that the act defining the powers of the Court of Industrial Relations, and the interpretation placed thereon, affects and applies to all political subdivisions, including not only school districts, but also counties, townships, cities and villages, and the State. All of these organizations have, by statute, been granted authority to employ necessary employees, enter into contracts with them, and fix wages and conditions of employment. Some instances pertaining to schools are found in sections 79-328, 79-441, 79-486, 79-519, 79-908, 79-1004, 79-1035, 79-1104, 79-1249,

79-1258, 79-1282, 79-1290, 79-1429, and 79-2619 (3), R. R. S. 1943. Others, pertaining to counties are found in sections 23-104 (6), 23-109, 23-135, 23-223, 23-224 (8), 23-260, 23-343.04, 23-904, 23-916, 23-1111, 23-1114, 23-1204, and 23-1209, R. R. S. 1943, and R. S. Supp., 1969. Has Chapter 48, article 8, R. S. Supp., 1969, amended all these statutes, and similar sections pertaining to other political subdivisions, by implication? If so, the amendment or repeal is of wholesale proportions and section 48-810, R. S. Supp., 1969, is in violation of Article III, section 14, Constitution, State of Nebraska, which provides in part: "And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

"Even though an act of the legislature professes to be an independent act, and does not formally purport to amend any prior act or acts, yet if, in fact, the legislative intent is to, and it clearly appears that the act does, make changes in an existing act or acts by adding new provisions or changing existing ones therein and mingling the new and the changed with the old on the same subject, so as to make of the old, the changed, and the new a connected piece of legislation covering the same subject, the later act must be considered an amendment of the former act or acts and within the constitutional prohibition." State ex rel. Beal v. Bauman, 126 Neb. 566, 254 N. W. 256. See, also, Tukey v. Douglas County, 129 Neb. 353, 261 N. W. 833; Chicago, B. & Q. R.R. Co. v. County of Box Butte, 166 Neb. 603, 90 N. W. 2d 72.

"The constitutional provision is applicable to an act which is not complete in itself, but relates to other existing statutes by changing them in part so that the changes and the existing provisions result in a connected piece of legislation covering the same subject matter." State v. Greenburg, 187 Neb. 149, 187 N. W. 2d 751.

Prior to the passage of Laws 1969, chapter 407, section 3, page 1407, section 48-810, R. R. S. 1943, did not apply to governmental functions of political subdivisions but

was limited to governmental service in a proprietary capacity. In making the section applicable to all forms of governmental service, the 1969 act necessarily limited and circumscribed the authority previously accorded to governmental units to determine and fix the wages and working conditions of employees. This is the principal subject of the act. It authorized the Court of Industrial Relations to step in and dictate settlements when disagreements arose. It is apparent that the 1969 act was not an independent act but related to other existing statutes granting sole authority to governmental units to finally determine and fix wages and terms of employment. It was the evident design that the changes in the 1969 act and the existing provisions result in a connected piece of legislation covering the same subject matter. It clearly appears that the 1969 act does make changes in existing statutes by limiting authority previously accorded governmental units, making their decisions subject to review and nullification, and permitting the Court of Industrial Relations to make these decisions for them. It represents an attempt to make of the old, the changed, and the new a connected piece of legislation covering the same subject and must be considered an amendment of the former acts and within the constitutional prohibition.

BOSLAUGH, J., dissenting in part.

I agree generally with the opinion of the majority of the court in this case. However, I believe section 48-837, R. S. Supp., 1972, enacted in 1969, established the right of the members of the plaintiff to be represented by it in collective negotiation with the defendant. I would affirm the order of the Court of Industrial Relations which directed the parties to undertake good faith negotiations.

FIRST NATIONAL BANK OF OMAHA, A CORPORATION, APPELLEE, AND CROSS-APPELLANT, V. FIRST CADCO CORPORATION, A CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES, IMPLEADED WITH MICRO DATA CORPORATION, INC., ET AL., APPELLANTS AND CROSS-APPELLEES.
203 N. W. 2d 770

Filed January 26, 1973. No. 38471.

1. **Fraudulent Conveyances.** Every conveyance made with the intent to hinder, delay, or defraud creditors or persons of their lawful debt or demands is void.
2. **Fraudulent Conveyances: Intent: Statutes: Creditors' Suits.** The question of fraudulent intent in all cases arising under the provisions of section 36-401, R. R. S. 1943, is a question of fact, and not of law.
3. **Fraudulent Conveyances: Property: Creditors' Suits.** A creditor may usually follow and subject to his claim the fund or proceeds resulting from a fraudulent conveyance and may pursue the same into any property in which it may have been invested, so far as it can be found.
4. **Fraudulent Conveyances: Corporations.** A conveyance in fraud of creditors may be effected by the organization of a corporation and the transfer of property to it with intent to hinder, delay, or defraud creditors.
5. **Fraudulent Conveyances: Vendor and Purchaser: Creditors' Suits.** The provisions of sections 36-401 to 36-409, R. R. S. 1943, do not impair the title of a purchaser for valuable consideration unless the purchaser had previous notice of the fraudulent intent of his immediate grantor, or of frauds rendering void the title of the grantor.
6. **Fraudulent Conveyances: Evidence.** Inadequacy of consideration is a badge of fraud.
7. **Fraudulent Conveyances: Evidence: Creditors' Suits.** A conveyance in consideration of an agreement for future support may, where it has the effect of hindering, delaying, or defrauding creditors, be evidence of fraudulent intent.
8. **Fraudulent Conveyances: Vendor and Purchaser: Creditors' Suits: Contracts.** If the value of the property conveyed exceeds the amount of the encumbrances thereon, an agreement by the grantee to pay off the encumbrances is not a valuable consideration as against the grantor's creditors. The ability of the grantee to pay the encumbrance is also a fact to be considered.
9. **Fraudulent Conveyances: Creditors' Suits.** A transfer by which a grantor reserves to himself a benefit to the detriment of his

creditors may constitute evidence of fraud.

10. **Fraudulent Conveyances: Vendor and Purchaser: Creditors' Suits.** Depending upon the facts and circumstances, one who is the beneficiary of a fraudulent conveyance may be required to account for the rents and profits thereof, including the rents and profits from the proceeds.
11. **Fraudulent Conveyances: Creditors' Suits: Trial.** Where there is a conveyance between close relatives without adequate consideration, the burden is upon the parties to the transaction to establish that it was done in good faith.
12. **Fraudulent Conveyances: Creditors' Suits.** The fact that the plaintiff in a creditor's bill action does have security does not deprive it of its standing as a creditor under section 36-401, R. R. S. 1943.
13. **Fraudulent Conveyances: Creditors' Suits: Equity: Marshalling Assets.** Whether the creditor mortgagee will be required to first exhaust the property which it has taken as security before subjecting the fraudulently transferred property to satisfaction of its judgment lien is in equity a matter for the sound discretion of the court.
14. **Fraudulent Conveyances: Appeal and Error: Equity: Evidence.** In equity this court when reviewing the findings of the trial court will, where the evidence is in conflict, consider that the trial court heard and observed the witnesses and must have accepted one version of the facts rather than another. This rule, however, has no application where, although the belief of the trial court is apparent, its decision was founded upon a question of the sufficiency of the evidence and not its credibility.
15. **Trial: Evidence.** In the trial of a civil action, after the plaintiff has introduced evidence tending to prove his case, if the defendant fails to testify to matters peculiarly within his knowledge necessary to his defense, a presumption exists that his testimony, if produced, would militate against his interest, which presumption may be considered by the court or jury trying the case in determining the facts proved.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Young, Kuhn, Person & Liakos and Gaines, Spittler & Otis, for appellants.

Dwight J. Moore and Swarr, May, Smith & Anderson for appellee First Nat. Bank.

Keith Miller, Harry B. Otis, and L. J. Tierney, for appellees First Cadco Corp. et al.

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

CLINTON, J.

This action, in the nature of a creditor's bill, was brought by the plaintiff, First National Bank of Omaha, against the defendants Micro Data Corporation, Inc., Robert Lucas, and others, the purpose of which was to have declared void certain conveyances of real estate made by Charles C. Lukovsky to the defendant Micro Data and to enjoin the defendant Micro Data from making disposition of certain property alleged to constitute the proceeds of such conveyances. Plaintiff also prayed for general equitable relief. The foundation of the plaintiff's claim is the allegation that the conveyances were made in violation of the plaintiff's rights as a creditor of Charles C. Lukovsky and with the intent to hinder, delay, and defraud the plaintiff in the collection of its debt.

The plaintiff also alleged that one of the defendants, Evelyn Lucas, a debtor of the plaintiff and coobligor with Charles C. Lukovsky, had transferred to her now deceased husband, Joseph F. Lucas, an interest in certain real property with intent to hinder, defraud, and delay the plaintiff in the collection of its debt; that this had been done with the advice and counsel of the defendant Robert Lucas; that she had permitted Robert Lucas to come into possession of the proceeds of the transfer together with proceeds of her husband's share of the property which had become hers as the sole beneficiary of his estate; that Robert Lucas holds these proceeds under the terms of an undisclosed trust for Evelyn Lucas; and that the plaintiff is therefore entitled to reach the proceeds.

The trial court found the conveyances from Charles C. Lukovsky to Micro Data were void. It also found the

property had been conveyed by Micro Data to bona fide purchasers and granted relief directed to the proceeds received by Micro Data, Robert Lucas, and Patricia Lucas from these subsequent conveyances. Previous to the trial on the merits, the trial court granted the application of the plaintiff for the appointment of the receiver for certain real property known as the Villa Rouge Apartments, titled in Micro Data, and received by it as proceeds from the sale of Lukovsky property.

The trial court denied on the grounds of failure of proof relief against Robert Lucas in connection with the transfers by Evelyn Lucas. The court did not make a finding as to what was the specific failure of proof.

The defendant Micro Data on this appeal: (1) Attacks the finding of the court as to the fraudulent nature of the conveyances; (2) asserts the plaintiff was not entitled to maintain this creditor's bill because the basic obligation of Lukovsky was secured by a mortgage lien against certain other property sufficient to satisfy the obligation; (3) challenges the validity of the appointment of the receiver; (4) asserts that because of a certain settlement agreement entered into during the course of this litigation between Charles C. Lukovsky, his wife, Bessie, and the plaintiff, the plaintiff no longer had the status of a creditor of Charles C. Lukovsky and was no longer entitled to the relief prayed for; and (5) claims the release from further personal liability of Charles C. Lukovsky provided for in the settlement agreement operates to discharge Micro Data.

The defendant Robert Lucas appeals from the decree of the court granting relief as against him because he claims he had earlier been ordered dismissed from the action and there was no appeal from that order.

The plaintiff cross-appeals from the denial of relief in connection with the transfers by Evelyn Lucas.

The only defendants who have filed briefs here are Micro Data and Robert Lucas. Such reference to other

parties to the litigation as is necessary will be made as we proceed.

We affirm the judgment of the trial court as to the conveyances to Micro Data. We find against Robert Lucas and for plaintiff on its cross-appeal.

The bill of exceptions and pertinent portions of the transcript have been carefully read. The record is of such size that it is more than one person can conveniently carry. We will make no attempt to completely summarize the evidence, but will give simply an outline of the underlying facts and from time to time give examples of the nature of the evidence. Sometimes this will be done in conclusionary form.

This case is in equity and it follows that on appeal to this court we are required to retry the issues of fact de novo. § 25-1925, R. R. S. 1943. The trial court did, in connection with the conveyances to Micro Data, make specific and detailed findings of fact. In reviewing those findings insofar as the credibility of witnesses is concerned we take into consideration that the trial court observed the witnesses and their manner of testifying. Erickson v. Tyler, 186 Neb. 743, 186 N. W. 2d 123.

The evidence in this case shows a tangled web. Plaintiff for its proof had, after extensive discovery proceedings, to rely to a large degree upon inferences drawn from the evasive and sometimes contradictory testimony of the defendants together with similar testimony from persons closely associated with the defendant Micro Data. That testimony, together with certain documentary evidence and the testimony of some disinterested witnesses as to certain aspects of the case, forms the basis for the conclusions which the plaintiff draws and which the trial court accepted as they relate to the transfers by Lukovsky to Micro Data, but rejected as they relate to the Evelyn Lucas property.

The Conveyances to Micro Data

Since we accept the finding of the trial court on this

aspect of the case, we here give only an outline of the evidence and its general nature.

The transaction which ultimately gave rise to this action had its origin in a loan of $360,000 made in 1965 by the plaintiff to the defendant First Cadco Corporation. The loan was secured by a first mortgage on real estate of the corporation in Lincoln, Nebraska. The note evidencing the loan was signed not only by the mortgagor, but also by Charles C. Lukovsky, Evelyn Lucas, and certain other individuals. All these persons and the individual defendants in this action are closely related. The purpose of having Lukovsky and the others sign the note was to guarantee its payment.

Lukovsky was a man of considerable wealth. In 1965 he owned 2,300 acres of farmland in Harrison County, Iowa. He had made loans to relatives and also had guaranteed loans to First Cadco Corporation in addition to that previously mentioned. These totaled more than $500,000. He was called upon to make good upon these guarantees and began to liquidate his assets to do so. He sold six or seven farms. The obligations, together with the taxes and expenses incurred in the course of liquidation, totaled more than $550,000. The evidence indicates that by August 1969 his sole remaining assets were two Iowa farms totaling about 520 acres. It was the conveyance of these two properties by Lukovsky to Micro Data which the trial court found void.

The plaintiff's loan to First Cadco Corporation came into default and on April 18, 1967, plaintiff commenced an action on the note against First Cadco, Lukovsky, Evelyn Lucas, and others, and on January 2, 1970, obtained a money judgment in the amount of $461,736. Execution was issued and returned unsatisfied.

For convenience and clarity we now identify some of the persons and entities involved. The defendants Robert Lucas and Patricia Lucas are husband and wife. Robert Lucas is a nephew of Dr. Lukovsky. Evelyn Lucas is Robert's mother. Dr. J. F. Lucas, now de-

ceased, was Robert's father. The witness, Calvin Ragle, was the incorporator and president of the defendant Micro Data. He was a friend and associate of Robert Lucas. Wallace Ruffcorn was a tenant on one of the two remaining Iowa farms and became the purchaser from Micro Data of that farm. Chester Investment is a limited partnership and it became the purchaser from Micro Data of the other farm. It conveyed to Micro Data as part of the purchase price real estate known as the Villa Rouge Apartments. This latter property is one of the items which the trial court found was subject to the lien of the plaintiff's judgment.

The trial court found that Robert Lucas and Patricia Lucas, acting through various business entities controlled by them, participated in a plan to and organized the procedure for the fraudulent conveyances, and arranged to receive the proceeds from these conveyances. This finding is compelled by the evidence.

The witness, Ragle, aged 25 at the time of trial, was an acquaintance of Robert Lucas. They had at one time both worked for or were associated with the same trucking company. Ragle at the time of trial had returned to truck driving. Ragle and Lukovsky met on one occasion at the Lucas home, apparently shortly before the various events we now relate transpired. What occurred at that meeting the record does not show.

Micro Data came into existence on September 22, 1969. Ragle was the incorporator and president. He was present when the articles of incorporation were typed by Patricia Lucas from some other articles in the Lucas library. Ragle testified he had consulted with the Lucases prior to forming the corporation, but stated he was only seeking Robert Lucas' advice.

Micro Data was formed for the ostensible purpose of engaging in the business of microfilming business records, but the business was never launched. A few days prior to the incorporation, Ragle, who had no experience in real estate transactions, at the request of

Robert Lucas went to Iowa and looked at the Lukovsky farms. Ragle was paid for these services and other services claimed to have been rendered for Lukovsky on a billing to Lukovsky by Sales Engineering, an entity or name under which Robert Lucas did business. According to Ragle's testimony he reported to Lucas: "Well, there was—I just reported that there was some farm land there, and that—I mean, what can you report? The farm land was there, it was in cultivation, and that was just about it, it was level." A few days after the incorporation one farm was conveyed by deed to Micro Data and a week or so later the other farm was conveyed.

The purported terms and circumstances of the "sales" are significant. Lukovsky testified the motivation for the sale was his desperate need for money, especially to pay one of the encumbrances on this land. The conveyances were made by warranty deed. Existing mortgages on the land were assumed, including the one which desperately needed to be paid. There was no down-payment. No mortgage was given by Micro Data to Lukovsky, nor lien of any kind retained to secure payment of the unpaid balance which admittedly was in excess of $100,000. There was no formal contract, just a memorandum, signed by Lukovsky and on behalf of Micro Data by Ragle, showing computation of the purchase price, including crops, deduction of the encumbrances (which were overstated by $37,500) assumed, balance due, and a notation of the amount of a monthly annuity payable to the seller. This latter item was, Ragle testified, later changed to a sum certain payable monthly. No interest on the unpaid balance was called for by this modification.

Micro Data had no assets. It had no income, and until it acquired the farms, it had no means of paying the encumbrances or the annuity except from the land itself or its income, or the proceeds of the sale of the farms themselves. Although it purportedly purchased the growing crops, when these were harvested the pro-

ceeds, or a part of them, went to Lukovsky.

In December 1969 Micro Data sold both farms, one to Ruffcorn, the tenant on that farm, and the other to Chester Investment for cash and the Villa Rouge Apartment properties. The evidence showed that after the sale Micro Data would make available to Lukovsky in addition to the monthly payments other sums if he wanted additional money. The trial court found the conveyances to Ruffcorn and Chester Investment were for value and without notice by the purchasers of the fraud in the conveyances by Lukovsky to Micro Data.

The evidence indicates Ragle was a mere figurehead as far as the operation of Micro Data was concerned. Patricia Lucas, the corporation secretary-treasurer, operated it in her own way and to suit her own purposes. Most of the proceeds of the sale to Chester Investment and Ruffcorn ended up in the possession and control of Patricia Lucas or Robert Lucas under the guise of business entities controlled by them. These proceeds are specifically identified in the findings of the trial court and are fully justified by the evidence.

The following are examples: R. Frederick II & Associates, Ltd., was controlled by Patricia Lucas. In the sale to Ruffcorn this entity took a note and mortgage on the farm for a purported loan of $21,900 to help Ruffcorn finance the purchase. It made a check to Ruffcorn in the amount. Ruffcorn made a check to Micro Data for the amount of this purported loan plus the additional downpayment. Micro Data transferred the check or made a check for the amounts to R. Frederick II & Associates.

Robert Lucas had guaranteed to an Omaha bank a note in the amount of approximately $40,000 of a corporation in which he apparently had an interest. Micro Data assumed this obligation, became the principal paper debtor, and began, using the proceeds of the farm sales, to pay off this loan at $500 per month. These payments purportedly were in consideration for services

rendered by Robert Lucas as a consultant to Micro Data. The nature and extent or value of these services is not disclosed. One of the services rendered was the recommendation that Micro Data assume the $40,000 loan so as to establish a credit rating. The $40,000 was shown on Micro Data books as an asset. Contradictory explanations for this are given. Patricia Lucas kept the books. Income from the Villa Rouge Apartments netted about $3,000 monthly. This property was managed for a fee by National Realty, a Lucas entity.

One method used to transfer assets was the purported purchase for cash by Micro Data of the stock of a no-asset corporation controlled by Lucas. A further enumeration of the devices used would unduly lengthen this opinion.

The following principles of law are applicable: Every conveyance made with the intent to hinder, delay, or defraud creditors or persons of their lawful debt or demands is void. § 36-401, R. R. S. 1943.

The question of fraudulent intent in all cases arising under the provisions of sections 36-401 to 36-409, R. R. S. 1943, is a question of fact, and not of law. § 36-406, R. R. S. 1943; First State Bank of Scottsbluff v. Bear, 172 Neb. 504, 110 N. W. 2d 83; Walkenhorst v. Apolius, 175 Neb. 583, 122 N. W. 2d 875.

A creditor may usually follow and subject to his claim the fund or proceeds resulting from a fraudulent conveyance and may pursue the same into any property in which it may have been invested, so far as it can be found. 37 C. J. S., Fraudulent Conveyances, § 32, p. 883; Lambert v. Reisman Co., 207 Iowa 711, 223 N. W. 541.

A conveyance in fraud of creditors may be effected by the organization of a corporation and the transfer of property to it with intent to hinder, delay, or defraud creditors. 37 C. J. S., Fraudulent Conveyances, § 48, p. 898; Shapiro v. Wilgus, 287 U. S. 348, 53 S. Ct. 142, 77 L. Ed. 355, 85 A. L. R. 128.

The provisions of sections 36-401 to 36-409, R. R. S. 1943, do not impair the title of a purchaser for valuable consideration unless the purchaser had previous notice of the fraudulent intent of his immediate grantor, or of frauds rendering void the title of the grantor. § 36-407, R. R. S. 1943.

Inadequacy of consideration is a badge of fraud. Farmers State Bank of Ewing v. Dierks, 137 Neb. 442, 452, 289 N. W. 860, 866.

A conveyance in consideration of an agreement for future support may, where it has the effect of hindering, delaying, or defrauding creditors, be evidence of fraudulent intent. Lincoln Trust Co. v. Sweeney, 124 Neb. 686, 248 N. W. 67; Blanchard v. McMillan, 113 Neb. 275, 202 N. W. 878.

If the value of the property conveyed exceeds the amount of the encumbrances thereon, an agreement by the grantee to pay off the encumbrances is not a valuable consideration as against the grantor's creditors. The ability of the grantee to pay the encumbrance is also a fact to be considered. 37 C. J. S., Fraudulent Conveyances, § 153, p. 973; Buell v. Waite, 200 Iowa 1020, 205 N. W. 974; Holley v. Iron Mountain Co., 332 Mo. 1243, 62 S. W. 2d 740.

A transfer by which a grantor reserves to himself a benefit to the detriment of his creditors may constitute evidence of fraud. Corn Belt Savings Bank v. Burnett, 203 Iowa 271, 211 N. W. 217.

Depending upon the facts and circumstances, one who is the beneficiary of a fraudulent conveyance may be required to account for the rents and profits thereof, including the rents and profits from the proceeds. First Nat. Bank of Plattsmouth v. Gibson, 80 Neb. 577, 114 N. W. 777, reversed on other grounds, 80 Neb. 580, 116 N. W. 1127; Wright v. Salzberger, 121 Cal. App. 639, 9 P. 2d 860; Sakis v. Sawyer, 143 Kan. 813, 57 P. 2d 52; 37 C. J. S., Fraudulent Conveyances, § 279, p. 1113.

Where there is a conveyance between close relatives

without adequate consideration, the burden is upon the parties to the transaction to establish that it was done in good faith. Lincoln Savings & Loan Assn. v. Mann, 129 Neb. 26, 260 N. W. 559; Lincoln Trust Co. v. Sweeney, *supra;* Christensen v. Smith, 123 Neb. 388, 243 N. W. 118.

We conclude as did the trial court that the conveyances by Lukovsky to Micro Data were for the purpose of hindering or delaying and defrauding the creditors of Lukovsky and specifically the plaintiff, and that Micro Data was a knowing party to the fraudulent conveyances as were the Lucases and the entities controlled by them.

We adopt as our own the findings of the trial court as to the specific assets which fraudulently came into possession of the Lucases and their business entities. We find that the proceeds of the sales to Ruffcorn and Chester Investment are subject to the lien of the plaintiff's judgment. We further find that the judgment of the trial court should be generally affirmed, except in the respects hereinafter in this opinion specifically excepted and otherwise dealt with.

Plaintiff's Standing as a Creditor

The defendant Micro Data contends the plaintiff has no standing to maintain a creditor's bill because of its mortgage on the First Cadco property in Lincoln, which gives it the status of a fully secured creditor. There is some evidence in the record which indicates that at the time the loan to First Cadco was made the Lincoln property had a value of $500,000. There is no evidence of its value at the time of the commencement of this action several years later. Whatever its value, the plaintiff apparently insisted upon personal guarantees and was not relying solely on its security.

Micro Data's contention is not well taken. The fact that the plaintiff in a creditor's bill action does have security does not deprive it of its standing as a creditor under section 36-401, R. R. S. 1943. Lincoln Trust

Co. v. Sweeney, *supra*. Whether the creditor mortgagee will be required to first exhaust the property which it has taken as security before subjecting the fraudulently transferred property to satisfaction of its judgment lien is in equity a matter for the sound discretion of the court. Lincoln Trust Co. v. Sweeney, *supra*. The Nebraska statutes pertaining to mortgage foreclosures seem to contemplate that the mortgage foreclosure proceedings shall be stayed until the proceedings for the collection of the judgment in the law action have been completed and that judgment is satisfied in whole or in part. § 25-2143, R. R. S. 1943. We find that under the circumstances of this case the plaintiff will not be required to exhaust its security by completing the foreclosure proceedings prior to further proceedings in this action. Other courts apparently have taken different views. See Annotation—Fraudulent Conveyances—Secured Creditors, 116 A. L. R. 1048.

There is an additional reason in this case why Micro Data's contention cannot prevail. During the course of these proceedings the plaintiff and Lukovsky entered into a settlement agreement which was in the nature of a covenant by plaintiff limiting its remedies and the properties to which it could have recourse. Under the terms of this agreement Lukovsky and his wife paid the plaintiff $100,000 in partial satisfaction of the judgment. The settlement agreement specifically provided that the plaintiff "reserves the right to pursue all claims asserted by it against Micro Data Corporation and any property transferred to it by Charles C. Lukovsky, including the proceeds of any such property and any amounts or any property that may be found by the Court or by agreement of the First National and Micro Data Corporation to be due to Charles C. Lukovsky or subject to First National's judgment against Charles C. Lukovsky shall be subject to execution, garnishment or any legal process by First National. Provided, however, it is the intention of the parties hereto that the reservation provided

pertains only to the property and the proceeds thereof now or at any time held by Micro Data Corporation and nothing herein shall be construed to give First National the right to pursue any other property of Charles C. Lukovsky. Any amount or property that may become available to First National through its prosecution of its action against Micro Data Corporation shall be the property of the First National and shall be applied toward the satisfaction of the judgment at Doc. 386 No. 98 in the District Court of Douglas County, Nebraska." By this agreement Lukovsky in effect waived whatever right he may have had to require the plaintiff to first exhaust its mortgage security. As a fraudulent grantee Micro Data's rights cannot rise any higher than those of the fraudulent grantor. We point out that if there is in fact a surplus in the First Cadco property Lukovsky as a paying guarantor would be entitled to reimbursement from the property mortgaged by his principal, First Cadco, to secure the debt which Lukovsky has in part paid.

Micro Data also contends that the settlement agreement itself operates to completely deprive the plaintiff of standing because it is no longer a creditor of Lukovsky. It cites no authority. The provisions of the agreement which we have above quoted, plus those of which we will not make mention, defeat such a position. The agreement specifically provides that the judgment against Lukovsky is not satisfied until either (a) the pending actions are settled, or (b) the judgment itself is satisfied.

Appeal of the Defendant Robert Lucas

At the close of the plaintiff's case, Lucas moved to dismiss. The motion was renewed at the end of the trial. The court took the motion under advisement and on April 10, 1972, made the following notation in the Journal: "Motion of Evelyn Lucas and Robert Lucas to dismiss is sustained." The plaintiff filed a motion for new trial on April 18, 1972, assigning as error the

sustention of the motion to dismiss. On April 20, 1972, the court took this motion for new trial under advisement. On April 24, 1972, the court entered the decree on the merits which included the following: "All amounts now in the possession of Robert Lucas and/or Patricia Lucas acting individually or under the name of their alter ego, R. Frederick II and Associates, shall be subject to immediate garnishment by plaintiff as amounts owing Micro Data Corporation. . . . Robert Lucas shall account for and repay all and any amounts paid on his behalf to the Omaha National Bank by Micro Data to plaintiff with legal interest, thereon, from the date of payment; such to be applied toward the satisfaction of the judgment debt of Charles C. Lukovsky. . . . The Court has determined that insufficient evidence exists to establish that the proceeds of sale of the Lucas farm are now in the hands of Robert Lucas; however, this determination is without prejudice to any application which may be filed or any action for accounting which may be brought against Patricia Lucas, individually or acting under the name of R. Frederick II and Associates, Ltd. The Court would also acknowledge its reluctance in holding that a failure of proof exists inasmuch as the dismissal of Robert Lucas on this portion is based upon the state of the record only, and not upon the personal belief of the Court."

On April 26, 1972, Robert Lucas and Evelyn Lucas and Micro Data filed motions for new trial. On April 28, 1972, the plaintiff renewed its motion for a new trial. On May 1, 1972, the court overruled all the motions.

Micro Data thereafter filed notice of appeal. Robert Lucas filed notice of appeal. The plaintiff at the appropriate time perfected its cross-appeal by filing the necessary brief in accordance with the rules of this court. Revised Rules of the Supreme Court, 1971, Rules 1d and 8b 3.

Robert Lucas argues that he was finally dismissed

from the case by the entry of the dismissal on the journal on April 10, 1972; that there has been no appeal by the plaintiff from the order overruling the plaintiff's motion for a new trial; that therefore the order of dismissal of April 10, 1972, was a several judgment in his favor and is final; and that this court has no jurisdiction so far as Robert Lucas is concerned.

Lucas cites sections 25-1301 and 25-1303, R. R. S. 1943. He also relies upon the recent decision of this court in Green v. Village of Terrytown, 188 Neb. 840, 199 N. W. 2d 611.

Lucas says the terms of the decree insofar as they affect him are inconsistent with the order of dismissal which had become final.

Plaintiff argues there is no inconsistency and that an oral colloquy (included in the bill of exceptions) between the court and plaintiff's counsel at the time the entry was made on the journal on April 10, 1972, indicates the dismissal was intended to apply only to the transfer of the Evelyn Lucas property and that the decree simply clarifies this.

We do not need to choose between these theories. The plaintiff filed a motion for new trial on April 18, 1972, and renewed it on April 28, 1972. The order of dismissal of April 10, 1972, whether intended by the court to apply to just the Evelyn Lucas transaction or also to the Micro Data transfers had not become final because the motion for new trial had been timely filed and not yet ruled on. This was not the situation in Green v. Village of Terrytown, *supra*, where either no motion for new trial was filed at all, or if it was, it had been ruled on and no appeal was perfected by anyone before the time for appeal had expired.

That is not this case. The trial court had jurisdiction both because the matter was pending on motion for new trial and because it had an inherent power to vacate or modify its decree within the term. Buchanan v. Buchanan, 186 Neb. 89, 180 N. W. 2d 886; Beliveau v.

Goodrich, 185 Neb. 98, 173 N. W. 2d 877; Colby v. Maw, 1 Neb. Unoff. 478, 95 N. W. 677; Weber v. Kirkendall, 44 Neb. 766, 63 N. W. 35. We do not mean to imply, however, that an order vacating a dismissal of a party could be entered within the term under the inherent power without notice to the party. The position of Robert Lucas that the order of dismissal as to him had become a final judgment in his favor is not well taken.

It follows that since Robert Lucas has appealed from the decree of April 24, 1972, the cross-appeal of the plaintiff is properly here under the rules of this court previously cited.

Plaintiff's Cross-Appeal

An examination of the plaintiff's amended petition clearly indicates that insofar as it relates to the Evelyn Lucas property it pleads a cause combining the two classes of creditor's bills described by this court in Thies v. Thies, 111 Neb. 805, 198 N. W. 151. In this case, one to set aside and reach the proceeds of an alleged fraudulent conveyance, and the other to reach assets on which execution could not be levied.

Evelyn Lucas, a defendant and one of the judgment debtors, did not testify in person. For reasons related to the condition of her health, the parties stipulated as to the nature of her testimony. This stipulation became a part of the plaintiff's case.

Mrs. Lucas was, in the year 1969, the owner as a joint tenant with her husband, J. F. Lucas, of an Iowa farm. It had a fair market value of $144,000. In the late summer of 1969 she conveyed by quit claim deed her interest in the farm to her husband. There was no consideration for this conveyance. Later the property was sold for $144,000. She joined in the conveyance. The proceeds of the sale were received in two checks, one for $34,000, and one for $110,000. Mrs. Lucas was informed (by whom the stipulation does not show) that her husband converted the checks into cash. Approximately $38,000 of the cash was used to pay one-

half of an indebtedness to the Greater Nebraska Corporation on which J. F. Lucas was jointly obligated with Dr. Lukovsky. (This debt was secured by a mortgage on one of the two Lukovsky farms. J. F. Lucas' share of this debt is the amount by which the mortgages assumed by Micro Data were overstated—the Lucas payment having been made before the assumption.)

Testimony of other witnesses showed that J. F. Lucas cashed the check for $110,000 on September 22, 1969, and received 9 $1,000 bills, 52 $500 bills, 400 $100 bills, and 700 $50 bills. Lucas cashed the $34,000 check at another bank. He died in the spring of 1970.

We return to the stipulated testimony. Mrs. Evelyn Lucas would have testified that Robert told her about April 28, 1971, that her husband had made a gift in cash in the amount of $33,000 to Robert's son on October 9, 1969. She knows of no source from which this could have come except from the sale of the farm. Following the death of her husband she searched the home and his office for the money and found no evidence of it. The stipulated testimony does not state that Mrs. Lucas would deny any knowledge of the whereabouts of the remainder of the proceeds of the farm sale. In response to interrogatories Mrs. Lucas had earlier stated that the $110,000 had to the best of her knowledge been used "for living expenses, payment of debts, taxes, legal expense, medical expense, and subsequent funeral expense."

The record shows Mrs. Lucas was the sole beneficiary of her husband's estate.

Employees of various banks testified. This testimony was that on January 2, 1970, Robert Lucas purchased a $15,000 certificate of deposit, using currency in denominations of $100 or more; and that on March 3, 1970, he purchased 15 $1,000 cashier's checks using currency in similar denominations. On April 8, 1970, at the same bank he purchased a $30,000 cashier's check pay-

ing in currency of like denominations. The currency was wrapped in packets like those used by banks. On May 21, 1970, he purchased $35,000 of cashier's checks using a $35,000 U.S. Treasury check which was apparently the proceeds of some U.S. Treasury bills, and on May 26, 1970, he purchased $1,650. On April 15, 1970, Patricia Lucas purchased $15,500 of cashier's checks. Currency was used on all these occasions except on May 21.

Robert Lucas did not testify. Evelyn Lucas was subpoenaed by the plaintiff and claimed excuse for reasons of health. The trial court granted the request over the objection of the plaintiff. As a result the stipulated testimony was received.

On the basis of the foregoing, was the plaintiff entitled to the relief prayed for? We try the matter de novo. It is evident the trial court decided the matter on the basis of the legal sufficiency of the evidence and not on its credibility. Accordingly, no presumptions based on having observed the witnesses apply.

Herewith our analysis. Mrs. Evelyn Lucas, at a time when she was a debtor to the plaintiff, conveyed without consideration her one-half interest in the farms to her husband. At that time she was a party defendant in the action on the First Cadco note. No business or other reason appears for this conveyance. This court has long held that such a conveyance between spouses shifts the burden of proving good faith as well as the consideration for the transaction upon the grantee. Stevens v. Carson, 30 Neb. 544, 46 N. W. 655, 9 L. R. A. 523; Luikart v. Bosse, 142 Neb. 157, 5 N. W. 2d 128. Had J. F. Lucas survived, the burden would have been upon him. At trial it rested upon his successor who, by reason of Lucas' death, is the wife, the original grantor.

The intent with which the conveyance is made may be gathered from the facts and circumstances surrounding it. Smith v. Ely, 164 Neb. 636, 83 N. W. 2d 55. The record supports the conclusion that Mrs. Lucas knew

of and countenanced the unusual step of converting the sales proceeds into cash. Although this occurred after the original conveyance it is relevant and material as pointing to the purpose of the original conveyance. We conclude the evidence is sufficient to show fraudulent intent in the conveyance of her one-half interest in the farm.

The right of the plaintiff to reach the claimed proceeds of the later sale depends upon a determination of whether the money which appears in the hands of Robert or Patricia Lucas at about the time of his father's death is in fact the proceeds of the sale—one-half of which would represent the proceeds of the fraudulent conveyance, and the other one-half representing the property of Evelyn Lucas as beneficiary of her husband's estate and which the plaintiff is entitled to reach in these proceedings because an ordinary execution is ineffective.

We have carefully considered the matter. That Robert Lucas had some contact with his father after the sale proceeds had been reduced to cash is indicated by the fact that it is claimed a gift of $33,000 was made to his young son and that this is the source of the funds used to operate the entity of R. Frederick II & Associates. The possession of the large sums of currency of large denomination at about the time of the death of the elder Lucas could, in the absence of any explanation, be deemed extraordinary. The machinations of Robert and Patricia Lucas in connection with the Lukovsky and Micro Data conveyances is relevant and material as showing purpose and design on their part. Shepard v. Hamaker, 120 Neb. 166, 231 N. W. 761. These transactions were occurring during the same period of time; common motivation and occasion for both are found in the original First Cadco and other transactions, resulting in the disastrous outcome for the Lukovskys and the elder Lucases.

Robert Lucas chose not to testify in his own behalf.

This court has said several times: "In the trial of a civil action, after the plaintiff has introduced evidence tending to prove his case, if the defendant fails to testify to matters peculiarly within his knowledge necessary to his defense, a presumption exists that his testimony, if produced, would militate against his interest, which presumption may be considered by the court or jury trying the case in determining the facts proved." Talich v. Marvel, 115 Neb. 255, 212 N. W. 540. See, also, Alexander v. Turner, 139 Neb. 364, 297 N. W. 589. Other courts have followed the rule. Tinsley v. Bauer, 125 Cal. App. 2d 714, 271 P. 2d 110.

Robert Lucas' failure to give any explanation weighs against him. The record shows that in 1970 Lucas had an income less than $600. The simple fact of the transaction by Lucas in cash without more would probably not be sufficient. But as we have already pointed out, there is other evidence tending to show motive, opportunity, and design. The possession of the funds then becomes material and is competent evidence. It is not necessary to have evidence which specifically identifies these funds as the proceeds. A reasonable and logical inference that they are is raised from the evidence. This is not unlike the rule which is applied in cases of criminal prosecution for embezzlement or burglary. See, Annotation: Evidence—Money—Accused's Possession, 91 A. L. R. 2d 1046; Dockerty v. People, 96 Colo. 338, 44 P. 2d 1013; Hansbrough v. United States (8th Cir.), 156 F. 2d 327. Similar rules have been applied in civil cases. Tinsley v. Bauer, *supra*.

We find that the proceeds of the sale of the Lucas property were in the possession of Robert Lucas in 1970, and he should be required to account for the same. Accordingly, the order of the court dismissing him from the action is reversed.

The Receivership

Micro Data complains the court erred in appointing a receiver for the Villa Rouge Apartment property.

Various objections are made. All, of course, fail with our decision in the appeal of Micro Data on the main issue. Micro Data as a fraudulent grantee has no interest in the Villa Rouge Apartments unless there is a surplus after satisfaction of the plaintiff's judgment. The appointment of a receiver was not erroneous and Micro Data is in no position to complain of it.

* * * * *

Micro Data has made 51 assignments of error. Such of the claims of alleged error as are not included within what is previously decided in this opinion have been found to be without merit.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. DALE D. JURGENS, APPELLANT.
203 N. W. 2d 787

Filed January 26, 1973. No. 38514.

1. **Probation and Parole: Appeal and Error: Criminal Law.** The suspension of sentence and the granting of probation is discretionary with the trial court, and in the absence of an abuse of discretion the trial court's determination will not be disturbed.
2. **Sentences: Appeal and Error: Criminal Law.** A sentence within the limits prescribed by the statute will not be disturbed in the absence of an abuse of discretion.
3. **Appeal and Error: New Trial.** A holding of this court on a first appeal becomes the law of the case on a retrial of the same issues unless on a second trial the facts are materially and substantially different.

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

Dale D. Jurgens, pro se.

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

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

SPENCER, J.

Defendant entered a plea of nolo contendere to a charge of motor vehicle homicide. The first appeal herein was before this court in 187 Neb. 557, 192 N. W. 2d 741. At that time, we vacated the sentence and remanded the cause for resentencing. The previous judge having retired, his successor took judicial notice of the previous presentence hearing and held one of his own. He then imposed exactly the same sentence and fine as previously imposed, with the exception that he eliminated the released time periods for which the previous sentence was vacated. We affirm.

In the previous case we held the suspension of sentence and the granting of probation is discretionary with the trial court and in the absence of an abuse of discretion the trial court's determination will not be disturbed, and a sentence within the limits prescribed by the statute will not be disturbed in the absence of an abuse of discretion.

Two judges after presentence hearings have denied appellant probation. Appellant's appeal is premised on the excessiveness of the sentence and the denial of probation. Both judges imposed a sentence of 50 days in jail and a fine of $500. As we said in the first case: "It would appear to us that the court could in this case either grant probation or impose a sentence such as here imposed and, * * * neither course would be an abuse of discretion." We have, therefore, already determined the issues presented by this appeal adversely to the appellant. A holding of this court on a first appeal becomes the law of the case on a retrial of the same issues unless on a second trial the facts are materially and substantially different. Landmesser v. Ahlberg, 184 Neb. 182, 166 N. W. 2d 124.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN L. MCCOWN, APPELLANT.
204 N. W. 2d 85

Filed January 26, 1973. No. 38567.

Appeal from the district court for Gage County: WILLIAM B. RIST, Judge. Affirmed. See *ante* p. 495, 203 N. W. 2d 445, for majority opinion.

Dalke, Carlson & Thompson, for appellant.

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

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

CLINTON, J., dissenting.

I dissent from that portion of the court's opinion dealing with the denial of the request of defendant's counsel to examine for purposes of possible impeachment a previous statement of the accomplice Haynes who had been granted immunity by the State and called as a prosecution witness. I would hold that there was an abuse of discretion by the trial court.

The majority opinion on the above issue rests its conclusion upon a claimed failure of counsel to make use of the discovery statute, section 29-1912, R. S. Supp., 1972. A careful examination of this statute clearly shows it does not require or authorize the production of a statement given by a witness *or a codefendant.* Neither was discovery by deposition under section 29-1917, R. S. Supp., 1972, available to the defendant. He could not compel his alleged accomplice or codefendant to testify, for to require the codefendant to do so would necessarily be to compel him to testify against himself. The defendant could not give his accomplice an immunity bath as could the State.

The conviction of the defendant rested almost completely upon the testimony of Haynes. It is funda-

mentally unfair to deny an opportunity to examine prior statements of an accomplice who has been granted immunity and who has the strongest of motives for lying or coloring his testimony. The majority opinion says: "We cannot see how McCown on the record could have been prejudiced by its refusal." The truth is we do not know and cannot know whether there is prejudice because the statement is not in the record. If the trial court refuses to require production of a prior statement of the witness, the statement should be made a part of the record on appeal in order that the defendant will not be deprived of an opportunity to show that the trial judge abused discretion in refusing to grant the demand and that the defendant was harmed by such ruling. Gaskin v. State (Tex.), 353 S. W. 2d 467. The majority opinion characterizes the request of counsel as a motion for a recess. It was not exclusively a motion for a recess as the majority opinion indicates. The principal request was a motion to produce, and this the trial court denied and as a result the statement did not get into the record.

Nebraska cases such as Erving v. State, 174 Neb. 90, 116 N. W. 2d 7, do not seem applicable under their very different facts. The proper rule which should be applicable here is as set forth in State v. Bachman, 41 Nev. 197, 168 P. 733.

I would require the State to produce the statement for examination by the defendant's counsel, and if the statement contains relevant and material matter inconsistent with the trial testimony of the witness and which could reasonably have affected the outcome, then that a new trial be granted.

PATRICIA LANZ, APPELLANT, V. LARRY LANZ, APPELLEE.
203 N. W. 2d 761

Filed January 26, 1973. No. 38607.

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. ———: ———. If the circumstances of the parties change and it is in the best interests of the children, the court may from time to time revise or alter a divorce decree so far as custody, care, and maintenance of children is concerned.
3. **Divorce: Parent and Child: Appeal and Error.** In cases involving determinations of child custody, 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.

Appeal from the district court for Sheridan County: ROBERT R. MORAN, Judge. Affirmed as modified.

Michael V. Smith, for appellant.

Wright & Simmons, John F. Wright, and John F. Simmons, for appellee.

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

NEWTON, J.

This is a proceeding to determine custody of the three minor children of the parties. The district court awarded custody to the defendant, entered judgment for plaintiff for $1,000 due on child support payments previously decreed, and taxed costs to the plaintiff. We affirm the judgment of the district court except with reference to costs.

Plaintiff obtained a decree of divorce on November 10, 1969, and was awarded custody of the children. Evidence adduced in support of defendant's petition for a change of custody strongly supports the award of custody to defendant. Since the divorce plaintiff has failed to maintain a proper home for the children and has, on

the whole, been guilty of disregarding or neglecting the interests of the children. It is conceded that since her divorce plaintiff has borne one illegitimate child; and has entered into a series of sexual relationships with a number of different men, traveled with some on occasion, and lived with at least two. Most of these relationships appear to have occurred in the various homes plaintiff established for herself and the children. Defendant has remarried, has steady employment, has established a home, and his wife joined with him in his plea for custody.

The record fully supports the decision of the district court which appears to be in the best interests of the children. The following fundamental rules appear to be applicable.

"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. * * *

"If the circumstances of the parties change and it is in the best interests of the children, the court may from time to time revise or alter a divorce decree so far as custody, care, and maintenance of children is concerned. * * *

"In cases involving determinations of child custody, 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." Phillips v. Phillips, 188 Neb. 89, 195 N. W. 2d 160.

The judgment of the district court is affirmed with the exception that costs in the district court and in this court are taxed to the defendant and plaintiff is allowed the sum of $500 for the services of her attorney in the district and Supreme Courts.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JOHN NELSON, APPELLANT.
203 N. W. 2d 785

Filed January 26, 1973. No. 38685.

Criminal Law: Sentences: Constitutional Law: Time. A criminal sentence in which the court considered prior time spent by defendant in custody may be consistent with state and federal constitutional guarantees of due process and with the federal constitutional guarantee of equal protection, although the record at the sentencing hearing is silent on the subject.

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

John Nelson, pro se.

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.

SMITH, J.

Defendant moved the district court for credit on his criminal sentence, the credit to be prior time he had spent in county jail. The court overruled the motion, and defendant appeals. He contends that the ruling violated constitutional guarantees of due process and equal protection.

Defendant pleaded guilty to embezzlement of more than $100. The district court on October 26, 1970, sentenced him to imprisonment for an indeterminate period of 1 to 3 years. The minimum and maximum periods prescribed by statute were 1 and 7 years. See §§ 28-506 and 28-539, R. R. S. 1943.

The judge who heard the motion was the judge who pronounced sentence. He found that in the sentencing of defendant he had considered the prior time spent in custody. Cf. § 83-1,106(1) and (5), R. S. Supp., 1972; Laws 1969, c. 817, § 37, p. 3091. The journal is silent, and no verbatim record of the sentencing hearing is before us.

Had the judge resentenced defendant, he clearly would have imposed a sentence with the same net time for defendant to serve. In doing so, he would not have penalized a defendant for attacking the sentence. Cf. North Carolina v. Pearce, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The resentence furthermore would not have discriminated against an indigent unable to tender a monetary bond.

A criminal sentence in which the court considered prior time spent in custody may be consistent with state and federal constitutional guarantees of due process and with the federal constitutional guarantee of equal protection, although the record at the sentencing hearing is silent on the subject.

AFFIRMED.

THE FIRST NATIONAL BANK OF McCOOK, McCOOK, NEBRASKA, A CORPORATION, APPELLEE, V. RONALD W. HULL, ALSO KNOWN AS R. W. HULL, ET AL., APPELLANTS.
204 N. W. 2d 90

Filed February 2, 1973. No. 38224.

1. **Replevin: Pleadings.** The right to amend is as liberally accorded in replevin actions as in other causes.
2. **Contracts: Evidence: Trial.** Parol evidence is inadmissible to vary a written agreement complete on its face.
3. **Contracts: Alteration of Instruments.** The filling of blanks in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in after the execution and delivery of a written instrument, it is a question of authority to do so.
4. ———: ———. The right to fill blanks in written instruments after execution and delivery is based upon an assumption of consent, in the absence of specific instructions, and the leaving of such blanks is considered to imply authority to fill them, and creates an agency in the receiver to do so in the way contemplated by the maker.
5. ———: ———. To require the discharge of a party to a written instrument on the ground of alteration, it must appear

that the alteration was both material and fraudulent.

6. ———: ———. Where an instrument has been executed in duplicate, the unauthorized alteration of one of the copies does not ordinarily affect the validity, operation, or effect of the other copy.

Appeal from the district court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed as modified and remanded with directions.

M. J. Bruckner of Marti, O'Gara, Dalton & Bruckner and Sara Jane Cunningham, for appellants.

Russell, Colfer, Lyons, Wood & Carroll and Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

NEWTON, J.

This is a replevin action based on two security agreements. Judgment was entered for plaintiff. Defendant's assignments of error are: (1) That plaintiff was erroneously permitted to amend its petition by substituting a duplicate copy of the security agreement; (2) that parol evidence of an agreement for further credit was wrongfully excluded; and (3) that there was a material alteration of the security agreement. We affirm the judgment of the district court.

The first security agreement was executed in duplicate and a copy retained by each party. The agreement, as signed by the defendant R. W. Hull, provided: "September 3, 1965 R. W. Hull . . ., a resident of #3 Parkview Addition . . . McCook . . . Red Willow . . . Nebraska . . . (hereinafter called 'DEBTOR'), for consideration grants to

Name: FIRST NATIONAL BANK

Office Address: McCOOK, NEBRASKA (hereinafter called 'SECURED PARTY') a security interest in the following property and any and all additions, accessions and substitutions thereto or therefore (herein-

after called the 'COLLATERAL'): All the motor vehicles listed and described on the attached sheet designated Exhibit A, now owned or after acquired

"Mark if applicable [ ] (a) All of Debtor's inventory including all goods, merchandise, raw materials, goods in process, finished goods and all other tangible personal property now owned or hereafter acquired and held for sale or lease or furnished or to be furnished under contracts of service or used or consumed in Debtor's business (all hereinafter called the 'Inventory'), and in contract rights with respect thereto and proceeds of both. Without limitation the term 'Inventory' includes All Petroleum products, tires and other motor vehicle supplies, now owned or after acquired

"Mark if applicable [X] (b) All accounts, notes, drafts, chattel paper, acceptances and other forms of obligations and receivables now or hereafter received by or belonging to Debtor for goods sold by it or for services rendered by it, all guaranties and securities therefor, all right, title and interest of Debtor in the merchandise which gave rise thereto including the right of stoppage in transit, and all rights of Debtor earned or yet to be earned under contracts to sell goods or render services and in the proceeds thereof.

"The security interest granted hereby is to secure payment of the indebtedness evidenced by a certain promissory note xxxxx payable to the Secured Party, or order, xxxx together with renewals thereof and such additional sums as may hereafter be advanced to the Debtor or expended by the Secured Party or its assigns on behalf of the Debtor or his assigns for any purpose whatsoever and evidenced by notes, drafts, open account, or otherwise, with interest thereon at rates to be fixed at the time of advancing or expending such additional sums, provided, however, that the making of any such advances or expenditures shall be optional with Secured Party, or its assigns; and this security agreement shall secure the payment of any and all exten-

sions or renewals and successive extensions or renewals of said note or notes, and of any indebtedness at any time owing to Secured Party, or its assigns, and shall further secure the payment of any and all indebtedness owing by Debtor to Secured Party, and for all of which this security agreement shall stand as a continuing security until paid (all of such indebtedness being referred to as the 'Obligations'); and the Debtor agrees that the Secured Party, its successors or assigns, may apply any payments made on the Obligations secured hereby, at its option, on any of the notes or other indebtedness secured hereby."

The security agreement was executed on September 3, 1965. On September 2, 1965, defendant R. W. Hull executed a financing statement which provided: "3. This Financing Statement covers the following indicated types or described items of property as collateral: All Petroleum products, tires and other motor vehicle supplies, and all Accounts, now owned or after acquired."

A similar statement was executed by defendant on September 27, 1968, covering: "All Supplies, equipment, fixtures, machinery, tools, Bulk Storage Tanks and Loading dock and pumps."

Sometime after the execution of the first security agreement the plaintiff inserted an "x" in the box preceding the provision for inclusion of defendant's inventory and also inserted the following in the paragraph specifying the indebtedness covered: "Note for $12,000.00 dated August 12, 1965, and a note for $64,000 dated September 3, 1965, both payable according to the tenor thereof."

Plaintiff was permitted to amend its petition by substituting the defendant's unchanged copy of the security agreement for the bank's copy which had been changed as noted. Defendants insist this cannot be done and cite State Farm Mutual Auto. Ins. Co. v. Drawbaugh, 159 Neb. 149, 65 N. W. 2d 542, which holds that a plaintiff in replevin must prove the title as he pleads it. In

that case ownership of the property in question was alleged when, in fact, plaintiff had only a "special ownership" and the petition was not amended in this regard. In the present case, only a special ownership under the security agreement was ever pleaded and the amendment in no way changed this factor. Possession of the replevined property was obtained under the security agreement. "The general rules governing the amendment of pleadings in civil actions generally, * * *, are applicable to amendments in replevin actions." 46 Am. Jur., Replevin, § 107, p. 60. Of similar import are Pekin Plow Co. v. Wilson, 66 Neb. 115, 92 N. W. 176; Tackaberry & Co. v. Gilmore & Ruhl, 57 Neb. 450, 78 N. W. 32. We conclude that defendant's first assignment is without foundation.

Defendant sought to introduce evidence indicating that plaintiff had agreed to extend further credit to him and failed to do so. This evidence was directly contradictory of the provisions of the written security agreement stating that additional advances "shall be optional with Secured Party." In this respect the security agreement was complete on its face and "Parol evidence is inadmissible to vary a written agreement complete on its face." See Jenkins v. Watson-Wilson Transp. System, Inc., 183 Neb. 634, 163 N. W. 2d 123.

As a defense to this action, defendant relied primarily on the assertion that there had been a material alteration of the security agreement. The first alteration is in regard to specification of the notes representing the indebtedness secured. Defendant does not deny that this was a correct statement of the indebtedness at the time the agreement was executed. Under such circumstances the element of fraud could not be involved and since it is apparent that indebtedness was owing by defendant to plaintiff, the specification of that indebtedness cannot be considered a material alteration.

The second alteration was by insertion of an "x" in the box prefacing the paragraph showing coverage of

the debtor's inventory. At the time of its execution, the security agreement included under this printed paragraph the typewritten statement: "All Petroleum products, tires and other motor vehicle supplies, now owned or after acquired." The fact that this was typed in as a part of this paragraph indicated that the provisions of the paragraph were intended to be applicable. Further evidence of such intention may be found in the provisions of the financing statements covering property generally classified as "inventory." Again the element of fraud is lacking in that the alteration was in line with the apparent intent of the parties as evidenced by these written instruments.

Section 3-115 (1) and (2), Commercial Paper, of the Uniform Commercial Code, provides: "(1) When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed.

"(2) If the completion is unauthorized the rules as to material alteration apply (section 3-407), even though the paper was not delivered by the maker or drawer; but the burden of establishing that any completion is unauthorized is on the party so asserting."

"The filling of blanks in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in after the execution and delivery of a written instrument, it is a question of authority to do so. * * *

"The right to fill blanks in written instruments after execution and delivery is based upon an assumption of consent, in the absence of specific instructions, and the leaving of such blanks is considered to imply authority to fill them, and creates an agency in the receiver to do so in the way contemplated by the maker." Mazanec v. Lincoln Bonding & Ins. Co., 169 Neb. 629, 100 N. W. 2d 881. This principle, however, would not apply to

the placing of the "x" in the blank square of a security instrument of the type here involved, where the form is designed to make the paragraph following the square inapplicable if the square is not marked with the "x". We wish to make it clear that in this case the authority to mark the square with the "x" arises from the fact the parties had indicated that that paragraph was to be applicable by causing to be typed therein the material previously referred to.

Section 3-407 (2), Commercial Paper, of the Uniform Commercial Code, provides: "(2) As against any person other than a subsequent holder in due course

"(a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense:

"(b) no other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given." Comment 3 b. under this section provides: "There is no discharge where a blank is filled in the honest belief that it is as authorized; * * *."

It will be noted that to void an instrument any alteration must be both material and fraudulent and that an incomplete instrument may be completed in accordance with the intention of the parties. We believe the changes made in the plaintiff's copy of the security agreement were valid under the criteria provided.

Irrespective of the foregoing, there is another ground on which the plea of alteration must be disallowed. As previously mentioned, plaintiff amended its petition so that it is based on the unaltered duplicate copy of the security agreement. "Where an instrument has been executed in duplicate, the unauthorized alteration of one of the copies does not ordinarily affect the validity, operation, or effect of the other copy." 4 Am. Jur. 2d, Alteration of Instruments, § 10, p. 12. See, also, Jones v. Hoard, 59 Ark. 42, 26 S. W. 193; Stine v. Oasis Oil

Co. (Tex. Civ. App.), 290 S. W. 302; Singer v. Murphy, 338 Ill. 620, 170 N. E. 777; Barkley v. Atlantic Coast Realty Co., 170 N. C. 481, 87 S. E. 219; Phillips v. Sipsey Coal Mining Co., 218 Ala. 296, 118 So. 513; Barr v. Ferris, 41 Cal. App. 2d 527, 107 P. 2d 269.

After the amendment of plaintiff's petition to set out the unchanged duplicate of the security instrument executed on September 3, 1965, the property which plaintiff was entitled to recover was limited to that described in this instrument and the security agreement dated September 27, 1968. This comprised all motor vehicles, petroleum products, tires, motor vehicle supplies, all other supplies, equipment, fixtures, machinery, tools, bulk storage tanks, loading dock, pumps, and accounts receivable. If there were any other items taken under the order of replevin, they are to be returned to the defendant.

The judgment of the district court is affirmed as to all items properly taken under the order of replevin, but the court is directed to ascertain if any other items were taken, and, if so, order their return to the defendant and enter judgment for resulting damages, if any. The cross-appeal is disallowed.

AFFIRMED AS MODIFIED AND REMANDED WITH DIRECTIONS.

WHITE, C. J., participating on briefs.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein, which I believe is based upon a misconception of both the facts and the law.

The words "All Petroleum products, tires and other motor vehicle supplies, now owned or after acquired" were typed in by some person at the bank. The examination of that entire section reveals that "All Petroleum products, tires and other motor vehicle supplies, now owned or after acquired," were part of the description of the term "Inventory," contained in that section. The inventory so described was to be pledged only if the

"Mark if applicable" box was actually marked. Someone connected with the bank marked that box, without the defendant's consent, and after the agreement was signed. (Exhibit 23.) Defendant's copy of the security agreement, which is the copy on which the bank is now attempting to rely for its replevin, was not marked in that section. It does not require a legal proposition to show that "All Petroleum products, tires and other motor vehicle supplies, now owned or after acquired," were not pledged unless the pertinent box was marked. A rather simple understanding of basic English seems to make this abundantly clear.

It is obvious that the defendant had a line of credit with the bank and that he fully performed the conditions of the agreement granting the line of credit. Yet the president of the bank, for his own purposes, ignored and violated that agreement. The following questions and answers are from his deposition: " 'Isn't it a fact that he always made his payments in accordance with the $12,000 program?' Answer. 'If you want to go by the record, that's true.' Question: 'According to the record he paid more than that, isn't that a fact?' Answer: 'That's true.' Question: 'Would you kindly tell us why you had enough?' Answer: 'Because he spend (sic) too much money.' Question: 'What do you mean by, spent too much money?' Answer: 'Well, he ran out of money. I wasn't going to loan him any more. That's all there was to it.' Question: 'Well, he ran out of money because you refused to keep your commitment, isn't that right?' Answer: 'I refused to loan him any more money.' Question: 'That's why he ran out of money?' Answer: 'Definitely. I refused to loan him any more money; that's why he ran out of money.' Question: 'Now, why did you refuse to lend him any more money?' Answer: 'Because I didn't want to lend him any more money.' Question: 'You didn't have a good reason?' Answer: 'I had my own reason. Just didn't want to loan him any more money.'

Question: 'What was your reason?' Answer: 'I didn't want to loan him any more money.' Question: 'That's your only reason?' Answer: 'That's my reason.'"

After refusing to honor its commitments to provide defendant with working capital, thus forcing him to close his doors, the bank then took all his security at a time when he was paying down his indebtedness, and then made no effort to satisfy the remaining indebtedness with that security. As of the date of trial, which was almost 1 year after the original taking, all the defendant's property was still sitting in a storage lot and warehouse, depreciating and deteriorating in the elements.

Sections 1-203 and 9-504, Nebraska Uniform Commercial Code, impose on the secured party the responsibility of proceeding in good faith and in a commercially reasonable manner in disposing of the collateral. The plaintiff's actions in this case do not meet either of these requirements. Good faith on the part of the bank has been totally lacking in all phases of the case.

Defendant contends that the alteration of the security agreement of 1965 was material, and it is therefore void. I agree. The majority opinion assumes a consent to unilaterally fill in certain blanks. I disagree. Furthermore, the bank president was not merely filling in blanks when he made the alterations. In addition, he added crossed out words and added others, clearly changing the original intent. This is evidenced by a comparison of the pertinent provisions of the copies of the security agreement of September 3, 1965. Where a party to a written instrument unilaterally fills in certain blanks, changes certain language, and marks as applicable certain paragraphs which at the time of the signing of the agreement were not marked as applicable, the alterations are material, fraudulent, and void the agreement.

The following from the defendant's brief is very pertinent: "This entire case revolves around the ques-

tion of what consideration was offered to Mr. Hull to induce him to make the pledges contained in the security agreements of September 3, 1965, and September 27, 1968. If the only consideration to be offered by the Bank were the notes of $12,000 dated August 12, 1965, and a note for $64,000 dated September 3, 1965, then why were those figures not inserted at the time of the execution of the agreement, and why did the original agreement refer to the 'note' rather than 'notes', and why would a man pledge $80,000 additional collateral for the same consideration that he already had?"

Clearly, the alteration in the present case was material, because it limited the bank's obligation to specific notes of $12,000 and $64,000, and renewals thereof, whereas the unaltered copy did not limit the bank's obligation in any way. Also, at the time of execution the words "of even date herewith" were crossed out, thus evidencing an intention not to limit the bank's obligations to notes executed on September 3, 1965. Nevertheless, in 1967, the bank president unilaterally inserted a note "of even date," i. e., $64,000 note dated September 3, 1965. Furthermore, the altered original caused the defendant Hull to pledge his inventory, which at that time was valued somewhere between 30 and 40 thousand dollars. This was clearly not intended by the defendant when he signed the instrument, nor was it possible for him to pledge his inventory at that time because it was already pledged to Champlin Petroleum Company.

In this case we are aborting our law on material alteration. To allow the plaintiff bank to stand on the defendant's unaltered copy of the security agreement, as the majority opinion does, violates the principle announced in our previous cases. In effect it permits the bank to unilaterally alter the agreement and then, when discovered and exposed, adopt a position which is no worse than the position it was in before it altered the security agreement. It encourages fraud and deceit.

This is evidenced by the fact that until the defendant's unaltered copy was produced when his deposition was taken 11 days prior to the trial, the bank's chief executive officer, who later admitted to altering the agreement, had steadfastly maintained under oath that he had never altered any of the security agreements.

When we adopted the Uniform Commercial Code we armed the banking industry with a sweeping and powerful instrument called the security agreement. To permit the bank, as the majority opinion does, to alter this powerful instrument unilaterally and with impunity, makes a mockery of the long-established sanctity of the written contract, and reduces the individual to a helpless eunuch in his dealings with the banking industry under the Uniform Commercial Code.

There is little question the replevin procedure employed herein is unconstitutional under Fuentes v. Shevin (1972), 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556. While the defendant is not relying on the unconstitutionality of the statute but rather on the merits of his case, I make this observation to call the Bar's attention to the unconstitutionality of our present replevin statute.

SMITH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. SIE BROOKS, APPELLANT.
204 N. W. 2d 86

Filed February 2, 1973. No. 38625.

1. **Criminal Law: Arrest.** A peace officer may arrest a person without a warrant if he has reasonable cause to believe that a felony is being committed or has been committed.
2. **Criminal Law: Arrest: Searches and Seizures.** Where a peace officer has reasonable cause to believe that a sale of narcotics is taking place inside a residence, exigent circumstances may justify his entering the residence for the purpose of making an arrest without prior disclosure of his authority and purpose.
3. **Criminal Law: Trial.** It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the

jury his personal belief in the guilt of the defendant unless the belief is expressed as a deduction from the evidence.

4. ———: ———. A prosecuting attorney in a criminal case should make no reference or comment upon the failure of the defendant to testify.

5. ———: ———. A comment or reference to the defendant's failure to testify may not be prejudicial error where the evidence of guilt is conclusive.

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

J. William Gallup of Schrempp & Bruckner, for appellant.

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.

BOSLAUGH, J.

The defendant appeals from a conviction for unlawful possession of heroin. The assignments of error relate to the ruling on a motion to suppress and misconduct of the prosecuting attorney.

On August 12, 1971, two police officers entered a residence at 1209 North 34th Street in Omaha, Nebraska. The warrant which they held to search the premises at that address did not authorize them to enter the premises without giving notice of their authority and purpose. See § 29-411, R. S. Supp., 1972.

As the officers walked up to the door, they saw the screen door was closed but the door itself was open between 1 and 2 feet. The officers could see a man, later identified as James Horn, and a woman inside the house standing near the door. The woman was handing money to Horn who was holding five "pipes" or packets of aluminum foil. The officers concluded they were witnessing a sale of narcotics. They opened the screen door, entered the house, and arrested Horn.

After they had entered the house they proceeded to serve and execute the search warrant. The defendant was found in a bedroom on the second floor. An aluminum package containing heroin was lying on top of a dresser in the bedroom.

The defendant contends that since the officers entered the house without giving notice of their authority and purpose before entering, the search was illegal and his motion to suppress should have been sustained.

The house at 1209 North 34th Street had been under surveillance by the police. The officers had information there was drug traffic in this area; that the defendant rented the property; and that Horn was selling drugs for the defendant. These facts and circumstances, together with what the officers observed through the open door, were sufficient to justify the immediate arrest of Horn without a warrant. A peace officer may arrest a person without a warrant if he has reasonable cause to believe that a felony is being committed or has been committed. § 29-404.02, R. S. Supp., 1972. The exigent circumstances here were sufficient to justify the entry into the house to make the arrest without a prior disclosure of authority or purpose. See, People v. Maddox, 46 Cal. 2d 301, 294 P. 2d 6; Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726. Since their entry into the house was lawful, the officers could then proceed to serve and execute the search warrant.

The alleged misconduct of the prosecuting attorney occurred during the arguments to the jury. In his closing argument the prosecuting attorney made a statement to the effect that "he was personally convinced of the Defendant's guilt." The defendant's motion for a mistrial was overruled and the jury was admonished to disregard the statement.

It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief in the guilt of the defendant unless the belief is expressed as a deduction from the evidence.

Wamsley v. State, 171 Neb. 197, 106 N. W. 2d 22. The record does not show that the belief expressed was not a deduction from the evidence, and the trial court indicated that he considered it to be the prosecuting attorney's "own interpretation of the evidence." The record does not show the failure to grant a mistrial was erroneous.

During his argument, defense counsel made a statement concerning something the defendant said when the police entered the bedroom. The prosecuting attorney objected to the statement saying: "* * * there is no evidence in the record about Mr. Brooks saying anything, because he did not take the stand." The defendant objected and moved for a mistrial which was overruled. The jury was directed to disregard the statement and, at the defendant's request, the jury was instructed to draw no conclusion or inference from the fact the defendant did not testify.

Section 29-2011, R. R. S. 1943, provides that no reference or comment should be made upon the defendant's failure to testify. Such a comment may be a violation of the federal constitutional rights of the accused. See Griffin v. California, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106. The rule is one of long standing in this state and there is no justification for the failure of a prosecuting attorney to abide by it.

The comment in this case was made in connection with an objection and appears to have been inadvertent rather than a deliberate statement made as a part of the argument of the State. The evidence of guilt in this case is clear. We have stated that such a comment is not prejudicial where the evidence of guilt is conclusive. Bruntz v. State, 137 Neb. 565, 290 N. W. 420. Under the circumstances in this case we determine that the denial of a mistrial was within the discretion of the trial court.

The judgment of the district court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The majority opinion is entirely correct in stating that there is no justification for the misconduct of the prosecuting attorney. The court holds that such conduct was not prejudicial because other evidence of guilt was "conclusive," resting that opinion upon Bruntz v. State, 137 Neb. 565, 290 N. W. 420. That case reversed a conviction because the county attorney, in argument to the jury, said: "The defendant does not get on the stand to tell you about this case." While this court recognized the rule that reversal was not required where the evidence of guilt was conclusive, it limited its acceptance of the rule to the situation "where the evidence of guilt is so conclusive that all will agree that no other factor could possibly have influenced the result, and not otherwise." This court reversed the conviction in Bruntz on the sole ground of the comment upon the defendant's refusal to testify. It said: "It is not our purpose, however, to encourage violations of the statute, nor have we the right to speculate in any case on whether prejudice has resulted from the comment. The only possible aim of such a remark is to thwart the statute."

The Bruntz case was some 25 years before Griffin v. California, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106. In 1965, Griffin held: "(T)hat the Fifth Amendment, in its direct application to the federal government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Since Griffin, comments by the prosecution upon the defendant's failure to testify have been a violation of constitutional rights as well as a violation of the Nebraska statutes.

Section 29-2011, R. R. S. 1943, prohibiting "any comment made upon" the neglect or refusal of an accused to testify has been in effect at least since 1913. Even if

the violation here were limited solely to the comment on the failure to testify, that violation should not be treated indulgently upon the theory that it may have been inadvertent rather than deliberately planned. The effect on the defendant's rights is exactly the same whether the violation occurs deliberately or inadvertently. It is hard to believe that a statute which has been in effect in Nebraska for so long was inadvertently violated by any prosecuting attorney.

In addition to commenting upon the defendant's failure to testify, the prosecuting attorney, in closing argument, also made a statement that he was personally convinced of the defendant's guilt. A portion of Canon 15 of the former Canons of Professional Ethics of the American Bar Association provided: "It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause." Disciplinary Rule 7-106(C) (4) of the Code of Professional Responsibility, adopted by this court April 10, 1970, provides in part that: "In appearing in his professional capacity before a tribunal, a lawyer shall not: Assert his personal opinion * * * as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein."

This court for many, many years has held that the expression of the personal opinion of the prosecutor in a criminal prosecution, not based on the evidence, in arguing the case to the jury is improper and should be condemned. See Wamsley v. State, 171 Neb. 197, 106 N. W. 2d 22. That case also held that even though an improper expression of personal opinion standing alone might not constitute prejudicial error sufficient to require a new trial, the cumulative effect of more than one irregularity might be sufficient to deprive the defendant of the constitutional right to a public trial by an impartial jury. This court quoted the following language with approval: "The doctrine of harmless error

does not apply where accused has been deprived of a substantial right, and it will not be extended to such an extent as to deprive accused of a fair trial, or a trial on the merits."

The majority opinion here, in referring to the statement of personal belief of the prosecutor in the guilt of the defendant, states: "The record does not show that the belief expressed was not a deduction from the evidence * * *." We might add, the record does not show that the belief expressed was a deduction from the evidence. The language of Disciplinary Rule 7-106(C) (4) does not permit an expression of personal opinion as to guilt or innocence of an accused under any circumstances, but only permits an argument on an analysis of the evidence for a position or conclusion of guilt or innocence.

There should be no compromise with ethical standards of proper trial conduct, much less the tacit acceptance of even an unintentional violation of the statutory and constitutional rights of a defendant accused of crime. In the words of this court in Bruntz v. State, *supra*, "If we treat violation indulgently, we shall soon —in the words of Pope—'first endure, then pity, then embrace.'"

RACHEL K. GALLAGHER ET AL., APPELLEES, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, IMPLEADED WITH H. F. JACOBBERGER ET AL., APPELLEES, CITIZENS TO SAVE ELMWOOD PARK, INC., A NONPROFIT NEBRASKA CORPORATION, INTERVENER-APPELLEE.
204 N. W. 2d 157

Filed February 9, 1973. No. 38485.

1. **Dedication: Municipal Corporations: Deeds: Parks and Public Grounds.** Where dedication is made to the public for a defined purpose, neither the Legislature, municipality, its successor, nor the general public has any power to use property

for any other purpose than the one designated, whether use be public or private, or whether dedication is a common-law or statutory dedication, notwithstanding that changed use may be advantageous to the public.

2. ———: ———: ———: ———. Where park property has been acquired by the municipality especially for park use with funds from the sale of bonds specifically authorized by the electors for that purpose, the city is a trustee of the property for such purpose, but in this case may divert the property from such use if it is clearly authorized to do so by the Legislature, at least where the property is no longer needed for park purposes.

3. **Statutes: Municipal Corporations: Contracts: Parks and Public Grounds.** L. B. 1409, Laws 1969, c. 846, p. 3185, did not authorize a metropolitan city to enter into an agreement with the Board of Regents of the University of Nebraska for the joint use of park property.

4. **Statutes: Municipal Corporations: Contracts.** In the absence of statutory authority, a city has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority.

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

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, James E. Fellows, Allen L. Morrow, George S. Selders, Jr., Kent N.Whinnery, Verne W. Vance, Thomas F. Dowd, Roger G. Stanway, Richard A. Cerveny, Robert J. Hamer and Cline, Williams, Wright, Johnson & Oldfather, for appellants.

J. A. C. Kennedy, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellees Gallagher et al.

Ephraim L. Marks of Marks, Claire, Hopkins, Rauth & Garber, for intervener-appellee.

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

CLINTON, J.

The following statement of the nature of this case is taken from the brief of one of the appellants, and to

which no exception is taken by the other parties and is adopted for purposes of this opinion.

"This was an action for declaratory and injunctive relief instituted by the plaintiffs, individually and on behalf of all citizens and taxpayers of the City of Omaha, on February 25, 1971, against the City of Omaha, the members of the Omaha City Council, the Mayor of Omaha, and the Board of Regents of the University of Nebraska, praying that a Joint Use Agreement executed by the City of Omaha and the Board of Regents be declared void and the defendants enjoined from implementing said agreement's provisions.

"The plaintiffs' petition alleged that the execution of the Joint Use Agreement was beyond the authority of the City of Omaha and in violation of constitutional and statutory limitations on its power as a municipality.

"The defendant answered by alleging that the Joint Use Agreement was authorized by the Nebraska Interlocal Cooperation Act, by LB 1409 (1969 Legislative Session), and by the constitutional, statutory and inherent power of the City of Omaha and the Board of Regents.

"On April 1, 1971, the lower court granted the Petition for Intervention of the Citizens to Save Elmwood Park, Inc., a non-profit corporation. . . .

"The court below held the Joint Use Agreement illegal, null and void, and entered judgment accordingly for the plaintiffs and intervenor."

We affirm.

The joint use agreement recited the need of the University of Nebraska at Omaha for additional parking for its students and of the City of Omaha for additional parking for Elmwood Park. It described the property involved which consists of a portion of Elmwood Park abutting the University of Nebraska at Omaha on the east and is referred to in the record as comprising approximately 21 acres. The term of the agreement was for 45 years from March 1, 1971, to February 29, 2016.

It provided for the use of the property by the University of Nebraska at Omaha for parking automobiles. The University of Nebraska at Omaha was required to make all the improvements thereon. It was granted exclusive use of the parking facilities from 7 o'clock a.m. to 10 o'clock p.m. Monday through Friday, inclusive, from September 1 through May 31, annually. At all other times the parking facilities could be jointly used. The Board of Regents would collect, receive, and keep all parking fees and could pledge the revenue to finance the issuance of revenue bonds. At the end of the term the Board of Regents had the right to remove all the improvements except drainage facilities and was required to repair any damage caused by such removal. Except for the right of the City to use the parking facilities during the period of nonexclusive use, no consideration was to be paid to the City by the Board of Regents.

It is stipulated that a certain part (a major portion) of the 21 acres was purchased in 1892 with funds derived from a park bond issue, the purpose of which was "the enlarging of Elmwood Park." The deeds conveying this major portion of the property contained no special restrictions, but the property was thereafter used continuously for park purposes. The remainder of the 21-acre tract was acquired in three separate parcels. Two of these deeds contained dedications which stated that the land "shall always be used for park and boulevard purposes."

The major portion of the testimony in this case was devoted to the wisdom or necessity of the joint use agreement and we have read the testimony, but since the only real question before us is the validity of the joint use agreement we will make very little reference to that testimony.

It would seem apparent that a city may use a portion of a park to provide parking facilities for users of the park. It may also be that the city and another govern-

mental entity might, when properly authorized, engage in some joint use of property not incompatible with their respective powers and not inconsistent with any trust impressed upon the property by contract or operation of law. We here, of course, confine ourselves to the specific issues which are raised by the facts in this case.

The first position which the plaintiffs and the intervener take is that the evidence shows the property in question has been dedicated to park use; and that the City holds such property in trust for such purpose for the use of the general public and the City may not divert the property to any other use. The defendants recognize the limitations upon the authority of the City to freely deal with property that has been by the donors dedicated to park use. Both sides cite Ash v. City of Omaha, 152 Neb. 393, 41 N. W. 2d 386, where this court said: "Where dedication is made for a defined purpose, neither legislature, municipality, its successor, nor general public has any power to use property for any other purpose than one designated, whether use be public or private, or whether dedication is a common-law or statutory dedication, notwithstanding that changed use may be advantageous to the public."

The foregoing pronouncement to which we adhere pertains, as indicated by the authorities cited by this court at that time, only to park land dedicated by the grantor or donor for such purposes. City of Fort Worth v. Burnett, 131 Tex. 190, 114 S. W. 2d 220. This case and others establish the principle that the above result follows because the public body has become a trustee of the property for the public. A possible exception to the limitation on diversion of the use to which the property has been dedicated may arise from an exercise of the power of eminent domain. Ash v. City of Omaha, *supra;* City of Fort Worth v. Burnett, *supra.*

Where the park property has been acquired by the municipality especially for park use with funds from the sale of bonds specifically authorized by the electors

for that purpose, the city is still a trustee of the property for such purpose, but in this case may divert the property from such use if it is clearly authorized to do so by the Legislature, at least where the property is no longer needed for park purposes. Wright v. Walcott, 238 Mass. 432, 131 N. E. 291, 18 A. L. R. 1242; Aldrich v. City of New York, 145 N. Y. Supp. 2d 732, 208 Misc. 930; Anderson v. Mayor and Council of Wilmington, 37 Del. Ch. 74, 137 A. 2d 521; Bedford-Nugent Co., Inc. v. Argue, 281 Ky. 827, 137 S. W. 2d 392. See, also, Annotation, Parks—Uses, 18 A. L. R. 1246; Annotation, Parks—Uses, 63 A. L. R. 484; Annotation, Parks—Uses, 144 A. L. R. 486. This court has at least impliedly recognized the trust which arises under such circumstances. See Carlson v. City of Fremont, 180 Neb. 262, 142 N. W. 2d 157, where we held that a municipality may without specific legislative authorization divert property from park use where it was acquired by the municipality with money from the general fund, the only dedication to park use arose out of the act of the municipality itself, and the property was not acquired with funds assessed for the particular purpose.

The Board of Regents takes the position that the proposed use is not a deviation from the dedication and points to the provisions of the lease which provide: "The design and location for all improvements shall be submitted to the City Council of the City of Omaha for its approval in writing before proceeding with the construction of the same and the Public Works Department of the City of Omaha shall have the right to approve the design and location of all entrances and exits from the parking facility to City streets or park roadways." And also the provision: "The parking and park functions for joint use on such real property shall be developed and landscaped in a park atmosphere and setting at Board's expense."

We can decide the question of whether there is a

diversion from park uses only upon the basis of the agreement itself. Although there is some evidence of a general conclusionary nature in the record that Elmwood Park needs more parking for patrons, the record is absent any specific information or data as to the need for additional parking incidental to park use, and as to how the location of the proposed facilities and the exclusive use and control by the Board of Regents during most of the period of the lease would fit into the needs of the park patrons whatever they may be. Accordingly we cannot, even if it were proper for us to do so, make any determination based upon the evidence that some possible joint use would or would not be inconsistent with the trust uses of the property.

Thus the next question which we must answer is whether the joint use agreement was authorized by the provisions of L.B. 1409, Laws 1969, c. 846, p. 3185, which was repealed shortly after the agreement by the parties was made. An examination of the act discloses that it authorizes the Board of Regents to acquire property by negotiation, or if negotiation fails, then by the exercise of the power of eminent domain. It authorizes the City to "Negotiate . . . for the sale" and to "Sell to the Board of Regents . . ." and also to "Exchange any tracts . . . ." It seems obvious the Legislature contemplated a sale and a payment. The "joint use agreement" was not within the terms of the legislative authorization.

The defendants contend that the execution of the agreement was within the constitutional, statutory, and implied powers of both the Board of Regents and the City. The plaintiffs counter with the contention that the City has "no power to enter into contracts which curtail or prohibit an exercise of its legislative or administrative authority" and that the joint use agreement is such a contract. It was upon the determination of this question that the lower court primarily founded its decision. It and the plaintiffs rely upon our opinion

in City of Nebraska City v. Nebraska City Speed & Fair Assn., 107 Neb. 576, 186 N. W. 374. The defendants assert the agreement meets all the strictures of the opinion of this court in that case and that there is no surrender of control. We cannot agree. In that case the park commissioners of the city of Nebraska City entered into a 25-year lease with the defendant authorizing it to construct and maintain and have the exclusive use and control of a race track and buildings to be constructed by the defendant upon park grounds, and also of certain portions of the park grounds surrounding the improvements. The question in the case arose in an action by the city to gain possession of the property before the lease expired. This court held the agreement invalid. We there said: "If a race track, for holding race-meets, is a proper improvement for a public park, it must be under the control of the park commissioners of the city. The city had the right to acquire the lands for a public park. When so acquired it must be used for a public park, and the public must be allowed access thereto, subject only to rules and regulations made by the board of park commissioners and ordinances of the city. Neither the park commissioners nor the city have authority to delegate to, or share with, appellees herein, or any person, the making of rules and regulations governing the control of its public park. Neither the park commissioners nor the city had the power to grant to appellee the exclusive use and control of said race track." A city, in the absence of legislative authorization, has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority. Seidel v. City of Seward, 178 Neb. 345, 133 N. W. 2d 390.

The joint use agreement which we consider here is far more than a "license or concession" which this court in the above case deemed permissible. It does grant to the Board of Regents exclusive use and control of the parking facilities during most of the time during

a 45-year period. It is true the agreement avoids the use of the word control, but it appears that exclusive use, the duty of maintenance, the right to collect and receive the revenue from the facilities, and to pledge said revenue to support a bond issue, all for a 45-year period which is not subject to interruption by the City, constitutes a large measure of control in the ordinary sense of that term and is to that extent at least, as the trial court in its decree held, a diversion of "dedicated park property to a parking lot for" the University and thus inconsistent with park use. Neither L.B. 1409, Laws 1969, c. 846, p. 3185, nor the Interlocal Cooperation Act, §§ 23-2201 to 23-2207, R. R. S. 1943, authorize this.

AFFIRMED.

LOWELL M. COIL, APPELLANT, V. NEBRASKA STATE DEPARTMENT OF HEALTH ET AL., APPELLEES.
204 N. W. 167

Filed February 9, 1973. No. 38527.

Licenses and Permits: Administrative Law: Courts. To the extent that courts may have power to review the action of a professional examining board in its refusal to recommend reinstatement under the provisions of section 71-155, R. R. S. 1943, of a license which has earlier been revoked, the Supreme Court has no right to compel the discretionary power of that public board unless its action is arbitrary or capricious.

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

Nelson, Harding, Marchetti, Leonard & Tate and Richard P. Nelson, for appellant.

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

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

CLINTON, J.

This is an appeal purportedly under the provisions of section 84-917, R. R. S. 1943, to review a determination made by the Director of Health of the Department of Health of the State of Nebraska not to receive or file the application of Lowell M. Coil under the provisions of section 71-155, R. R. S. 1943, for reinstatement of a license to practice pharmacy in the State of Nebraska.

Coil was convicted on February 7, 1964, in the federal district court of a violation of a statute of the United States prohibiting knowingly making false entries in narcotics records and was thereafter placed on probation. On July 28, 1966, following a hearing at which he was present, represented by counsel, and gave evidence, his license to practice pharmacy was revoked by the Director of Health under the provisions of section 71-147, R. R. S. 1943, on the grounds of his conviction of a felony which is one of the specific grounds mentioned in the statute. There was no appeal from this order of revocation.

Section 71-155, R. R. S. 1943, under which Coil seeks reinstatement provides in part as follows: "If such license is revoked, such revocation shall be for all times; Provided, that, at any time after the expiration of two years, application may be made for reinstatement of any licensee whose license shall have been revoked. Such application shall be addressed to the director, but may not be received or filed by him unless accompanied by a written recommendation of reinstatement by the board of examiners in the profession of the petitioner."

The record before us shows that the application for reinstatement was not accompanied by a recommendation for Coil's reinstatement, because after a hearing before the board of examiners at which he appeared and was represented by counsel and evidence was presented by both the applicant and the Department of

Health, the board of examiners not only refused to recommend reinstatement, but made a negative recommendation.

The action of the Director of Health in refusing to receive or file the application was therefore clearly in accordance with the mandate of the statute and was therefore correct and not subject to further review by us.

What we are apparently being asked to do here is to review the record before the board of examiners and then simply to direct it to either reconsider its action or to make an affirmative recommendation to the Director of Health, or perhaps to order the director to receive, file, and consider the application without an affirmative recommendation by the board of examiners. This latter course would clearly be a direct violation of the statutes. If we were to grant relief in accordance with either of the first two alternatives, we would have to meet the problem of whether the board of examiners is within our jurisdiction in this case and the members of the board parties to this action merely because they are part-time public officers which the Department of Health appoints and can remove for cause, but whose action the department cannot control. §§ 71-116, 71-118, 71-131, R. R. S. 1943.

The statutes in question make no provision for such review by any court. They provide for appeals only from the order of the director's revocation or suspension of the license. §§ 71-156, 71-159, R. R. S. 1943. These statutes obviously do not contemplate a review of the discretionary recommending power of the board of examiners. It is doubtful that the provisions for review of administrative action under the Administrative Procedures Act, Chapter 84, article 9, R. R. S. 1943, apply. The board of examiners is not an agency with rule-making power under section 84-901, R. R. S. 1943. See §§ 71-111 to 71-124.01, R. R. S. 1943. It would seem that the hearing before the board of examiners is there-

fore not a contested case within the meaning of sections 84-901, 84-915, and 84-917, R. R. S. 1943, to which the appeal provisions of section 84-917, R. R. S. 1943, are applicable, but since this issue has not been made or briefed by the parties we do not now expressly so hold, but will leave that for determination when and if the question arises in a later case.

We are convinced, however, and do hold that if we do have power to review, it is limited simply to a determination of whether the declination of the board of examiners to give an affirmative recommendation is arbitrary or capricious. Where, as here, the statute makes a recommendation by the board of examiners a condition precedent to consideration by the director of the application for reinstatement, it seems very clear that the intention of the Legislature was to make the board of examiners' action almost wholly discretionary. The very nature of the power of recommending implies this. Whether or not a former licensee should have his license reinstated would involve in many instances some judgment and expertise in the particular field of the licensee. Such judgment and expertise may be presumed to exist in the board of examiners. The legislative mandate is clear. It would indeed be incongruous if either the district court or this court were deemed to have the duty to review the board of examiners' action on the merits. Thomas v. Board of Pharmacy, 152 N. C. 373, 67 S. E. 925. Due process, it is clear, requires no such review. Brinkley v. Hassig, 83 F. 2d 351.

Our independent research disclosed no case involving review by the courts of a power of a professional examining board to recommend reinstatement after revocation for cause. As previously noted, what the petitioner in effect asks us to do is akin to the issuance of a writ of mandamus. The principles applicable to such a request for relief would seem to govern our action here. Under the language of section 71-155, R. R. S. 1943, as it pertains to reinstatement of a licensee after

revocation, it is certainly clear that we have no right to compel the discretionary power of this public board unless its action is arbitrary or capricious. State ex rel. Truax v. Burrows, 136 Neb. 691, 287 N. W. 178.

We have examined the proceedings before the board of examiners. The refusal of the board to recommend reinstatement cannot be classified as either arbitrary or capricious. Whatever may be the standards of review under section 71-159, R. R. S. 1943, or upon appeal under the Administrative Procedures Act, Chapter 84, article 9, R. R. S. 1943, they are deemed not to apply here except to the extent above set forth.

Coil, in his petition for review, complains that the action of the board of examiners making a negative recommendation is beyond its powers under the statutes and claims that this was the basis of the director's refusal to receive or file the application. In this we believe he is mistaken. The action of the director was founded upon the statutory language which prohibits him from receiving or filing the application and therefore from considering it unless the board of examiners makes an affirmative recommendation of reinstatement.

Assignments of error in this court do not include an attack on the constitutionality of the statutes. The view we have taken of this case makes it unnecessary to consider the assignments of error as made by the appellant Coil.

The order of the Director of Health declining to receive or file the application for reinstatement is affirmed.

AFFIRMED.

OMAHA SKY DIVERS PARACHUTE CLUB, INCORPORATED, APPELLANT, V. RANGER INSURANCE COMPANY, APPELLEE.
204 N. W. 2d 162

Filed February 9, 1973. No. 38543.

1. **Insurance: Airplanes and Aircraft. An aircraft insurance policy**

may exclude coverage when the airplane is flown by certain types of persons or pilots.

2. **Insurance: Contracts: Airplanes and Aircraft.** The insurer under an aircraft insurance policy may lawfully exclude certain risks from the coverage of its policy and where damage occurs during the operation of the insured aircraft under circumstances as to which the policy excludes coverage, there is no coverage.
3. **Insurance: Contracts: Time: Airplanes and Aircraft.** Under an aircraft insurance policy that excludes coverage while the aircraft is operated in flight by other than a pilot or pilots holding valid and effective pilot and medical certificates, there is no coverage where a pilot's medical certificate lapsed 5 months before an accident occurred.

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

Weber & Fugit, for appellant.

William J. Brennan, Jr., for Fitzgerald, Brown, Leahy, McGill & Strom, for appellee.

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

McCOWN, J.

This is an action on an aircraft insurance policy to recover for damage to the insured aircraft. The district court sustained a motion for summary judgment for the defendant and dismissed plaintiff's petition.

The plaintiff, Omaha Sky Divers Parachute Club, Incorporated, was the owner of a 1959 Cessna aircraft. On September 2, 1970, the defendant, Ranger Insurance Company, issued an insurance policy insuring the aircraft for a term of 1 year. The coverage included loss of or damage to the aircraft while in motion. On January 12, 1971, a brake on the plane failed upon landing and the aircraft was damaged in the resulting wreck. The plane was piloted by John F. Peters. He held a valid and effective F.A.A. pilot certificate, but his previously valid F.A.A. medical certificate had expired on August 9, 1970. On January 14, 1971, 2 days after the

accident an F.A.A. medical certificate with no limitations was issued to John F. Peters. On the date of the accident, Peters had no medical infirmity that would have prevented his having a valid medical certificate and his failure to have such a certificate in no way contributed to the accident.

Item 7 of the declarations page, Part Two of the policy, provided: "PILOT CLAUSE: Only the following pilot or pilots holding valid and effective pilot and medical certificates with ratings as required by the Federal Aviation Administration for the flight involved will operate the aircraft in flight: STAN SEARLES; OTHERWISE, PRIVATE OR COMMERCIAL PILOTS HAVING A MINIMUM OF 300 TOTAL LOGGED HOURS, INCLUDING 20 HOURS IN INSURED MAKE AND MODEL."

Under the heading of "EXCLUSIONS," on page 2 of the policy, is the following language: "This Policy does not apply: * * *

"2. to any occurrence or to any loss or damage occurring while the aircraft is operated in flight by other than the pilot or pilots set forth under Item 7 of the Declarations;".

The district court found that the applicable F.A.A. regulations require that a pilot have in his possession a valid medical certificate issued within the preceding 24 months; that the insurance policy provisions quoted above are clear and unambiguous; and that the policy provided no coverage for an aircraft operated in flight by a pilot not having a valid and effective medical certificate. The district court then overruled a motion for summary judgment by the plaintiff, granted the defendant's motion for summary judgment, and dismissed the plaintiff's action.

The sole issue here is whether the insurance policy excluded coverage for damage which occurred while the aircraft was being operated in flight by a pilot whose medical certificate had expired.

The plaintiff contends that the provisions of the in-

surance policy previously quoted constitute only a warranty or condition and that a breach of such warranty or condition will not permit the insurer to avoid liability unless the breach contributed to the loss. Plaintiff relies on section 44-358, R. R. S. 1943, which provides in part: "The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding."

Item 7 of the declarations standing alone might well be interpreted as a warranty or a condition, but any such interpretation cannot be extended to the separate exclusion clause. The exclusion clause here provides that the policy does not apply to any "damage occurring while the aircraft is operated in flight by other than the pilot or pilots set forth under Item 7 of the Declarations." Coverage is excluded while the plane is operated in flight by anyone except the pilot or pilots described separately in the declarations. Both the exclusion clause and the declaration are clear and unambiguous. The exclusion does not constitute either a warranty or a condition within the meaning of section 44-358, R. R. S. 1943.

It is well established that an aircraft insurance policy may exclude coverage when the airplane is flown by certain types of persons or pilots. See 11 Couch on Insurance 2d, § 42:634, p. 315. The insurer under an aircraft insurance policy may lawfully exclude certain risks from the coverage of its policy and where damage occurs during the operation of the insured aircraft under circumstances as to which the policy excludes coverage, there is no coverage. Pacific Indemnity Co. v. Kohlhase, 9 Ariz. App. 595, 455 P. 2d 277.

The policy provisions here require that a pilot hold "valid and effective pilot and medical certificates with ratings as required by the Federal Aviation Administra-

tion * * *." That language is unambiguous. The evidence establishes that the medical certificate of the pilot in command of the aircraft at the time of the accident had lapsed even before the insurance policy here had been issued. Under language in an aircraft policy excluding coverage "while such aircraft is in flight unless the pilot in command of the aircraft is properly certificated * * *," it has been held that the lapse of a pilot's medical certificate excluded coverage whether or not there was any causal connection between the breach of an exclusionary clause and the accident. See, Baker v. Insurance Company of North America, 10 N. C. App. 605, 179 S. E. 2d 892; Glades Flying Club v. Americas Aviation & M. Ins. Co. (Fla. App.), 235 So. 2d 18.

Here the terms of the policy specifically exclude coverage while the aircraft is operated in flight by any pilot not "holding valid and effective pilot and medical certificates." A medical certificate, which had lapsed 5 months before the accident occurred, and before the issuance of the policy was not a "valid and effective" medical certificate. A renewal shortly thereafter did not validate it retroactively. Federal aviation regulations prohibited Peters from acting as a pilot unless he had in his personal possession an appropriate current medical certificate. He could not lawfully act as a pilot in command at the time of the crash. The subsequent renewal did not wipe out the violation nor alter the fact that the violation had occurred. Under an aircraft insurance policy that excludes coverage while the aircraft is operated in flight by other than a pilot or pilots holding valid and effective pilot and medical certificates, there is no coverage where a pilot's medical certificate lapsed 5 months before an accident occurred.

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

AFFIRMED.

ROGER L. GREEN, APPELLANT, V. VILLAGE OF TERRYTOWN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL, APPELLEES.
204 N. W. 2d 152

Filed February 9, 1973. No. 38545.

1. **Summary Judgments.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law.
2. ———. The burden is upon the party moving for the summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled.
3. ———. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists.
4. ———. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom.
5. ———. A motion for a summary judgment is not a substitute for a demurrer or a motion for a directed verdict.

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

Lyman, Meister & Olsen, for appellant.

Wright & Simmons, John F. Wright, and John F. Simmons, for appellees.

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

CLINTON, J.

The question here involved is the propriety of the action of the trial court in sustaining the motion of the defendants Bartow and McGuire for summary judgment. An earlier motion for summary judgment by the Village of Terrytown was sustained and appeal therefrom by the plaintiff to this court was dismissed for having been untimely filed. Green v. Village of Terrytown, 188 Neb. 840, 199 N. W. 2d 610.

The plaintiff brought this action against the Village of Terrytown and two of its employees, the present defendants, to recover for personal injuries alleged to have been received when a motorcycle the plaintiff was driving on one of the streets of the Village at about 10:45 p.m. on May 17, 1967, struck a telephone pole lying in the street. It was alleged that the present defendants as employees of the Village had earlier on the day of the accident placed the pole in its position in the street to protect some fresh concrete pavement which they had that day placed in the street. The negligence alleged is the placing of the pole in the street without any light, reflector, or other device or precaution to warn persons using the street. The answer of the two defendants was a general denial.

The only evidence introduced by the defendants in support of the motion for summary judgment was the deposition of the defendant Bartow which had been taken by the plaintiff as part of his discovery procedures. The trial court did not specify in its order sustaining the motion the reason or reasons therefor. The plaintiff and the defendants in their briefs discuss primarily the question of whether or not the evidence conclusively shows that there was no duty on the part of the defendants to place lights, reflectors, or other warning. The briefs are otherwise rather divergent in their approaches.

Bartow testified in the deposition that he was employed by the Village of Terrytown. He was in charge of this particular job insofar as it pertained to the repair of the pavement and was assisted by the defendant McGuire and another unidentified person, who apparently was not a regular employee of the Village. Bartow's testimony was to the effect that they excavated some of the asphalt which was bad and replaced it with concrete, and that no one had directed them to place the pole. They did it to protect the cement while it hardened. They finished the work about 4 or 5 p.m.

on May 17, 1967. They placed no lights or reflectors. Bartow did not think it was necessary. The street would be well lighted at that point because there was a street light very close. The testimony is not clear, but it would appear that the pole was placed diagonally and extended at least 12 feet into the street. Twelve feet was the maximum width of the patch which apparently narrowed at one end. The pole was about 16 inches in diameter and maybe 20 feet long. One end was on the curb. The pole was well weathered and was the color which such poles are. He did not testify concerning the color of the pavement. In his opinion the pole could be seen by persons down the street as far as you can see around the curve. He was not sure whether or not it was his duty to place lights, reflectors, or other warnings. His testimony further leads to the inference that there were no other employees whose assigned duty it was to place lights or reflectors or otherwise mark the pole.

The following principles are applicable here. The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law. § 25-1332, R. R. S. 1943; Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244. The burden is upon the party moving for the summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. Johnson v. Metropolitan Utilities Dist., 176 Neb. 276, 125 N. W. 2d 708. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. Johnson v. Metropolitan Utilities Dist., *supra*. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn there-

from. Johnson v. Metropolitan Utilities Dist., *supra*.

The motion for summary judgment was improperly sustained for at least two reasons. First, although there were before the court no conflicting evidentiary facts, the ultimate inferences to be drawn from those facts are not clear. Second, since those inferences are not conclusively established it cannot be determined whether the defendant is entitled to judgment as a matter of law. It is, for example, not conclusively established by Bartow's testimony that it was not his duty to place lights, reflectors, or other warnings of the barricade. His testimony can lead to the inference that he knew or expected that no one else would do it and that there was no established procedure of the Village placing the duty on someone else. Likewise, reasonable minds might differ as to whether or not such lights or warnings might under the circumstances be required. If we assume the pole could be adequately seen in the daytime there is no evidence in the record whatever to establish precisely what the conditions might be during hours of darkness or of poor visibility. What about the possibility that the street lights might go out? Might not reasonable minds differ as to whether this affects the duty to place warnings if one existed? Was the material with which to give warnings available to the defendants?

As we have already noted, Bartow testified a traveler ought to be able to see the pole at least from the curve. The evidence does not precisely show this but the implication is that the traffic coming from the direction of the curve would be using the side of the street which was wholly or partly obstructed by the pole. How far away would such traveler be from the pole when he first had an opportunity to observe it? The evidence does not show. All this could affect the judgment of the reasonable man as to whether the lights, reflectors, or other markers should have been placed. In short, the inferences to be drawn from the evidence which

was before the court on the motion are not conclusive in any respect and do not show the defendant Bartow was entitled to judgment as a matter of law.

Evidence on the possible authority and duties of the defendant McGuire is almost wholly lacking. It shows only that he was a regular employee of the Village and that he was helping in the road repair job. Bartow stated that he (Bartow) was in charge of the cement work, but in Bartow's words, referring to who was in charge of directing barriers, "Ted McGuire and I both were mixed up in that."

The defendants have clearly failed to present in support of their joint motion for summary judgment evidence which conclusively establishes that there was no genuine issue of fact and that they were entitled to judgment as a matter of law. Johnson v. Metropolitan Utilities Dist., *supra*. In that case this court went on to say: "A motion for a summary judgment is not a substitute for a demurrer or a motion for a directed verdict. We do not determine at this time that the plaintiff's evidence, whatever it will be, will present a jury question. We determine only that the record at this time does not show conclusively that there is no issue of fact in this case."

What we have said before disposes of the contention of the defendants that it was the duty of the plaintiff to present some evidence to contradict that of the defendants, otherwise the motion should be sustained. This position overlooks the nature of the moving party's burden. It is only where the movant's evidence establishes, taken at its apparent face value, that there is no genuine issue of fact and that under the evidence he is as a matter of law entitled to judgment, that the party against whom the motion is made has some duty of coming forth with contradictory evidence. See Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290.

The defendants cite and rely upon the case of Pester v. Holmes, 109 Neb. 603, 191 N. W. 709, for the proposi-

tion that the defendants as employees of a municipal corporation had under no circumstances any duty either to erect barricades or give any warning and therefore are not liable. An examination of the opinion in that case shows it does not support that broad a proposition. That case held that the servant is not liable for a breach of duty of the master to a third party. However, the servant may be liable if the master has delegated to the servant that duty or made him responsible for the performance of the act which would fulfill the duty. The court there said: "The duty is the mother of the obligation, and as we have shown that the duty to erect barriers or give proper warning of the excavation rested upon the master, the obstruction being a lawful one, the servants, who had and were given no control over the project, but merely dug the ditch under the master's direction, were not liable for failure of the master to give warning."

The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Clark on Code Pleading (2d Ed.), § 88, p. 557. Properly used it can accomplish that purpose. It can, however, have the opposite effect. In tort cases of the kind where reasonable minds may differ as to whether an inference of negligence is to be drawn from the given set of facts, it can have no application. It is difficult to use in many tort cases. As Judge Lay observed in Williams v. Chick, 373 F. 2d 330, 332 (8th Cir.): "It is a reasonable observation that a summary judgment proceeding does not prove a very satisfactory approach in tort cases." It does have its proper and improper application in tort cases, however, as Miller v. Aitken, *supra;* and Johnson v. Metropolitan Utilities Dist., *supra,* illustrate.

REVERSED AND REMANDED.

COUNTY OF SARPY, NEBRASKA, APPELLEE, V. LAWRENCE ISKE ET AL., APPELLANTS.
204 N. W. 2d 146

Filed February 9, 1973. No. 38565.

1. **Easements: Deeds.** The extent of an easement created by conveyance is fixed by the conveyance.
2. ———: ———. In ascertaining the extent of an easement by conveyance, this court attaches importance to circumstances surrounding the making of the conveyance. The criteria are not exclusive.

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

J. Patrick Green of Eisenstatt, Higgins, Kinnamon & Okun, for appellants.

Dixon G. Adams, for appellee.

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

SMITH, J.

The question is whether a power line and poles were a privileged use under grant of an easement for construction and maintenance of an agricultural levee. The district court found for the easement owner, Sarpy County, and an order accordingly enjoined Lawrence and Anna Iske, owners of the servient tenement. Iskes appeal.

The facts are as follows. In 1966 the Corps of Engineers of the Department of the Army prepared design memorandum R-613-1 for construction of a levee in Sarpy County. The purpose was protection of 3,000 acres of land, some of which the Iskes owned. The memorandum provided for electric motors to pump water over the levee and into the Missouri River. Some of the water would be runoff, but it was not known whether runoff from Iskes' land would be pumped.

Subsection 4.3.8 of the memorandum stated that Omaha

Public Power District would supply power for operation of the motors. It continued: ". . . (OPPD) would build approximately two miles of power line from an existing line to the pumping station." The proposed line was not located, but the site of the pumping station was to be some distance from Iskes' land.

Lawrence Iske attended meetings that Army representatives held to explain the project to farmers, for 2,600 acres were farmland. The representatives often spoke of the electric motors and line. The memorandum to which they sometimes referred was present and available for perusal by the public, although the representatives did not generally encourage such practice.

Lawrence Iske heard nothing about the electric motors or line at the meetings he attended. According to his testimony an Army representative advised him that farming to the toe of the levee would be permissible. Iske studied "a good bit" not only the plans the easement grant was to describe but also other attached plans. One pictured the service pole and another, the pumps. Lawrence Iske testified: "Q. . . . (D)id you see . . . (the pumps) when you looked at it when . . . (an Army representative) showed you the plans? A. No, I don't think he especially pointed them out there. I wasn't interested anyway. That wasn't on my land . . .. Q. Did you know there was going to be some pumps there? A. No, I didn't know that, not on my land."

The easement grant, dated April 7, 1967, described "An Agricultural levee . . . as described in Plan Numbers M(R613) C1-310E of the U.S. Army Corps of Engineers." Those plans did not disclose electric motors or a power line.

In construction of the levee an unstated number of concrete posts were set approximately 12 feet from the levee and either inside or on the boundary line of the easement. The engineers intended the posts to prevent landowners from plowing within the easement.

After construction of the levee and concrete posts,

OPPD over Iskes' protest built a power line with 6 poles, one with a guy wire, within the easement. The line extended to the service pole near the pumping station.

Iskes cross-petitioned for damages from the power line but not from the concrete posts, although Lawrence Iske conceded that the posts served their purpose. Lawrence Iske testified that the power poles substantially interfered with his farming, but the location of the poles with reference to the concrete posts does not otherwise appear.

The extent of an easement created by conveyance is fixed by the conveyance. Bors v. McGowan, 159 Neb. 790, 68 N W. 2d 596 (1955); Restatement, Property, § 482 (1944). If the details are obscure, a reasonably convenient use must have been intended. 2 American Law of Property, §§ 8.65 and 8.66, pp. 276, 277 (1952).

In ascertaining the extent of an easement by conveyance, this court attaches importance to circumstances surrounding the making of the conveyance. The criteria are not exclusive. See, Bors v. McGowan, *supra;* 2 American Law of Property, § 8.66, p. 277 (1952); Restatement, Property, § 483 (1944).

Iskes assert that we should construe the easement (1) to have been gratuitous and thus lessen the weight we give to the expectations of the grantee, and (2) to benefit grantors, the grantee having drafted the conveyance. See, 2 American Law of Property, § 8.67, p. 280 (1952); Restatement, Property, § 483(b) and Comments g and h (1944); Gettel v. Hester, 165 Neb. 573, 86 N. W. 2d 613 (1957). Respecting the first proposition, the easement was gratuitous in the sense that Sarpy County paid no money to Iskes for the conveyance. With that reservation we assume the truth of the first proposition for present purposes. The second proposition does not require us to resolve every ambiguity under all circumstances against the draftsman.

Details of the easement granted by Iskes are obscure.

In the absence of other language a grant of an easement for an agricultural levee without substantial benefit to land owned by the grantor does not ordinarily confer a privilege for construction of a power line. Under the foregoing rules of interpretation and the evidence the Iskes' grant, however, encompassed construction and maintenance of the power line.

The judgment is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I dissent for the reasons I now state. The majority opinion acknowledges: "The easement grant, dated April 17, 1967, described 'An Agricultural levee . . . as described in Plan Numbers M(R613) C1-310E of the U.S. Army Corps of Engineers.' Those plans did not disclose electric motors or a power line." The more complete language describing the use is: "An Agricultural levee and obtaining Borrow Material *therefor as described* in Plan Numbers M (R613) C1-310E of the U.S. Army Corps of Engineers." (Emphasis supplied.) Yet the court goes on to hold that the easement may be used for the construction of a power line. It would seem that such a conclusion could be arrived at only upon the theory that the construction of a power line is by definition, usage, or common understanding included within the term "agricultural levee." There is no evidence to support that position. The dictionary defines levee as an embankment designed to prevent flooding. The word agricultural would imply that its purpose is to protect agricultural lands. There is nothing in the language or the plans referred to which could inform or advise the grantor that a power line would be constructed and maintained on the easement site.

Unless a person has some special knowledge he could not know or suspect from the language of the plans referred to that the grant of an easement for an agricultural levee could include the right to build, construct, and maintain a power line. The plain, clear meaning of the

reference to the plans was to describe the dimension of the right-of-way and the location of the borrow area. This is the clear, plain, and unambiguous import of the language "and obtaining Borrow Material therefor as described in Plan Numbers . . .."

As counsel for the appellee aptly observed in oral argument the primary rules of construction are those imposed by the meaning of language. The language is clear. We can go no farther.

The following language from the appellants' brief is apropos and in point: "The use the grantee of an easement may make of the servient estate 'is limited both as to extent and nature to the terms of the original grant.' Webb v. Platte Valley Public Power and Irrigation District, 146 Neb. 61, 18 N. W. 2d 563, 566 (1945); Rest., Property, Sec. 482. Where the language of the grant is specific, no activities outside the user granted may be undertaken. County of Johnson v. Weber, 160 Neb. 432, 70 N. W. 2d 440, 447-448 (1955); Cover v. Platte Valley Public Power and Irrigation District, 162 Neb. 146, 75 N. W. 2d 661, 667 (1956). As this Court stated in County of Johnson v. Weber, supra, 'the rule is that if the grant of an easement or reservation is specific in its terms, it is decisive of the limits of the easement.'

"The ordinary rules of construction applicable to deeds apply to easements by grant. 28 C. J. S., Easements, § 75, pp. 752-753; 25 Am. Jur. 2d, Easements, § 75, p. 481. If the language of an easement 'is couched in clear and unambiguous language', the easement 'is not subject to a construction other and different from that which flows from the language used.' Cover v. Platte Valley Public Power and Irrigation District, supra, 75 N. W. 2d 667; 28 C. J. S., Easements, § 75, p. 753."

At the time the easement was signed the complete plans of the levee system as distinguished from just the portion of it on the defendants' land were not even in existence. These do show that at other points in

the levee system electric pumps would be used and that access to power supply would be needed. The court now in effect has incorporated the complete plans in the easement granted by the plaintiff.

The case of Bors v. McGowan, 159 Neb. 790, 68 N. W. 2d 596, does not, in my judgment, support the action of the court. That case involves simply the right of an owner of an easement for ingress and egress to keep the road in repair so that it remained usable.

The case of the appellee is not one which creates any special sympathy. The levees are beneficial to it. The power line will not substantially increase the burden of the easement. Nonetheless, this is a case where the principles are more important than the equities. The ordinary rules of conveyance should not be stretched to accommodate and remedy the oversight of the draftsman for the United States Army Corps of Engineers.

GENE M. LIENEMANN, APPELLEE AND CROSS-APPELLANT, V. MARGARET A. LIENEMANN, APPELLANT AND CROSS-APPELLEE.
204 N. W. 2d 170

Filed February 9, 1973. No. 38576.

1. **Divorce: Statutes: Appeal and Error.** Under the provisions of Laws 1972, L. B. 820, the no-fault divorce law, when an appeal in an action under the prior divorce statutes is filed in the Supreme Court, this court is invested with original de novo jurisdiction and is required to disregard the judgment of the district court and make independent determinations of the issues presented to the district court, and therefore the provisions of Laws 1972, L. B. 820, are applicable to such determination by this court.
2. **Divorce: Statutes: New Trial.** Subsection (4) of section 33 of Laws 1972, L. B. 820, requires that when a new trial is had on issues in a divorce case the provisions of said L. B. 820 shall govern the law determining such trial.
3. **Divorce: Appeal and Error.** The taking of an appeal to the Supreme Court in a divorce action vests this court with jurisdiction and requires it to disregard the judgment and action

of the district court and to enter a new, independent, and final judgment determining the issues of the case.

Appeal from the district court for Cheyenne County: JOHN H. KUNS, Judge. Reversed and remanded with directions.

Jack R. Knicely, for appellant.

Peetz & Dorwart, for appellee.

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

WHITE, C. J.

The principal question involved in this appeal is the determination by this court of whether Laws 1972, L.B. 820, commonly called the no-fault divorce law, governs the trial of this case on appeal in this court. This case was tried on September 3, 1971. L.B. 820 became effective on July 6, 1972. The lower court sustained the defendant's motion to dismiss the plaintiff's petition for an absolute divorce under the law effective prior to L.B. 820, on the ground of insufficiency of evidence and because of lack of corroboration. At the conclusion of the defendant's evidence the trial court sustained the plaintiff's motion to dismiss the defendant's cross-petition for divorce from bed and board on the ground of lack of corroboration. The trial court made no disposition of the issues of child custody, support, and alimony. On appeal and trial de novo in this court as provided by law, we remand the cause to the district court with directions to enter a decree appropriate to the provisions of Laws 1972, L.B. 820, either by way of absolute divorce or decree of legal separation, and to receive evidence and to determine the questions of maintenance or alimony, child custody, child support, and the division of property of the parties.

The parts of section 33 of L.B. 820, the no-fault divorce act, which this court is called upon to construe to determine the essential question involved in this

case, are: "(2) This act shall apply to all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered. Pending actions for divorce or separation shall be deemed to have been commenced on the basis of irretrievable breakdown. Evidence adduced after the effective date of this act shall be in compliance with this act. * * * (4) In any action or proceeding in which an appeal was pending or a new trial was ordered prior to the effective date of this act, the law in effect at the time of the order sustaining the appeal or the new trial shall govern the appeal, the new trial, and any subsequent trial or appeal."

This appeal was pending in this court on July 6, 1972, the effective date of the act. Consequently, the decision in this case focuses more precisely upon the words "the law in effect at the time of the order sustaining the appeal or the new trial *shall govern* the appeal, the new trial, and any subsequent trial or appeal." (Emphasis supplied.) We take judicial notice of the fact that L.B. 820 was modeled after the California and Iowa no-fault divorce laws. It is further clear that the quoted language of subsection (4) of section 33 of our act is, in a literal sense, incongruous with our procedural statutes for trial on appeal. There are no intermediate courts of appeal in Nebraska and no provision for certiorari or a court-ordered appeal. In Nebraska, appeal is a matter of right and the filing of a notice of appeal from the district court to this court, as was done in this case, automatically, by application of law, vests this court with jurisdiction and, just as important, completely divests the district court of any jurisdiction of the action. We feel that any confusion in interpretation of the analysis of the statute is cleared up when we consider the fact that at the time L.B. 820 went into effect this court was vested with jurisdiction of the cause. We go to the nature of our jurisdiction on appeal in divorce cases and our powers and duties

under the provisions of law. The law in effect is section 25-1925, R. R. S. 1943, which provides as follows: "In all appeals from the district court to the Supreme Court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Supreme Court to *retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions,* and upon *trial de novo* of such question or questions of fact, reach an *independent conclusion* as to what finding or findings are required under the pleadings and all the evidence, *without reference to the conclusion* reached in the district court or the fact that there may be some evidence in support thereof." (Emphasis supplied.) In an unbroken line of decisions this court for many years has held section 25-1925, R. R. S. 1943, is applicable to a divorce action. We have also held, without deviation, that the Supreme Court is required to try the case *de novo* and reach independent conclusions as to the findings of fact and of the law. Otherwise stated, we have undeviatingly held that on trial de novo the Supreme Court will retry the issues on a written record and reach independent conclusions without reference to that of the district court. Gable v. Carpenter, 136 Neb. 669, 287 N. W. 70; Robinson v. Dawson County Irr. Co., 145 Neb. 32, 15 N. W. 2d 231; Sherwood v. Salisbury, 139 Neb. 838, 299 N. W. 185; Thurston v. Travelers Ins. Co., 128 Neb. 141, 258 N. W. 66; Scholz v. Scholz, 172 Neb. 184, 109 N. W. 156; Jones v. Jones, 173 Neb. 880, 115 N. W. 2d 462; Upah v. Upah, 175 Neb. 606, 122 N. W. 2d 507.

The briefs in this case argue the meaning of the term "the order sustaining the appeal." We do not feel that we need or should define this term. In fact, it is easily observable that it is impossible to give a definitive application to this language when the term is inapplicable to our appeal procedure. It is obvious

from the terms of both subsection (2) and subsection (4) of section 33 of L.B. 820 that it is required in a case of a retrial or a new trial of the issues in the case that the provisions of L.B. 820 should govern. This conclusion flows from the language of subsection (4) which states "the law in effect at the time * * * shall govern the appeal, the new trial, and any subsequent trial or appeal." The intent of the act can be further gathered from the provision of subsection (2) which says that this act shall apply to all pending actions and proceedings commenced prior to its effective date on which a *judgment* has not been entered. At the time of the effective date of L.B. 820 on July 6, 1972, this court was vested with jurisdiction of the matter and under the affirmative provisions of section 25-1925, R. R. S. 1943, it was pending here for retrial anew independent of any judgment or any action of the district court. It is obvious for the purposes of determining the question herein involved, that a judgment, in the sense of a *final* judgment, had not been entered. The reason is that the appeal vested this court with the absolute power and the absolute duty to disregard the judgment and the action of the district court and enter a new and independent determination of the issues. We reiterate the words of the statute: "* * * to retry the issue or issues * * * and upon trial de novo * * * reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court * * *." Language could not be used more clearly to demonstrate, within the meaning of the appropriate language of subsection (4) of section 33 of L.B. 820, that its provisions apply to the retrial or the new trial in the Supreme Court and that there was no "judgment" within the meaning of subsection (2) of the act.

Consequently, we hold that under the provisions of L.B. 820, the no-fault divorce law, when an appeal in

an action under the prior divorce statutes is filed in this court, this court is invested with original de novo jurisdiction and is required to try the case anew and make independent determinations of the issues presented to the district court, and the provisions of L.B. 820 are applicable to such determination by this court. As we have mentioned the trial court refused all relief to each of the parties and made no determination or findings as now required under L.B. 820, and no determination as to the matter of whether a legal separation or a dissolution of the marriage should be granted and no findings or determinations as to custody of the children, support, maintenance, and alimony.

The trial court, of course, was bound at the time of the trial and the judgment in the district court by the provisions of the previous statutes. Nevertheless, since the provisions of L.B. 820 are now applicable, the judgment of the district court must be reversed and the cause remanded with directions to enter a decree as provided for and authorized under the provisions of L.B. 820. The judgment is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH and MCCOWN, JJ., concur in the result.

NOLAN BRACY, APPELLANT, V. AMERICAN FAMILY MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLEE.
204 N. W. 2d 174

Filed February 9, 1973. No. 38578.

1. **Insurance: Contracts.** Objectively reasonable expectations of a beneficiary-insured relating to the terms of his insurance contract will ordinarily be honored.
2. ———: ———. The purpose of an insurer against liability for medical payments in an automobile policy may be not to make medical payments to an insured who is injured in another vehicle owned by the insured but not insured under the policy.

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

Robert C. Vondrasek, for appellant.

Boland, Mullin & Walsh, for appellee.

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

SMITH, J.

The problem in this case arises out of medical expense coverage provisions in two automobile insurance policies issued by defendant to plaintiff, the named insured. The district court rendered summary judgment for defendant, and plaintiff appeals. He asserts that the court misconstrued policy provisions.

The declarations of one policy described only a 1963 Corvette automobile owned by plaintiff, and they limited defendant's liability for medical expense to $1,000. The declarations of the other policy described a 1969 Dodge automobile and they limited defendant's liability for medical expense to $5,000. In the operation of the Corvette plaintiff sustained bodily injury that caused him medical expense in excess of $5,000. Defendant discharged its liability on the Corvette policy but denied liability on the Dodge policy. Plaintiff sued to recover $4,000 on the latter contract.

Aside from the declarations, the two policies for present purposes were identical in language. Defendant agreed "To pay all reasonable medical expense incurred within one year from the date of the accident: . . . To or for the named insured and each relative who sustains bodily injury caused by accident, . . . while occupying an automobile . . . ." An exclusion read: "This policy does not apply . . . to bodily injury sustained by the named insured . . . while occupying an automobile owned by . . . the named insured . . . , other than an automobile which qualifies as an 'owned automobile' as defined herein . . . ." "Owned automobile" was defined as

"the automobile described in the declarations." The headings, insuring agreements, and exclusionary clauses were equally prominent.

Objectively reasonable expectations of a beneficiary-insured relating to the terms of his insurance contract will ordinarily be honored. Nile Valley Coop. Grain & Milling Co. v. Farmers Elevator Mut. Ins. Co., 187 Neb. 720, 193 N. W. 2d 752 (1972). See, also, Bose v. American Family Mut. Ins. Co., 186 Neb. 209, 181 N. W. 2d 839 (1970).

In provisions for liability for medical expense or medical payments some difficulty has been experienced in the use of the phrases "owned automobile" and "non-owned automobile." See, Grantham v. United States Fidelity & Guaranty Co., 245 S. C. 144, 139 S. E. 2d 744 (1964); Pouros, Melendes, and Craig, "Medical Payments Provision of the Automobile Insurance Policy: An Illustration of First Party Insurance Problems," 52 Marq. L. Rev. 445 at 467 (1969-70). It has been said: "The purpose of the insurer is readily apparent. It is willing to make medical payments when an insured is injured while occupying a vehicle which is insured under the policy. . . . It is unwilling, however, to make medical payments to an insured who is injured in another vehicle owned by . . . (the) insured but not insured under the policy." Simpson v. KFB Insurance Co., Inc., 209 Kan. 620, 498 P. 2d 71 (1972). See, also, Brouillette v. Fireman's Fund Insurance Co., 163 So. 2d 389 (La. App., 1964), writ of review denied, 246 La. 594, 165 So. 2d 485 (1964).

Exclusionary clauses similar to those in the present case have protected insurers. See, McKinley v. Colorado Farm Bureau Mutual Ins. Co., 163 Colo. 529, 431 P. 2d 859 (1967); Simpson v. KFB Insurance Co., Inc., *supra;* Brouillette v. Fireman's Fund Insurance Co., *supra;* Grantham v. United States Fidelity & Guaranty Co., *supra.*

The policy provisions in question are clear enough

that the summary judgment for defendant honored objectively reasonable expectations of plaintiff. It follows that subordinate rules of interpretation are inconsequential.

The judgment is affirmed.

AFFIRMED.

UNIVERSAL TERRAZZO & TILE CO., A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. PARSONS CORPORATION, A CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES.
204 N. W. 2d 149

Filed February 9, 1973. No. 38589.

New Trial: Evidence. Newly discovered evidence does not require the granting of a new trial unless it is of such controlling nature that it probably would change the result of the former trial.

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

Young, Kuhn, Person & Liakos, for appellants.

Monen, Seidler, Ryan & Festersen, for appellee.

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

BOSLAUGH, J.

This was an action to recover the amount due the plaintiff for work upon the Sunset Shopping Center at Norfolk, Nebraska. The defendant Parsons Corporation was the principal contractor on the project. The plaintiff was a subcontractor. The Insurance Company of North America was the surety on a performance bond for Parsons.

The trial court found that the plaintiff should recover the amount of $62,295.39 from the defendants; an additional $4,578.64 from Parsons; and an attorney's fee in the amount of $8,000 from the insurance company.

Separate motions for new trial filed by the defendants were overruled on March 1, 1971.

On January 21, 1972, the defendants filed a petition for a new trial because of newly discovered evidence. The defendants appeal from the order overruling this motion.

The newly discovered evidence consisted of a written contract, dated October 13, 1966, in which N.N.D. Investment Company agreed to invest $32,000 in Community Betterment Specialists in return for a promise that the plaintiff would be awarded a contract for work at the Sunset Shopping Center project. N.N.D. Investment Company was controlled by the officers and stockholders of the plaintiff. Community Betterment Specialists was the promoter of the Sunset Shopping Center project.

The contract between Sunset Plaza, Inc., the owner of Sunset Shopping Center, and Parsons was a "cost of the work plus a fee" contract. The contract included all subcontracts as a cost of the work.

The subcontract between the plaintiff and Parsons consisted of a work order, dated January 31, 1968, to furnish labor and materials for certain specified work on the project together with additional work that was performed at the request of Parsons. Parsons contends its contract with the plaintiff was without consideration and therefore unenforceable because the plaintiff was already bound to do the work under the contract with Community Betterment Specialists. The record does not support this contention.

The 1966 contract between the plaintiff and Community Betterment Specialists merely provided that Sunset Plaza, Inc., and W. C. McNeely, the president of Sunset Plaza, Inc., and Community Betterment Specialists, would "take such steps as are necessary to consummate a contractual agreement whereby Universal Terrazzo will be awarded a contract in the amount of $46,591.00 for the furnishing of all labor and materials" for specified work.

At the trial, William C. Hawkins, the president of Parsons, was asked how the subcontract came to be let to the plaintiff. He testified that McNeely and another employee of Community Betterment Specialists gave him some figures that had been submitted by Mr. Bortolotti, an officer of plaintiff, and stated: " 'If the figures are in line, we would like to use Mr. Bortolotti and he will buy stock from us in our companies.' " Hawkins further testified the figures were in line; Parsons was requested to issue a purchase order; and a purchase order was written in January 1968. At the hearing on the motion, Hawkins testified that Parsons regarded the plaintiff as a subcontractor.

Newly discovered evidence does not require the granting of a new trial unless it is of such controlling nature that it probably would change the result of the former trial. Penn Mutual Life Ins. Co. v. Lindquist, 132 Neb. 220, 271 N. W. 429; Finnern v. Bruner, 170 Neb. 170, 101 N. W. 2d 905. The newly discovered evidence in this case does not satisfy that requirement.

The evidence at the trial showed that Parsons knew McNeely wanted the subcontract let to the plaintiff because Bortolotti was a prospective investor in Community Betterment Specialists. The 1966 contract with N.N.D. was of little additional significance. Community Betterment Specialists did not contract with the plaintiff to do the work at the project but merely agreed to arrange for the contract to be let to the plaintiff. Parsons knew the circumstances when it accepted the plaintiff as a subcontractor on the project. The evidence did not entitle the defendants to a new trial.

The plaintiff cross-appeals from the refusal of the district court to award an additional attorney's fee for the proceedings on the petition for a new trial. Apparently the district court believed the fee previously allowed was adequate to cover the additional proceeding. We find no abuse of discretion in that regard.

The judgment of the district court is affirmed. The

plaintiff is allowed the sum of $500 for the services of its attorneys in this court to be taxed against the defendant Insurance Company of North America.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY DAVID STROH, APPELLANT.
204 N. W. 2d 156

Filed February 9, 1973. No. 38604.

1. **Criminal Law: Sentences: Appeal and Error.** The Supreme Court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence.
2. ———: ———: ———. Where the punishment of an offense is left to the discretion of the court within prescribed limits of the statute, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

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

A. James McArthur, for appellant.

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

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

SPENCER, J.

Defendant was found guilty of assault with intent to commit rape, and was sentenced to 7 years in the Nebraska Penal and Correctional Complex. He premises his appeal on excessiveness of sentence. We affirm.

Defendant was charged with forcible rape. A jury trial was had on that issue. It resulted in a mistrial prior to actual submission. Defendant then waived his

right to a trial by jury and stipulated that the matter be retried before the court without a jury on the transcript of evidence adduced at the jury trial. Upon this retrial the court found defendant guilty of the lesser-included offense of assault with intent to commit rape.

The only question presented by this appeal is the excessiveness of a 7-year sentence. Under the provisions of section 28-409, R. R. S. 1943, the penalty for assault with intent to commit rape is imprisonment "in the Nebraska Penal and Correctional Complex not more than fifteen nor less than two years."

Prior to passing sentence upon defendant the court, under the authority of section 83-1,105, R. S. Supp., 1969, committed the defendant to the Division of Corrections for a period of 90 days for study and report for sentencing. Defendant's presentence investigation discloses a dismissal of a prior charge of statutory rape and two felony convictions, one in Nebraska for burglary and one in Colorado for assault with a deadly weapon. The psychiatrist's report attached to the presentence investigation indicates that defendant does not fit the definition of a sexual sociopath as defined in the Nebraska statutes, and that he could not be benefited by confinement in the Lincoln Regional Center.

Section 29-2308, R. R. S. 1943, provides in part: "* * * the Supreme Court * * * may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence." We have frequently said that where the punishment of an offense is left to the discretion of the court within prescribed limits of the statute, a sentence prescribed within such limits will not be disturbed unless there appears to be an abuse of such discretion. State v. Stroh (1966), 181 Neb. 24, 146 N. W. 2d 756.

The sentence imposed herein is well within the limits provided by law. A review of the record and the pre-

sentence report does not indicate any abuse of discretion on the part of the trial court. We do not find the sentence to be excessive on the record herein. The record amply supports the court's sentence, and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PATRICIA VAN ACKEREN, APPELLANT.
204 N. W. 2d 165

Filed February 9, 1973. No. 38605.

Criminal Law: Sentences: Appeal and Error. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion.

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

Paul E. Watts and Stephen Greenberg, for appellant.

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

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

WHITE, C. J.

The sole question involved in this case is whether a minimum indeterminate sentence of 1 to 3 years imposed upon the defendant for the crime of unlawful deliverv of a controlled substance, LSD, was excessive.

The defendant plead guilty and we also have before us in the record a full report of the presentence investigation in this matter. The lower court had before it the official police report which showed that at approximately 11:15 p.m. on September 19, 1971, officer Helms, working in an undercover capacity with the narcotics

unit of the Omaha police department, was informed that a narcotics buy was set up at 4825 Taylor Street with a party named Stephen Van Ackeren. At approximately 11:45, officer Helms and the informant went to 4825 Taylor Street where they were met by Stephen Van Ackeren and his wife, Patricia, the defendant and appellant. The presentence report shows that the defendant initiated and participated actively in the transaction. The defendant asked officer Helms if he were interested in some "sunshine," officer Helms stated that he was and asked the price. The husband of the defendant then stated that the price was $2.50 a hit, and officer Helms produced a $10 bill whereupon the defendant's husband gave the defendant a small match box from which she took four orange-colored tabs, placed them in a piece of tinfoil, and handed them to officer Helms. Officer Helms gave the defendant the $10 bill which she in turn gave to her husband. There is no dispute that the orange-colored pills constituted LSD, lysergic acid diethylamide.

We recite the facts from the presentence report because of what transpired during the sentencing procedures before the district court. It appears from an examination of the record that despite her plea of guilty and the positive statement of the police officer, the defendant persisted, both at the time of the arraignment, and at the time of the final sentencing, in a version of the incident which would create the impression that she rather unwillingly accepted the LSD tablets from a friend and was disposing of them for the friend. Her joint and active participation with her husband, who was also charged, is apparent from the above recital of the facts. We are unable to find, in the presentence investigation and in the sentencing proceedings, any indication of sincere remorse and a desire for rehabilitation on the part of the defendant.

Since the defendant was a first offender and in light of the sentence that was actually given, the fundamental

question presented to the district court and the sole question raised here is whether the defendant should have been placed on probation. Although this is not a crime of violence, it is apparent from the nature of the substance delivered, and the danger involved to users, that it was a drug offense of the more serious type. The record reveals no recommendation of probation from the county attorney or from the probation officer. In examining the question of the difficulty of the supervision of the defendant while on probation the presentence investigation reveals many facts which must have been persuasive to the trial judge. The defendant first began to "drop" LSD occasionally, perhaps every week, stating that she first began because of boredom because her husband was in the Nebraska Penal and Correctional Complex. This lasted for about 7 months and then after a "very bad trip" she quit for approximately 6 months. She then smoked marijuana and hashish for about the next 6 months, but got bored with this after her previous experience with LSD. She states that she stopped taking drugs in the spring of 1971. Her father is a mechanic of an unknown address and her mother is unemployed and living in Omaha. Each of her parents had been previously married and divorced and are now divorced from each other. As mentioned, her husband has been in the Nebraska Penal and Correctional Complex for about 15 months for burglary; in addition her mother has been confined in the Women's Reformatory in York for uttering a forged instrument, her father's presence and interest is absent, and her grandfather was a two-time inmate of the Nebraska Penal and Correctional Complex.

Because of the nature of the offense, the trial court must have been peculiarly concerned with the problems involved with the necessary supervision of the defendant while on probation, her genuine desire to rehabilitate herself, and her repeated return to the use of drugs because of "boredom" in her private life. Combined with

these facts is her persistence through the sentencing procedure, in an absolutely uncorroborated and unsubstantiated version of the sale of the LSD in order to accommodate one of her friends.

Considering all the circumstances, we are unable to say that the trial court, who had the defendant before him at least twice, and had all the information of the presentence investigation before him, and considering the seriousness of the offense, abused its discretion in imposing a minimum indeterminate sentence of from 1 to 3 years. This court has held, without deviation, that where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion. Such an abuse does not appear from the record in this case.

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

AFFIRMED.

McCOWN, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. STEPHEN G. HURLEY, APPELLANT.
204 N. W. 2d 176

Filed February 9, 1973. No. 38621.

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

Stephen G. Hurley, 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.

CLINTON, J.

This is an appeal from the sentence imposed after a plea of guilty to a charge of robbery. The defendant was sentenced pursuant to section 28-414, R. R. S. 1943, to a term of from 6 to 8 years in the Nebraska Penal and Correctional Complex. The sole issue presented is whether or not there was a violation of a plea bargain.

Defendant was charged with two counts of robbery. He was represented by counsel at arraignment and on January 19, 1972, pled not guilty. Later, on April 24, 1972, defendant again appeared with counsel and asked leave to withdraw his plea of not guilty as to one count of the information. Before granting the motion the court examined the defendant and established he was 18 years old and had completed the 10th grade. The court then carefully explained the right of trial by jury and all the rights that attended it, and that a plea of guilty would waive those rights. Defendant affirmatively answered he understood. Further inquiry revealed a plea bargain. The record shows the bargain was that following a plea of guilty and sentencing on this charge that two other felony charges would be dismissed. Defendant was then specifically asked if there had been promises of anything else and he answered, "No, sir."

The court then determined the defendant understood that conviction of even one count of robbery carried a possible sentence of from 3 to 50 years and that while defendant was hopeful of probation defendant knew the county attorney had not promised nor recommended it. The defendant admitted the essential facts constituting the basis for the plea on this count but denied involvement as to the other robbery. The court then accepted the plea of guilty and deferred sentencing.

At the hearing for sentencing on May 31, 1972, prior to the imposition of sentence, defendant for the first time stated that the plea bargain included a flat sentence of 3 or 4 years. Inquiry revealed that defendant

had mentioned this term to his attorney, that the attorney had talked to the county attorney and the court, but that no promise had been obtained and that the defendant had not been told there was such a promise. The attorney had told defendant he thought the sentence might be for 4 years. This occurred after entry of the plea of guilty.

The record does not support defendant's contention. It is abundantly clear that defendant understood the nature of the charge, the possible penalty, his rights, and the effect of a plea of guilty. The plea of guilty here represents an intelligent and voluntary choice between the alternate courses of action. State v. Thompson, *ante* p. 115, 201 N. W. 2d 204; State v. Turner, 186 Neb. 424, 183 N. W. 2d 763; State v. Cruse, 187 Neb. 331, 190 N. W. 2d 629. The plea bargain as it existed was carried out. There was no request to withdraw the plea of guilty. There is nothing to show that the plea was the result of any such other promises or any misunderstanding. The court specifically found that the plea was voluntary and intelligently made and the record clearly supports the findings.

The judgment and sentence appealed from are affirmed.

AFFIRMED.

AGNES SIMPKINS, ALSO KNOWN AS MRS. HAROLD SIMPKINS, APPELLANT, V. KATE RITTER ET AL., APPELLEES.
204 N. W. 2d 383

Filed February 16, 1973. No. 38502.

1. **Bailments: Contracts.** Generally, an agreement to return the identical property makes the contract one of bailment and not of sale, and the title to the property is not changed.
2. ———: ———. It is of the very essence of a contract of bailment that it shall contemplate the return of the property bailed.
3. **Bailment: Words and Phrases: Contracts.** The term "bailment" is comprehensively defined as a delivery of personalty for

some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.

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

Bauer, Galter & Scott, for appellant.

Duane J. Dowd of Riedmann, Dowd & Jeffries, for appellees.

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

SPENCER, J.

This is a replevin action brought by Agnes Simpkins to recover the possession of a horse named Cider Dave from Kate and Jack Ritter, wife and husband. Simpkins appeals from a judgment denying restitution of the horse and damages. We reverse.

The following questions are presented by this appeal: 1. Was the conveyance of Cider Dave to Kate Ritter an outright and unqualified conveyance of title and ownership, or was a bailment created with a reversionary interest reserved in Agnes Simpkins? 2. If a bailment was created, then was Cider Dave to be returned to Simpkins at the end of the 1971 racing season; or was such return to be made when the horse was 12 years old, no longer raceable, or on the death of Kate Ritter?

Simpkins, who is employed in Lincoln, breeds and raises thoroughbred race horses. Kate Ritter is a groom and housewife. Jack Ritter is a horsetrainer and a plater. A groom is one who cares for horses, and a plater is one who shoes horses. The Ritters, who had been training horses for a number of years, trained horses for Simpkins on previous occasions. There was no relationship between the parties other than friendship.

During the 1970 racing season discussions were had between Simpkins and Kate concerning the taking and training of Cider Dave. In January of 1971, Cider Dave was sent from the Simpkins farm in Raymond, Nebraska, to the Ritter farm at Anthony, Kansas. On January 27, 1971, after Cider Dave had been sent to Kansas, Simpkins, pursuant to a phone request, signed the jockey club certificate of foal registration in blank, and mailed the certificate by certified mail to Kate. Kate placed her name on the certificate as the transferee, and inserted the date of transfer as June 8, 1970.

Simpkins' testimony indicates she transferred the horse to the Ritters for the 1971 racing season, at the end of which time it was to be returned to her. She did this because she was unable to train or race the horse. She testified that the Ritters were to pay the entire cost of Cider Dave's upkeep, and in return they were to receive all his earnings.

Kate conceded she paid nothing for the horse, but alleges it was given to her with the intention that she was to be its sole owner. However, she did admit Cider Dave was eventually to be returned to Simpkins. The area of the disagreement involved was when that return was to take place. Was it at the end of the 1971 racing season, or, as Kate contended, not until she was through with him? This she interpreted to be when the horse was 12 years old and no longer raceable; if he broke down; or if something happened to her.

Simpkins contended the transfer of the certificate of foal registration was made in order to permit Kate Ritter to race the horse during the 1971 racing season. She adduced other evidence indicating that such arrangements are frequently made in the racing business. Under her theory, the transfer was not made for the purpose of transferring ownership, but only for the limited purpose of permitting Kate to race the horse and retain all earnings during the period that the bailment was to be in effect.

It is undisputed the horse was to be returned at some time to Simpkins. It is also undisputed Simpkins had refused to sell the horse. It tests credulity to believe that under the circumstances she would give the horse to Kate for its entire racing life. The testimony of Simpkins is much more within the range of believability.

Generally, an agreement to return the identical property makes the contract one of bailment and not of sale, and the title to the property is not changed. 8 Am. Jur. 2d, Bailments, § 22, p. 927. As we said in Luikart v. Massachusetts Bonding & Ins. Co. (1935), 129 Neb. 771, 263 N. W. 124: " 'It is of the very essence of a contract of bailment that it shall contemplate the return of the property bailed, * * *.' "

The trial court ignored the bailment characteristics of the transaction. Relying on the foal certificate and the racing entry, the trial court found Kate Ritter to be the owner of the horse. However, the transfers are entirely consistent with the delivery of possession for bailment purposes.

In Mimick v. Beatrice Foods Co. (1958), 167 Neb. 470, 93 N. W. 2d 627, we said: "The term 'bailment' is comprehensively defined as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be."

We conclude the transfer herein was a bailment. It therefore follows that title and ownership remained in the bailor Simpkins. For this reason the trial court's findings that title was in Kate Ritter was in error.

Judgment reversed and cause remanded, with instructions to enter judgment for possession in favor of Agnes Simpkins.

REVERSED AND REMANDED.

CLINTON, J., dissenting.

This court has many times said that in a jury-waived law action the trial court's finding has the same effect as a verdict and will not be set aside unless clearly wrong. Pester v. American Family Mut. Ins. Co., 136 Neb. 793, 186 N. W. 2d 711. This is fundamental and salutary doctrine and should be observed. We have violated the principle in this case and made ourselves the finder of the facts. This is evidenced by the following quotation from the majority opinion: "The testimony of Simpkins is much more within the range of believability." The agreement may indeed be an unusual one, but then many agreements in areas with which we are unfamiliar may seem unusual, but this is surely not the sole measure of the credibility of the witness who testifies concerning it. Indeed, it might have nothing to do with credibility whatever.

An examination of the pleadings in this case does not, as is not unusual in a replevin action, disclose precisely what interests the parties claim other than the right to immediate possession. The plaintiff's petition simply stated she claimed an interest and had the right to possession. The defendants' answer was a general denial.

An examination of the pleadings shows that the dispute was over ownership. The defendant Kate Ritter, testifying to the course of the conversations which led to her claimed ownership of the horse, said: "She still wanted me to take the bay colt and I told her again that I could not afford a horse, and she said this is not going to cost you anything, I am giving this horse to you, it's his only chance. And I said we would have to think it over." With reference to the transaction itself, she testified: "Agnes Simpkins wanted to know if what we had decided and we told her again that we could not afford a horse of our own. She said I am giving you this colt, do you understand that, and I said, well we will do what we can, we will try, and

she cried she was so happy that we had taken the colt known as Cider Dave."

Exhibit 4 to which the trial court made specific reference was the Jockey Club registration for Cider Dave. On the back thereof there appears the following: "All transfers must be signed by previous owner or authorized agent, showing address of new owner and date of transfer." Then is shown a transfer to Kate Ritter of Anthony, Kansas, the date 6-8-70, and the signature of Mrs. Agnes I. Simpkins. The evidence shows that Kate Ritter, as owner, registered Cider Dave with the Secretary of the Racing Commission. Exhibit 19 referred to by the court is a pamphlet of the rules of the Racing Commission of the State of Nebraska adopted pursuant to statute. These rules, among other things, provide as follows: "Each trainer shall register with the Racing Secretary all the horses in his charge giving the name, age, sex, breeding and ownership of each." Rule 12.36, Nebraska Rules of Racing, 1970, p. 84. "All ownerships in a horse, except a trainer's percentage of his winnings, shall be filed with the Racing Secretary, before the horse shall start, as also shall every change in ownership thereafter during the meeting." Rule 13.55, p. 98. "The Jockey Club Registration Certificate for all horses entered in claiming races must be in possession of the Racing Secretary. When ownership changes as a result of a claim, the Racing Secretary shall cause the Jockey Club Registration Certificate to be properly endorsed prior to transfer to the new owner's file." Rule 13.56, p. 98. "No person, or persons shall enter or allow to be entered in a claiming race, a horse against which any claim is held, either as a mortgage, bill of sale, or lien of any kind, unless when or before entering the horse the written consent of the holder of the claim shall be filed with the Association conducting said race." Rule 15.13, p. 122.

The rules themselves, of course, do not directly establish ownership but compliance or noncompliance there-

with by parties who are in the business such as the plaintiff and defendants is certainly admissible evidence on the issue of ownership. Among the items which the court considered decisive is included a statement in the following form requested by Simpkins and signed by Kate Ritter and according to her testimony back-dated at the request of Simpkins. "If anything should happen to me while I own Cider Dave, I here by want the colt to be given to Agnes Simpkins for her own." Simpkins denied the document was in the form in which she wanted it but nonetheless she kept it.

Also included in the documentary evidence is a letter from Simpkins to Kate Ritter, mostly about racing of horses, which contains the following: "Lannigan moved ½ mile west of us and have been trying to find out—they don't believe Dave is yours—plain call us liars to our face." The same letter said: "I hope Dave makes you money every time he runs." Another letter from Simpkins to Kate Ritter contained the following: "Kate —I hope Dave is the best thing that happens to you—We liked him from the start & that is why I kept pushing him at you. It is his only chance."

Simpkins acknowledged that if Ritters had put Cider Dave in a claiming race and if the horse had been claimed, the Ritters would have been entitled to keep the purchase price.

No matter what words may be used to describe the nature of the property interest of the parties in Cider Dave, there is no doubt about what the trier of the fact found and that there was far more than just substantial evidence to support the findings.

Disregarded completely in the majority opinion are the following factors which support the finding of the trial court. If Ritters could make Cider Dave a winner, Simpkins would profit because under Nebraska regulations she, as the breeder, would receive 20 percent of the purse and in addition the value of the parent stock which she owned would increase. Also worthy

of note is the fact that Cider Dave had a foot problem which made his future uncertain. The Ritters apparently trained and raised horses for other people, but until they took Cider Dave owned none of their own. Ritter's husband was a plater and a trainer. Simpkins was not in a position to race the horse. The expert testimony showed that the cost or the value of the 90-day training period to get Cider Dave ready for racing was $750 to $1,000. Cider Dave earned $2,400 in 1971. There was evidence which would indicate that at the beginning of the period Cider Dave's value was from $500 to $1,000.

I would follow the rule which has previously always been followed by this court. This case wholly turns on questions of credibility. The apparent claim of the majority opinion that the trial court misconstrued the applicable rules of law just is not correct.

McCOWN, J., joins in this dissent.

FRANCES LANC, APPELLANT, V. DOUGLAS COUNTY WELFARE ADMINISTRATION ET AL., APPELLEES.
204 N. W. 2d 387

Filed February 16, 1973. No. 38522.

1. **Appeal and Error: Evidence: Records.** In an error proceeding from an inferior court or tribunal to the district court, and on appeal therefrom to this court, error cannot be predicated on the sufficiency or insufficiency of the evidence as a matter of law to affirm or reverse the findings and judgment of the inferior court or tribunal from which error was prosecuted, unless all the material and relevant evidence is properly presented in a bill of exceptions.
2. ———: ———: ———. Where alleged errors of law dependent upon evidence are asserted, it will be conclusively presumed that the evidence adduced in the inferior court or tribunal supports the judgment or final order therein made in the absence of a proper bill of exceptions.
3. ———: ———: ———. The provision of the statutes requiring the plaintiff in error to file with his petition an au-

thenticated transcript of the proceedings containing the final order sought to be reversed, vacated, or modified is jurisdictional and mandatory.

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

Wilbur C. Smith and Jack L. Spence, for appellant.

Clarence A. H. Meyer, Attorney General, and E. D. Warnsholz, for appellees.

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

CLINTON, J.

The plaintiff, a former employee of the Department of Welfare of Douglas County, Nebraska, by petition in error under the provisions of sections 25-1901, et seq., R. R. S. 1943, sought review by the district court for Douglas County, Nebraska, of an order of the Joint Merit System Council confirming her discharge by the Department of Welfare. The district court affirmed the order on the merits.

No bill of exceptions has been preserved in this case. All the errors assigned in the petition would require a review of the evidence. Attached to the petition in error are unauthenticated copies of numerous documents and an unauthenticated copy of the order of the Joint Merit System Council. The council is apparently an agency-created board pursuant to the provisions of Laws 1951, c. 311, § 10, p. 1070, and its functions are apparently ultimately to be transferred to the State Personnel Board. See § 81-8,106, R. R. S. 1943. See, also, §§ 81-1308, 81-1318, R. R. S. 1943.

In her brief the plaintiff argues her case on the merits. The Joint Merit System Council urges affirmance because of the absence of a bill of exceptions. The plaintiff urges that this court review on the basis of the unauthenticated transcript. The council also urges the plaintiff's remedy was not by petition in error, but by

appeal under the State Administrative Procedures Act, section 84-917, R. R. S. 1943, and that the venue lay in the district court for Lancaster County where the council acted and rendered its decision. It cites and relies on The Flamingo, Inc. v. Nebraska Liquor Control Commission, 185 Neb. 22, 173 N. W. 2d 369; and section 81-1319, R. R. S. 1943.

Section 84-917, R. R. S. 1943, by its express terms, does not limit the right of review to the appeal procedure authorized by subsection (2) of that section. Subsection (1) provides in part: "Nothing in this section shall be deemed to prevent resort to other means of review . . . ."

Whether the proceedings are in error or by appeal, since the errors we are asked to review require a consideration of the evidence, we cannot give them consideration in the absence of a bill of exceptions. Everts v. School Dist. No. 16, 175 Neb. 310, 121 N. W. 2d 487; Dovel v. School Dist. No. 23, 166 Neb. 548, 90 N. W. 2d 58; State ex rel. Hartman v. Weiss, 181 Neb. 685, 150 N. W. 2d 264; Leech v. Philpott, 12 Neb. 577, 12 N. W. 116.

Both the unauthenticated "transcript" attached to the plaintiff's petition in error and the authenticated transcript of the proceedings in the district court disclose that the order of the Joint Merit System Council from which appeal was taken and the transcript of the proceedings before the council were completely unauthenticated. Therefore neither the district court nor this court obtained jurisdiction. The filing by the plaintiff in error of an authenticated copy of the order or judgment appealed from is jurisdictional and mandatory. Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49; New Home Sewing Machine Co. v. Thornburg, 56 Neb. 636, 77 N. W. 86; § 25-1906, R. R. S. 1943.

It is unnecessary for us to decide whether venue in error proceedings is governed by section 84-917, R. R. S. 1943, and whether our holding in The Flamingo, Inc.

v. Nebraska Liquor Control Commission, *supra*, applies here. Since neither the district court nor this court acquired jurisdiction in the matter of the order of the Joint Merit System Council, the appeal must be dismissed.

APPEAL DISMISSED.

DOROTHY A. BENNETT, APPELLANT, V. CURTIS E. BENNETT, APPELLEE.
204 N. W. 2d 379

Filed February 16, 1973. No. 38544.

1. **Divorce: Parent and Child: Infants.** A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.
2. **Divorce: Parent and Child: Infants: Appeal and Error.** The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the district court for Scotts Bluff County: ROBERT R. MORAN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Lyman, Meister & Olsen, for appellant.

Van Steenberg, Winner & Brower, for appellee.

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

BOSLAUGH, J.

This is an appeal from a judgment transferring the custody of the minor children of the parties from the plaintiff, Dorothy A. Bennett, to the defendant, Curtis E. Bennett.

The parties were divorced on November 19, 1970. The decree entered at that time found that the plaintiff, Dorothy A. Bennett, was a fit and proper person to have the custody of Susan Ann Bennett, now 12 years of age; Derry Deanne Bennett, 10 years of age; and Tracy Lea Bennett, 8 years of age.

On March 14, 1972, the defendant filed an application to modify the decree, alleging a change in conditions had occurred. After a lengthy hearing, the trial court found generally for the defendant and awarded him the custody of the children subject to reasonable rights of visitation in the plaintiff. The plaintiff appeals.

The controlling issue here is the best interests of the children. A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Packett v. Packett, 184 Neb. 769, 172 N. W. 2d 86. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Boyer v. Boyer, 183 Neb. 226, 159 N. W. 2d 546.

The evidence in this case is in conflict on many points. A determination as to whether the change in custody should have been made depends to a large extent upon a resolution of these conflicts. In reviewing the record we consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than another.

The application alleged in part that the plaintiff had failed to furnish a proper home environment for the children in that she regularly drank intoxicating liquors to excess; entertained a male companion, not her husband, at her home until the early hours of the morning

and, on occasion, for the entire night; and neglected the children generally. The defendant's evidence sustained these allegations generally. There was evidence that the children were left alone in the home while the plaintiff was away drinking and that occasionally no arrangement was made for their meals. A daughter of the plaintiff's male companion had been living in the plaintiff's home while one of her children had been living in the home of defendant's parents. Although there was no evidence of extreme neglect or of substantial adverse effect upon the children, the evidence did sustain a finding that the plaintiff had not furnished a proper home environment for the children within her capabilities. The evidence indicated that the plaintiff was more concerned with her own pleasure than the welfare of her children and they suffered some disadvantages as a result of this attitude.

With respect to the defendant, the evidence shows that he has remarried, maintains a suitable home, and will be able to care for the children. We find that the plaintiff's charges of misconduct and unfitness against the defendant are not sustained by the evidence.

As we view the record, there was no abuse of discretion by the trial court and it was in the best interests of the children that their custody be transferred to the defendant.

The other assignments of error relate to the refusal of the trial court to grant a continuance; the refusal to permit the plaintiff to withdraw her rest and offer additional evidence; and the failure to allow a fee for the plaintiff's attorney.

The denial of the continuance and the refusal to permit the plaintiff to reopen her case were both within the discretion of the trial court. The plaintiff's failure to obtain counsel until 2 weeks after she had been served with the notice of hearing did not give her a right to a continuance. The motion to reopen the case was not made until after the case had been decided.

The additional evidence would have been cumulative only.

We are of the opinion that the trial court should have allowed the plaintiff a fee for the services of her attorney in that court. Upon remand, a reasonable allowance should be made. In all other respects, the judgment of the district court is affirmed. The plaintiff is allowed the sum of $250 for the services of her attorney in this court.

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

WHITE, C. J., participating on briefs.

STATE OF NEBRASKA EX REL. MERLE RITTENHOUSE ET AL., APPELLEES, V. DUANE NEWMAN ET AL., APPELLANTS.
STATE OF NEBRASKA EX REL. GERALD BAIRN ET AL., APPELLEES, V. DUANE NEWMAN ET AL., APPELLANTS.
STATE OF NEBRASKA EX REL. ORVIN L. LAKE ET AL., APPELLEES, V. DUANE NEWMAN ET AL., APPELLANTS.
204 N. W. 2d 372

Filed February 16, 1973. Nos. 38584, 38585, 38586.

1. **Schools and School Districts: Officers: Administrative Law: Mandamus.** An act is nonetheless ministerial because the person performing it or the officer who is obligated to perform it, may have to satisfy himself that the state of facts exist under which it is his right and duty to perform the act.
2. ———: ———: ———: ———. The fact that a necessity may exist for the ascertainment, from personal knowledge, or from information derived from other sources, of those facts and conditions, such as residence, upon the existence of fulfillment of which the performance of the act becomes a clear and specific duty, does not operate to convert the act into one judicial in its nature.
3. **Schools and School Districts: Appeal and Error.** It is fundamental that mandamus is a law action and that conflicts in evidence or findings of fact based thereon will not be disturbed on appeal unless clearly wrong.
4. **Schools and School Districts: Domicile.** The act of registering

to vote has been considered by our court to be persuasive of the fact that a person considered such place his legal resigence.

5. ———: ———. The motivation to change one's legal residence is immaterial so long as a party has the requisite intent to establish a new residence and abandon his former home.

Appeals from the district court for Garden County: JOHN H. KUNS, Judge. Affirmed.

Atkins, Ferguson, Nichols & Hahn and Dennis M. Coll, for appellants.

Richards & Richards, for appellees.

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

WHITE, C. J.

The district court held that the parents of the school children involved were legal residents of School District No. 131 and issued writs of mandamus requiring the appellants to readmit them to school. On appeals to this court, we affirm the judgments of the district court in issuing the writs and readmitting the children to the school in School District No. 131.

Appellants' first contention on these appeals is that mandamus was not the proper remedy in these actions. They contend that the determination of the residency of the students is not ministerial in character, involved discretion, and that the school board was acting in a quasi-judicial capacity. Therefore, they assert, under boilerplate law, that mandamus cannot be used as a remedy to compel the reinstatement of the appellees' children. We are firmly of the opinion that the duties of a board of education with respect to the admittance of students is of a ministerial, and not a discretionary, nature. It is true that the gray area between a clearly ministerial and a clearly quasi-judicial discretionary action is sometimes difficult to find. We have consistently held that an act is nonetheless ministerial because the person performing it or the officer who is

obligated to perform it, may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act. State ex rel. McIlvain v. City of Falls City, 177 Neb. 677, 131 N. W. 2d 93; Little v. Board of County Commissioners, 179 Neb. 655, 140 N. W. 2d 1. One of the conditions the board of education must determine prior to admission is that of residency. This act, multitudinously performed over the State of Nebraska, is not designed or intended to be discretionary in nature. It is simply a condition and once having been determined, requires the board of education to either admit or not admit such child to school. We feel it comes squarely within the abstract definition set out in Larson v. Marsh, 144 Neb. 644, 14 N. W. 2d 189, where it was said: "A ministerial act has been defined as one performed in response to a duty which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." See, also, State ex rel. Line v. Kuhlman, 167 Neb. 674, 94 N. W. 2d 373; Mekota v. State Board of Equalization & Assessment, 146 Neb. 370, 19 N. W. 2d 633.

The fact that a necessity may exist for the ascertainment, from personal knowledge, or from information derived from other sources, of those facts and conditions, such as residence, upon the existence of fulfillment of which the performance of the act becomes a clear and specific duty, does not operate to convert the act into one judicial in its nature. See Larson v. Marsh, *supra*.

Very close, if not controlling, is our recent holding in School Dist. No. 23 v. School Dist. No. 11, 181 Neb. 305, 148 N. W. 2d 301. In that case this court held that a county superintendent of schools was not required to hold a hearing under the statute requiring him to at-

tach adjoining school districts in the event there had been a change or changes in the channels of a river and the determination that not more than 20 persons of school age were residents of the district. This court said in that case: "In the present case the superintendent decided no dispute of adjudicative fact, and no statute required him to act in a judicial manner. Such orders are not reviewable by error proceedings, which are limited to orders made in the exercise of judicial functions. * * * In such circumstances collateral attack offers an adequate remedy." Consequently, we hold that the act challenged here is ministerial and nonadjudicative in nature and subject to the operation of the writ of mandamus.

Appellants further contend that there was a remedy at law available to the appellees. The answer to this contention is that the other remedies available are not adequate to afford relief upon the subject matter involved. It is clear that one who is deprived of the privileges of the public school in the district of his residence is entitled to a speedy and adequate remedy. The school children were denied admittance and to require them to pursue other remedies in this case by circuitous and dilatory action at law would in itself defeat the very purpose of an adequate remedy. See, Vermillion v. State, 78 Neb. 107, 110 N. W. 736; State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N. W. 2d 341.

The main question involved in this appeal is whether or not the trial court erred in finding that the appellees were legal residents of School District No. 131. It is fundamental that mandamus is a law action and that conflicts in evidence or findings of fact based thereon will not be disturbed on appeal unless clearly wrong. State ex rel. McKee v. Porter, 90 Neb. 233, 133 N. W. 189; State ex rel. Charvat v. Sage, 119 Neb. 374, 229 N. W. 118; State ex rel. Heil v. Jakubowski, 151 Neb. 471, 38 N. W. 2d 26; State ex rel. City of Grand Island

v. Union Pacific R.R. Co., 152 Neb. 772, 42 N. W. 2d 867; State ex rel. Weinberger v. Gormley, 155 Neb. 242, 51 N. W. 2d 343. This rule, applicable to mandamus proceedings, follows the general rule that this court will not disturb the findings of fact made by a trial court in a law action and sitting without a jury unless they are clearly wrong. Pester v. Amercan Family Mut. Ins. Co., 186 Neb. 793, 186 N. W. 2d 711; Highway Equipment & Supply Co. v. Jones, 182 Neb. 234, 153 N. W. 2d 859.

We therefore briefly review the evidence to find out if it supports the trial judge's finding of residence in these actions. In case No. 38584 (Rittenhouses) the record shows that the Rittenhouses moved from their farm home to a rented residence in Oshkosh (School District No. 131) 3 years prior to the time of hearing in the district court. Both Mr. and Mrs. Rittenhouse are employed at the Midwec Corporation in Oshkosh, although they maintain a farming and ranching operation on their land some 32½ miles from Oshkosh. They registered to vote in Oshkosh 3 years ago, registered two of their three vehicles in the Oshkosh district, they eat and sleep in their Oshkosh residence, and testified unequivocally that it was their intention to have Oshkosh as their residence and that they consider Oshkosh their home. On the other hand the appellants introduced evidence showing that the Rittenhouses built a new house on their land in 1965 and that they spend some weekends and summers at this ranch house, and that their farm vehicle used on the ranch was registered in the farm district. The evidence also shows that they continue their employment at Midwec Corporation in Oshkosh during the summer months and commute back and forth.

In case No. 38585 (Bairns) the record shows that in August 1971 the Bairns moved from a farmhouse on land which they rent to a rented house in Oshkosh. They are engaged in a farming and ranching operation

on the above-mentioned rented land and have not subleased the house located there because it was not theirs to sublease. The Bairns also registered to vote in Oshkosh and licensed their car there. The undisputed testimony is that they eat and sleep in Oshkosh and both testified unequivocally that they consider it their legal residence and their home. The only evidence to the contrary is that the Bairns spend some weekends at their former ranch home. Their home in Oshkosh is furnished by themselves and they do have some furniture still located in the rented farmhouse. They also have a farm vehicle which is still registered in the farm district.

In case No. 38586 (Lakes) the evidence shows that the Lakes moved from a house on land owned by the father of Mr. Lake to a home owned by the Lakes located ½ mile west of Oshkosh on or about September 1, 1971. The Lakes continue to run a farming and milking operation for the benefit of Mr. Lake's father which is located on the father's land. The Lakes are registered to vote in Oshkosh, register their personal vehicle in Oshkosh, and testified that Oshkosh is their legal residence and consider Oshkosh to be their home.

From the above brief recital of some of the pertinent evidence in the case, it is obvious there is ample evidence, if not a clear preponderance of the evidence, to support the trial court's finding that the appellees intended their legal residences and homes to be in Oshkosh; that they have previously changed their residences; and that the appellees did, in fact, intend to abandon their former residences and make Oshkosh their homes. The findings and decisions of the trial court are amply supported by the evidence under the applicable rules of law that this court has stated in Willie v. Willie, 167 Neb. 449, 93 N. W. 2d 501; Means v. Means, 145 Neb. 441, 17 N. W. 2d 1; In re Estate of Meyers, 137 Neb. 60, 288 N. W. 35; State ex rel. Vale v. School Dist. of City of Superior, 55 Neb. 317, 75 N.

W. 855. We observe in passing that the act of registering to vote has been considered by our court to be persuasive of the fact that a person considered such place his legal residence. In re Estate of Meyers, *supra*. We also observe that the testimony of the appellees themselves as to intention, although subjective in nature, is entitled to great weight. It is significant that in three of the above-cited cases, Willie v. Willie, *supra*, Means v. Means, *supra*, and In re Estate of Meyers, *supra*, this court held that the stated intent of the party to the effect that his former home was *not* abandoned prevails. We also observe that the motivation of appellees in changing their legal residency is immaterial so long as they have the requisite intent to establish a new residence and abandon their former homes. 25 Am. Jur. 2d, Domicile, § 24, p. 18.

The trial court heard all the testimony, observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the other. We think this is especially important when the fundamental issue involved is to ascertain the existence or nonexistence of the necessarily subjective intent to maintain a permanent residence. It is abundantly clear from the facts we have recited and the law applicable that the findings of fact of the trial court were amply supported by the evidence and fall far short of being clearly wrong.

We therefore hold that the writs of mandamus were properly issued in these cases as to all appellees and that the trial court's determination that appellees are legal residents of School District No. 131 is correct. We affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DARRELL G. NICHOLS, APPELLANT.
204 N. W. 2d 376

Filed February 16, 1973. No. 38595.

1. **Searches and Seizures.** In evaluation of the reasonableness of a search or seizure without warrant it is imperative that the facts be judged against an objective standard; to wit, the facts available to the officer at the moment of the search or seizure should warrant a man of reasonable caution to believe the action taken was appropriate.
2. **Searches and Seizures: Constitutional Law.** Wherever an individual may harbor a reasonable expectation of privacy he ought to be free from unconstitutional governmental intrusion.

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

Noyes W. Rogers of Walter, Albert, Leininger & Grant, for appellant.

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

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

SMITH, J.

In a criminal prosecution for breaking and entering, defendant, Darrell G. Nichols, moved to suppress a radio that police officers without a warrant seized from an automobile. The court overruled the motion, and a jury found defendant guilty. On appeal he contends the court erred in the ruling.

Officer Robertson of the Nebraska State Patrol received radio information from another officer who had stopped the automobile at North Bend, Nebraska. He heard the description of the automobile, the names of the occupants, their records as known burglars, and that one of them, Noah McNamer, was a known drug offender. The men were considered armed and dangerous.

With the foregoing information Robertson on January

30, 1972, at 1 a.m. saw the automobile eastbound on U.S. Highway No. 30 at a point 5½ miles east of Columbus. Having followed it and radioed for assistance, he with the assistance of another officer stopped the automomobile ¾ of a mile west of Schuyler, Nebraska. McNamer was the operator and Nichols was sitting opposite him.

Officer Williams, who was assisting Robertson, approached the right side of the automobile. Nichols, who was unaware of the presence of Williams, began to move around. Nichols' hands were not visible to Williams, so the latter opened the door and turned his flashlight on them. Nichols was holding a walnut-grain wooden case near his feet on the floorboards. Upon inquiry he said the case was a cassette player, and he lifted the object to the area of his lap. Williams observed a radio with a price tag that listed a price of $54.05 and Dier Supply, the seller. He knew that Columbus was the location of the seller. Nichols then stepped outside the automobile, voluntarily handed the radio to Williams, and at the suggestion of Williams walked back to a patrol car to expose the object to more light. Within 3 or 4 minutes Williams was informed by another officer that Dier Supply had been burglarized the evening of January 29th or the early morning of January 30th. Arrest, prosecution, and conviction of Nichols ensued.

In evaluation of the reasonableness of a search or seizure without warrant it is imperative that the facts be judged against an objective standard. Would the facts available to the officer at the moment of the search or the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate? Wherever an individual may harbor a reasonable expectation of privacy he ought to be free from unconstitutional governmental intrusion. Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See, also, Adams v. Williams, 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). The constitutional validity of a warrantless seizure can only be decided in the concrete factual

context of the individual case. See, Adams v. Williams, *supra;* Sibron v. New York, 392 U. S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968).

Officers Robertson and Williams geared their actions to the state of their knowledge. No unlawful interference with Nichols' right of privacy or freedom of movement occurred. The district court correctly overruled the motion to suppress the evidence.

AFFIRMED.

McCOWN, J., dissenting.

The objective standard for determining the reasonableness of a search or seizure without a warrant set out in the majority opinion comes directly from Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889. The words: "* * * would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" are followed immediately by the following statement: "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. * * * And simple '" good faith on the part of the arresting officer is not enough." * * * If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.' "

In this case, the prior stop of the automobile at North Bend, Nebraska, had identified the automobile, verified its description and registration; and revealed the names of the two occupants of the car and the driver's license. A radio check then revealed the criminal records of the two men. At the time officer Robertson later stopped the automobile again on U.S. Highway No. 30, there was no traffic violation or other suspicious conduct. He knew of no burglary or any other crime which might have been committed in the vicinity. He knew the

identity of the occupants of the automobile and that the registration and driver's license were in order. Officer Robertson admitted that the only reason the officers stopped the automobile was because the two occupants were known burglars.

Under these facts, the majority opinion holds that a "known" criminal may be stopped and "frisked" or "searched" at any time solely because he is a "known" criminal. At least as long ago as 1933, the Supreme Court held that criminal reputation standing alone cannot justify the issuance of a search warrant. See Nathanson v. United States, 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159. The fact that an individual is "known" to the police as a criminal does not destroy his constitutional right to be secure "against unreasonable searches and seizures" guaranteed by the Fourth Amendment.

MARTHA J. WICHERT (MAGEE), APPELLEE AND CROSS-APPELLANT, V. GILBERT H. WICHERT, APPELLANT AND CROSS-APPELLEE.
204 N. W. 2d 381

Filed February 16, 1973. No. 38598.

Divorce: Parent and Child: Infants. In a divorce action, where a divorce has been granted and the custody of children has been fixed, the court in a proper proceeding may, where the circumstances of the parties have changed or it shall be to the best interests of the children, modify the decree as it concerns the care, custody, and maintenance of the children, having due regard for the rights of fit, proper, and suitable parents.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed as modified.

E. Dean Hascall, for appellant.

L. W. "Jim" Weber and Larry Fugit, for appellee.

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

CLINTON, J.

The issue in this case is whether custody of the two sons of the parties should be changed from the plaintiff mother to the defendant father. The decree of divorce was entered on October 9, 1970, and pursuant to stipulation, care and custody was awarded the mother and the father was granted rights of visitation at reasonable times. The application for change of custody was filed on February 17, 1972. The district court, after the hearing on the application, continued permanent custody in the mother and awarded temporary custody in the father during the month of July annually and during Christmas and Easter vacations in alternate years. It modified the child support judgment to provide that the $300 payment for July each year should not be paid to the plaintiff, but should be set aside by the father in a fund of his own choosing to be used for the post high school education of the boys. The court denied the plaintiff's request for attorney's fees. The defendant appealed from the order denying him permanent custody. The plaintiff cross-appealed from the modification of the support payment and the denial of the attorney's fee.

The boys were age 10 and 7 at the time of hearing on the application for change of custody on April 26, 1972. The defendant is an Army officer. The mother is a secretary-bookkeeper. Both parties have remarried, the mother on March 18, 1972, and the father on August 2, 1971.

The trial court obviously concluded that both parties were fit and proper persons to have custody, but that the best interests of the children did not require a change of permanent custody at that time. We have carefully read the record and considered the matter de novo. After having done so we cannot say that there has been any change of circumstances which indicates that the best interests of the children will be served by a permanent change of custody. Young v.

Young, 166 Neb. 532, 89 N. W. 2d 763. The modification of the child support judgment was proper and within the discretion of the court. We find, however, that the plaintiff should be awarded the sum of $750 for the services of her attorney in this and the trial court.

AFFIRMED AS MODIFIED.

WILLIAM MCCLELLEN, APPELLANT AND CROSS-APPELLEE, V. ALBERT DOBBERSTEIN, JR., ET AL., APPELLEES AND CROSS-APPELLANTS.
204 N. W. 2d 559

Filed February 23, 1973. No. 38435.

1. **Appeal and Error.** Consideration of a cause on appeal is limited to errors assigned and discussed.
2. **Appeal and Error: Judgments.** It is not the duty of a reviewing court to search the record for the purpose of ascertaining if there is prejudicial error; every reasonable presumption will be indulged in favor of the correctness of the judgment that is entered; and any ruling alleged to be prejudicially erroneous must be specifically pointed out.
3. **Trial: Instructions: Verdicts.** Generally, any alleged errors in instructions occurring in the course of a trial are irrelevant, if the jury arrived at a verdict consistent with a directed verdict that should have been granted.
4. **Motor Vehicles: Negligence.** The driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and he cannot relieve himself of that duty.
5. ———: ———. The existence and presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or destroy visibility are not to be deemed intervening causes, but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of care commensurate with such surrounding conditions.
6. **Motor Vehicles: Negligence: Highways.** Where an object on the highway in front of one driving thereon at night is so nearly the color of the road that it may be difficult to distinguish

until quite close, it cannot be said, as a matter of law, that such person was guilty of contributory negligence.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed and cross-appeal dismissed.

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

Knapp, Tarrell, State & Yeagley, for appellees.

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

WHITE, C. J.

The appeal here is by the plaintiff from a $25,000 personal injury judgment resulting from a rear-end motor vehicle collision on Avenue M just outside Kearney, Nebraska. The gist of the plaintiff's appeal is the contention that there was error in several instructions and that he was entitled to a directed verdict on the issue of liability. The defendants have cross-appealed contending that the plaintiff was guilty of contributory negligence as a matter of law and that the action should be dismissed. We affirm the judgment of the district court and dismiss the cross-appeal.

Only the facts necessary for a disposition of this appeal will be set out in this opinion. The defendant Moreno, an employee of Dobberstein, abandoned a garbage truck owned by Dobberstein in the right side of the roadway of Avenue M because it was out of gas, placed no warning devices around it, and notified no one of its presence. It remained there until sometime during the evening. Between 10 minutes of 12 o'clock midnight and 1 a.m. two Kearney police officers in a cruiser stopped to investigate the truck. The unlighted truck was parked facing north on the east side of the roadway. The cruiser was parked on the west side of the street approximately two car lengths north of the front of the northbound truck. The southbound cruiser lights were on low beam and there was ample room

for vehicular traffic to pass between the truck and the cruiser from either direction. The officers finished checking the truck and at that time saw the plaintiff's car coming over the south end of a bridge about 1,800 feet or 6 city blocks south of the location of the truck. One of the officers testified that, recognizing the danger, he took a two-cell flashlight, equipped with a red tone and ran down the road, swinging the flashlight horizontally so both a red and a white light showed, for the purpose of stopping the plaintiff. He reached a point about a block south of the parked truck in the plaintiff's lane of travel. He estimated the speed of the plaintiff's car at 50 to 55 miles per hour; that there was no decrease in speed of the plaintiff's car from the time it crossed the bridge; and that the car never varied in its path until the impact. The plaintiff admitted seeing lights on the road to the north when he came over the bridge. He did not know whether they were on bright beam but testified that they blinded him. He never saw the officer or the flashlight or heard any verbal warning. He never reduced his speed, never saw the parked truck, and looked to the right side of the road to avoid looking at the bright lights. He realized the car with the bright lights was stationary when he was about 4 blocks from it.

The trial court submitted the issues of negligence and contributory negligence to the jury. The jury resolved these issues in favor of the plaintiff. The difficulty of the plaintiff's position arises from this fact. The plaintiff assigns as error and argues error in instructions Nos. 2, 3, 6, and 16, all relating to the issues of liability. Neither in the plaintiff's assignments of error nor in his argument in his brief does he assert or argue the insufficiency or inadequacy of the jury verdict on damages, nor assert nor argue that the verdict is not supported by the evidence. The plaintiff recovered a substantial verdict in the sum of $25,000. The matter of the insufficiency or inadequacy of the verdict is not

before us for judicial review and cannot be considered. It is elementary that consideration of a cause on appeal is limited to errors assigned and discussed. Revised Rules of the Supreme Court, 1971, Rule 8a 2(3); § 25-1919, R. R. S. 1943; United States Nat. Bank v. Feenan, 182 Neb. 524, 156 N. W. 2d 29. It is further apparent, in light of the amount of the recovery in this case in the sum of $25,000, together with the failure of plaintiff to assert in any fashion by assignment of error or argument in his brief any inadequacy of the verdict, that our consideration of the case does not come within the exception of a plain error appearing in the record. Points not covered by any assignment of error will not be considered by this court. Cook v. Lowe, 180 Neb. 39, 141 N. W. 2d 430. It is not the duty of a reviewing court to search the record for the purpose of ascertaining if there is prejudicial error; every reasonable presumption will be indulged in favor of the correctness of the judgment that is entered; and any ruling alleged to be prejudicially erroneous must be specifically pointed out. Kasparek v. May, 182 Neb. 582, 156 N. W. 2d 144. These rules follow and are consistent with the fundamental law that a judgment will not be reversed unless prejudicial error affirmatively appears from the record. It is incumbent upon the party appealing from the judgment to show prejudicial error to entitle it to reversal. Workman v. Workman, 174 Neb. 471, 118 N. W. 2d 764; Blair v. Klein, 176 Neb. 245, 125 N. W. 2d 669. The plaintiff contends that he is entitled to a directed verdict on the issue of liability. Again this contention must fail since, having prevailed, he does not assign or assert any error in the amount of the verdict. We have recently held that any alleged errors in instructions occurring in the course of a trial are irrelevant, if the jury arrived at a verdict consistent with a directed verdict that should have been granted. Van Ornum v. Moran, 186 Neb. 418, 183 N. W. 2d 759.

Plaintiff alleges and assigns error in the admission of exhibit 57, being a map or diagram of the accident area. Again it is clear, under the authorities already set out in this opinion, that such error, if present, could not possibly be prejudicial to the plaintiff, inasmuch as the jury resolved the question of liability in the plaintiff's favor.

The plaintiff assigns as error the failure of the trial court to give his requested instruction No. 11, which, in effect, directed the jury that it was proper for it to take into consideration the low purchasing power of the dollar. There are two answers to this assignment of error. In the first place, as we have pointed out, error is not assigned with reference to the amount of the verdict, nor is it asserted in argument that the verdict of the jury in the sum of $25,000 is in any way inadequate. It is true that the jury can consider such a factor in arriving at the amount of the verdict but this court has specifically held that it is not a proper subject for an instruction. Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315. There is no merit to this contention.

A much more serious question is presented by the defendants' cross-appeal. The defendants contend, in substance, that the plaintiff does not come within the exceptions to the range of vision rule, and was guilty of contributory negligence as a matter of law, barring recovery, in failing to see and avoid collision with the parked garbage truck. They rely upon the basic statement of the rule in Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106, in which we said that the driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and he cannot relieve himself of that duty. In conjunction therewith, he must so drive his automobile that when he sees the object he can stop in time to avoid it. The defendants argue that the court, in the application of this rule, must disregard the plaintiff's testimony as to

the fact that his vision was blinded momentarily by the lights of the police cruiser. It is true that this court has said many times the existence and presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or destroy visibility are not to be deemed intervening causes, but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of care commensurate with such surrounding conditions. Nichols v. Havlat, 140 Neb. 723, 1 N. W. 2d 829. See, also, Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

We are of the opinion that the facts in this case bring it within the exceptions to the rule and that the trial court properly determined the issues were submissible to the jury. We have stated that an exception applies to situations where the object, obstruction, or depression is of the same color as the roadway, and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision. Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870; Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571; Adamek v. Tilford, 125 Neb. 139, 249 N. W. 300; Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576. We have consistently held that where an object on the highway in front of one driving thereon at night is so nearly the color of the road that it may be difficult to distinguish until quite close, it cannot be said, as a matter of law, that such person was guilty of contributory negligence. Giles v. Welsh, 122 Neb. 164, 239 N. W. 813; Monasmith v. Cosden Oil Co., 124 Neb. 327, 246 N. W. 623.

The factual argument of the defendants as to the plaintiff's negligence is very persuasive on the merits. But the only question that is presented to us, under well-recognized rules as to a directed verdict, is whether there are sufficient conflicts or inferences under the evidence in the case to warrant a jury to find for the

plaintiff under the comparative negligence rule. As we have stated (see Guynan v. Olson, *supra*) the cases in which a court is warranted to submit a rear-end collision situation to the jury generally embraces facts and situations involving factors which might reasonably be considered to relieve a driver of the duty to see the object or vehicle in time to avoid it. More precisely, the question is usually presented as to whether a driver, in order to escape the rule of stopping within the range of vision of a discernible object, is excused for not seeing the vehicle or object in the road ahead of him sooner than he actually did and was unable to escape the collision. The evidence is undisputed that the unlighted parked truck, in the middle of the plaintiff's roadway, was covered with tar, gravel, and dirt, and that the box of the truck was dark green in color. The roadway was unlighted. It is also undisputed that the defendant Moreno abandoned the truck in the roadway and he did not place any flares, flags, flashers, or other warning devices on the road to warn oncoming travelers of the presence of his abandoned truck. These facts would seem to bring the case clearly within the exceptions announced in the rules we have recited and particularly to the factual situations present in Monasmith v. Cosden Oil Co., *supra*, and Giles v. Welsh, *supra*. In essence, the defendants seek to escape the application of the exceptions to the rule by arguing quite forcefully that the lights of the police cruiser and the activity of the officers in attempting to stop the plaintiff bring the case back within the application of the rule. We feel that the questions of the relative location of the police cruiser, the degree of brightness or dimness of its lights, the question of the plaintiff's conduct when facing this quite unusual situation, and the credibility of his testimony to the effect that he did not see the officer's flashlight or hear the verbal warning properly present questions for the jury under all the circumstances. It is true that the plaintiff did not decrease his

speed, did not see the parked truck until he was immediately upon it, that he did see the headlights of the police officer's cruiser, at least 1,700 feet prior to the time of the collision. We point out that this is not simply a question of blinding lights as being an excuse for not being able to see a vehicle ahead in your lane of traffic on the highway. We have held many times that it is not. But what we do hold is that the combination of circumstances presenting the judgment problem to the plaintiff of where the stationary police cruiser car was, its relation to the parked truck which alone by itself would have presented a jury question, his speed, and the credibility of his testimony as to his failure to heed the warnings of the police officer presents a combination of circumstances from which a jury was entitled to form a judgment as to whether he was contributorily negligent. The trial court properly submitted the issue of contributory negligence to the jury.

We come to the conclusion that the assignments of error are without merit and that the verdict of the jury and the judgment of the trial court should be affirmed. The judgment of the trial court is therefore affirmed and the cross-appeal of the defendant dismissed.

AFFIRMED AND CROSS-APPEAL DISMISSED.

NEWTON, J., dissenting.

Plaintiff was injured in an automobile accident occurring on a graveled road on the outskirts of Kearney, Nebraska. The defendant Moreno was operating a truck which ran out of gas early in the evening and which was permitted to stand on the highway, without flares, until the accident occurred several hours later. That defendants were negligent is apparent. The only question is whether or not the plaintiff was guilty of contributory negligence, barring his right to recover as a matter of law. I find that he was and consequently disagree with the majority opinion.

The undisputed evidence reflects that two police officers observed the parked truck in the northbound

traffic lane and parked their patrol car with lights on low beam two or three car lengths north of the truck but in the southbound lane. The lights of the patrol car illuminated the truck. Plaintiff approached from the south. His approach was observed by the officers. One of the officers, in full uniform, ran down the road toward plaintiff waving a flashlight. The distance he covered is somewhat problematical but it is clear that he was in the area lighted not only by the lights of the patrol car but also by those of the plaintiff's automobile. Plaintiff was traveling at a speed variously estimated at from 40 to 55 miles per hour. He struck the rear of the truck and drove it ahead two car lengths. He states he failed to see the officer with the flashlight and failed to hear the officer yell as he was passed although plaintiff's window was partially open. Plaintiff did not slow down. Plaintiff further states that when still 2 or 3 blocks away he ascertained that the patrol car with its headlights on was not moving. A parked car, after dark, ordinarily dictates a cautious approach as it may indicate an accident, a highway blockage, or people on the highway. Plaintiff denies that he was blinded by the lights of the patrol car and states: "Q So you could see what was in front of you, is that correct?

A They was bright lights, yes.

Q And they were impairing your vision, were they not?

A If I had looked to the front, yes.

Q Didn't you look at them to see that they were bright, Mr. McClellen?

A Yes, and then I looked to the side rather than stare them down.

Q You are not trying to tell this jury that you drove six blocks looking down at a gravel ridge, are you?

A I looked to the road, to the front of me, to the bank where my dim lights were showing the road and the bank ahead of me, yes.

Q Your lights shone in the road the direction your car was headed, didn't they?
A Yes, to the front and side. * * *
Q And you could see the glare ahead of you and it obscured your vision of the road, did it not?
A It obscured the vision of the road on — if I had looked into the beam of the light, but not to the front of me and to the side, no.
Q The beam was coming right down the road, wasn't it, sir?
A Not to the direction I was looking, no.
Q The direction you were looking was to the right side?
A To the right and forward, side of the road, yes."

It is apparent that plaintiff was also negligent. He failed to decrease speed and approach the parked patrol car with any degree of caution. He either failed to see or ignored the police officer in plain view in the roadway with the flashlight and also ignored the warning shout. By his own statements he makes it clear that he was not watching the road ahead but was looking to the side and he failed to see the truck which was at least partially illuminated by the lights of the patrol car.

This court has frequently held that: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision." O'Conner v. Kientz, 184 Neb. 554, 168 N. W. 2d 703.

In the present case we are not dependent upon the "range of vision rule." "The driver of a motor vehicle has a duty to keep a proper lookout and watch where he is driving even though he is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and to know what is in front of him for a

reasonable distance." Willey v. Parriott, 179 Neb. 828, 140 N. W. 2d 652.

Here the plaintiff concedes that he was not watching the road ahead of him. As a result he failed to see the officer attempting to warn him of danger, failed to see the parked truck, and crashed into it with little if any diminution of speed. Certainly, one who completely fails to watch where he is driving is much more guilty of negligence as a matter of law than one who simply drives at a speed that prevents his stopping in time to avoid an object within his range of vision.

BOSLAUGH, J., joins in this dissent.

CLINTON, J., concurring.

I believe the dissent of Newton, J., requires a response.

Where reasonable minds may differ as to whether certain conduct may be characterized as violating the reasonable man standard and therefore be determined to be negligent, a jury question is presented. This is such a case. The dissent does not fairly describe the evidence on the issue of contributory negligence nor the possible inferences which the jury would be entitled to draw from it. Four points need to be noted.

(1) The dissent assumes the parked truck was illuminated by the headlights of the police car. There was evidence from which the jury could conclude otherwise. The plaintiff testified the parked car was immediately to his left just before the collision. This would mean the police car was a little to the south of the truck. The police officers testified the car was about two car lengths north of the truck.

(2) The jury could have properly concluded that the police officer did not give any effective warning by his presence and waving the flashlight which the plaintiff could have seen in time to avoid the collision. The speed of the plaintiff's car was variously estimated at 40 to 55 miles per hour. One officer testified that when he saw the plaintiff's oncoming car he ran south toward it and was 1 block south of the truck when the

plaintiff's car passed him. He also testified that at the time of the impact he was within two to two and a half car lengths of the truck. He therefore must have run back toward the scene at a speed which approached at least 35 miles per hour. The jury was not required to believe this and consequently doubt is created as to what the officer did.

The other officer stated he was just to the left of the truck immediately before the impact and apparently was not aware the collision was about to occur until just a "split second" before the collision when he became aware of the "glare" of the lights of the oncoming car. He took two or three steps away from the truck. There was an immediate exchange of conversation between him and his fellow officer. It was as follows: "Well, I immediately — I heard — I heard my co-officer ask — Robert Taylor ask if we needed the unit. I hollered, I asked him if we needed the unit. There was an exchange of conversation. He wanted to know if I was all right and so I went immediately to the cruiser without ever going to the McClellen car and I called the emergency unit. I took Officer Taylor's word that we needed a unit and then I went to the car."

The plaintiff testified: "As I approached the headlights, after I had went through the headlights of the car parked there, it was immediately to my left, the car, as I looked out the window to the left, I seen somebody standing beside the car and that is the last I remember." This testimony would tend to support the conclusion not only that the officer was not where he said he was, but also that the police car was south of the truck and illuminated it not at all.

The jury could have concluded that the testimony of the officer to the warning signals he gave was not accurate. It may very well have given consideration to the fact that the officer, who admittedly overlooked (although both officers had been at the scene long enough to make a rather thorough inspection of the

truck) the simple expedient of turning on the flasher with which the police car was equipped and which expedient might possibly be regarded as a standard procedure, might very well not have been alert enough to have given the flashlight signals exactly as claimed.

(3) The description of the truck, its color, its load, its lack of lights, the background, the effect of the admittedly bright lights (even on low beam) of the police car on the vision of the plaintiff, clearly brings this case within the exceptions to the assured clear distance ahead doctrine.

(4) The dissent interprets the plaintiff's testimony as compelling a finding as a matter of law that he did not look at all and failed to see what was in plain sight. The dissent quotes only a small portion of the testimony on the point. The entire testimony including that quoted would support a conclusion that if the plaintiff looked directly at the headlights of the police car they were bright enough to be blinding and that for that reason he focused his gaze right and forward to the full extent that his low beam light reached. This is not a total failure to maintain a lookout. It is probably a practice followed by most drivers passing oncoming cars with especially bright lights.

A jury question was presented.

SPENCER, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. LITTLE ART CORPORATION, A CORPORATION, APPELLANT.
204 N. W. 2d 574

Filed February 23, 1973. No. 38542.

1. **Statutes: Constitutional Law: Criminal Law.** Section 28-921, R. S. Supp., 1972, is not unconstitutionally vague nor is it unconstitutional for failure to prescribe a procedure for its enforcement.

2. **Evidence: Constitutional Law: Criminal Law.** Where a single copy of a film is seized for the sole purpose of preserving it for evidence in a criminal action, such a seizure does not violate the First Amendment.
3. **Evidence: Obscenity: Criminal Law.** The court may order a defendant to deliver one copy of any alleged obscene material to the prosecuting authority for use in connection with any pending criminal prosecution.
4. **Trial: Obscenity: Criminal Law.** A showing of scienter or knowledge of obscenity is required.
5. **Constitutional Law: Obscenity: Criminal Law.** Obscenity is not subject to the protection of the First Amendment.
6. **Words and Phrases: Obscenity: Criminal Law.** Three elements must coalesce to sustain a finding of obscenity, namely: (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.
7. **Trial: Instructions: Obscenity: Criminal Law.** In the present state of the law a failure by the court to define the term "community standards" as referring to standards on a local, state, or national basis is not erroneous so long as the jurors are instructed to determine the case, not on their individual standards, but on contemporary community standards.
8. **Trial: Evidence: Obscenity: Criminal Law.** A defendant has a constitutional right to introduce evidence pertaining to the community standard.
9. ———: ———: ———: ———. Affirmative proof of community standards is not necessary.
10. ———: ———: ———: ———. Extraneous evidence that the materials in question are obscene is not required.

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

Walter J. Matejka, Arthur Schwartz, and Frank Slaninger, for appellant.

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

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

NEWTON, J.

The defendant corporation is a theater operator and was engaged in showing four films at a local Omaha, Nebraska, theater. Police officers attended the theater, viewed the films, and subsequently charged defendant with knowingly circulating and publishing obscene, lewd, indecent, and lascivious movie films. An order of court was obtained directing defendant to deliver to the State one copy of each movie and setting a hearing on the question of obscenity for the fourth day thereafter. Defendant stipulated that the film copies should be retained by the State pending trial. Upon trial to a jury, a verdict of guilty was delivered and judgment entered thereon. We affirm that judgment.

A view of the films discloses that they contain very little, if any, plot or story. They are fully occupied with scene-after-scene of sexual intercourse, lesbianism, cunnilingus, sodomy, fellatio, and masturbation. They are what is generally referred to as "hard-core pornography."

The conflict between individual rights and the public welfare is never ending. There never has been, and there never will be, a criminal law adopted which is not in some measure restrictive of individual freedoms or rights. The question constantly before the courts is the allowance of a maximum of human liberty consonant with the welfare and protection of the public. The laws prohibiting the dissemination of obscenity are no exception to this general proposition. How far may an individual go along these lines before it is found that his actions are detrimental to, and tending to debauch and degenerate, the public? In recent years the federal courts have tended to go to great lengths to protect the individual malefactor on constitutional grounds and have discounted the public need for protection. As a result the term "obscene" has been to all intents and purposes emasculated. Acts occurring on the stage, which, if performed in Times Square in New York City, or any other public place, would not be condoned, are sanc-

tioned. This is true even though such acts if performed on the public street may be just as much a form of "expression" as when performed on the stage. Although we may doubt the logic, and disagree with the permissiveness engendered, we are nevertheless bound by constitutional restrictions as interpreted by the United States Supreme Court.

Section 28-921, R. S. Supp., 1972, prohibits the sale, circulation, or publishing of any obscene, lewd, indecent, or lascivious movie film. It does not appear to be unconstitutionally vague in the light of Roth v. United States, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, wherein similar statutes were held to meet constitutional requirements. It was therein stated: " 'The Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *.' " Nor is the statute unconstitutional because it fails to contain a directive for a prompt judicial determination of obscenity. That is a procedural matter and when constitutionally permissible procedures are followed in enforcement of the statute there can be no valid complaint.

It is not entirely clear whether or not there must be an adversary hearing on the question of obscenity prior to issuance of a warrant authorizing the seizure of allegedly obscene material. See, United States v. Alexander (8th Cir., 1970), 428 F. 2d 1169. See, also, Quantity of Copies of Books v. State of Kansas, 378 U. S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809; Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288, affirmed 397 U. S. 98, 90 S. Ct. 817, 25 L. Ed. 2d 78; United States v. Wild (2d Cir., 1969), 422 F. 2d 34, cert. den. 402 U. S. 986, 91 S. Ct. 1644, 29 L. Ed. 2d 152, rehear. den. 403 U. S. 940, 91 S. Ct. 2242, 29 L. Ed. 2d 720; United States v. Fragus (5th Cir., 1970), 428 F. 2d 1211; Krahm v. Graham (9th Cir., 1972), 461 F. 2d 703. An in-depth study of

that question is not here required. Alexander states that: "* * * where a single copy of a film is seized for the sole purpose of preserving it for evidence in a criminal action, such a seizure does not violate the First Amendment." It further holds that the court may order a defendant to deliver one copy of any alleged obscene material to the prosecuting authority for use in connection with any pending criminal prosecution. See, also, Metzger v. Pearcy (7th Cir., 1968), 393 F. 2d 202; Tyrone, Inc. v. Wilkinson (4th Cir., 1969), 410 F. 2d 639, cert. den. 396 U. S. 985, 90 S. Ct. 478, 24 L. Ed. 2d 449; Bethview Amusement Corp. v. Cahn (2d Cir., 1969), 416 F. 2d 410, cert. den. 397 U. S. 920, 90 S. Ct. 929, 25 L. Ed. 2d 101; Platt Amusement Arcade, Inc. v. Joyce, 316 F. Supp. 298. In the present case, an order of the court, following the filing of a criminal complaint, was obtained requiring delivery of one copy of each of the films to the State and the question of obscenity was set for prompt hearing. Furthermore, a stipulation was entered into whereby defendant consented to the retention of the films. We are at a loss to find any abuse of defendant's constitutional rights under the circumstances here attendant.

Scienter or knowledge of obscenity is required. See Smith v. California, 361 U. S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205. In this case the films were being publicly shown by the defendant and knowledge of their contents or character by defendant's employees was inescapable.

Obscenity is not subject to the protection of the First Amendment. See, Jacobellis v. State of Ohio, 378 U. S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793; Roth v. United States, *supra.* These cases and others, including Memoirs v. Massachusetts, 383 U. S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1, hold that three elements must coalesce to sustain a finding of obscenity, namely: "* * * (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." By this test hard-core pornography such as we are here considering must be adjudged obscene.

In regard to the meaning or interpretation of the term "community standards" we find that the United States Supreme Court has failed to define it and its members are divided on the question. Cases from other courts are hopelessly divergent. See In re Giannini, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P. 2d 535, cert. den. 395 U. S. 910, 89 S. Ct. 1743, 23 L. Ed. 2d 223. In this California case the court held the reference was to a state-wide standard. In Alexander v. Commonwealth, 212 Va. 554, 186 S. E. 2d 43, it was held to refer to a local community standard. The difficulty with applying a national standard, as has been frequently pointed out, is that neither jurors nor witnesses are to be found with knowledge of such a standard on a national scale. In the case before us the court simply used the term "contemporary community standard." In the present state of the law, we cannot find that a failure to further define the term is erroneous. Furthermore, the court reviewed the instructions with counsel and defendant neither objected to the instruction subsequently given nor requested any change in it. In any event, the materials here in question must necessarily be held to affront any standard mentioned.

Ordinarily, although a defendant has a constitutional right to introduce evidence pertaining to the community standard, the State is not required to do so. In State v. Amato, 49 Wis. 2d 638, 183 N. W. 2d 29, cert. den. 404 U. S. 1063, 92 S. Ct. 735, 30 L. Ed. 2d 751, rehear. den. 405 U. S. 981, 92 S. Ct. 1190, 31 L. Ed. 2d 257, it was held that affirmative proof of community standards was not necessary. See, also, State v. Watkins (S. C.), 191 S. E. 2d 135. To the same effect is United States v. Wild (2d Cir., 1969), 422 F. 2d 34, cert. den. 402 U.

S. 986, 91 S. Ct. 1644, 29 L. Ed. 2d 152, rehear. den. 403 U. S. 940, 91 S. Ct. 2242, 29 L. Ed. 2d 720; and Kahm v. United States (5th Cir., 1962), 300 F. 2d 78, cert. den. 369 U. S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18.

Neither is extraneous proof of the obscene nature of the materials required. In Ginzburg v. United States, 383 U. S. 463, 86 S. Ct. 942, 86 S. Ct. 969, 16 L. Ed. 2d 31, rehear. den. 384 U. S. 934, 86 S. Ct. 1440, 16 L. Ed. 2d 536, it was held that the alleged obscene materials were sufficient in themselves for a determination of obscenity.

Other assignments of error not herein discussed are found to be without merit.

The judgment of the district court is affirmed.

AFFIRMED.

SMITH, J., concurs in the result.

McCOWN, J., concurring in result only.

I concur fully that the films involved here are hard-core pornography without any redeeming social value, and that the conviction should be affirmed.

I emphatically do not join in the assertions that the federal courts have gone to great lengths to protect malefactors at the expense of public need for protection, and that public obscenity has been sanctioned and permissiveness engendered in our society by the United States Supreme Court. Such statements, whether dicta or not, lend support to unjustified and misinformed public criticism of all courts and magnify misunderstanding between state and federal courts.

NEWTON, J., accentuatus.

No court, or judicial decision, is sacrosanct. Sycophantic agreement, or blind obeisance, restraining constructive criticism can only perpetuate errors.

RALPH LARSON ET AL., APPELLANTS, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA ET AL., APPELLEES.
204 N. W. 2d 568

Filed February 23, 1973. No. 38593.

1. **Summary Judgments.** A summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.
2. **Injunctions: Damages.** Injunction is an extraordinary remedy and ordinarily will not be granted except in a clear case where there is an actual and substantial injury. The right must be clear and the damage irreparable.
3. ———: ———. A writ of injunction is not wholly a writ of right and may be withheld, in the discretion of the court, when it is likely to inflict greater injury than the grievance complained of.

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

Phillips & Murphy, for appellants.

Cline, Williams, Wright, Johnson & Oldfather, Alan E. Peterson, Healey, Healey, Brown & Burchard, and Douglas L. Kluender, for appellees.

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

BOSLAUGH, J.

This was an action to enjoin the use of fees collected from students at the University of Nebraska for purposes alleged to be illegal. The plaintiffs are students at the University. The defendants are the Board of Regents of the University; the Association of Students of the University of Nebraska (ASUN); and various officials of the University or the State of Nebraska.

The trial court sustained motions for summary judgment and dismissed the action. The plaintiffs appeal.

A summary judgment is proper where there is no genuine issue as to any material fact and the moving

party is entitled to judgment as a matter of law. § 25-1332, R. R. S. 1943.

The fees in question are mandatory fees collected from all students enrolled as full-time students at the University. During the fall semester, 1971, fees amounting to $51.50 per student were collected. Of this amount $42 is not in question. In dispute are the following allocations, per student: $1.25 to the Daily Nebraskan; $ .30 to the ASUN; $6 to the speakers program sponsored by the Nebraska Union; and $1.95 to the "unallocated fee fund." The plaintiffs contend the defendants had no right to impose, collect, and spend mandatory student fees for these purposes.

The Daily Nebraskan is a campus newspaper. The ASUN is the student government organization at the University. The speakers program sponsored by the Nebraska Union is a lecture and discussion program carried out by bringing various speakers to the campus.

The plaintiffs' principal contention is that their constitutional rights are being violated because the mandatory fee system requires them to contribute to the support of political views and doctrines with which they disagree. They rely, primarily, on International Assn. of Machinists v. Street, 367 U. S. 740, 81 S. Ct. 1784, 6 L. Ed. 2d 1141.

In the Street case, the Supreme Court of Georgia had held that a union shop agreement, negotiated pursuant to the Railway Labor Act, was invalid because it required employees of the railroad to pay dues which were used in part to support political and economic programs and candidates for public office which some of the employees opposed. On appeal, the judgment was reversed by the United States Supreme Court on the ground that the Railway Labor Act did not authorize a union to spend an employee's money, over his objection, for political causes which he opposed.

The Street case did not establish the proposition upon which the plaintiffs rely, but some of the opinions

in that case may be interpreted as recognizing and supporting the proposition. See, also, Hanson v. Union Pacific R.R. Co., 160 Neb. 669, 71 N. W. 2d 526, reversed in Railway Employes' Dept. v. Hanson, 351 U. S. 225, 76 S. Ct. 714, 100 L. Ed. 1112.

But if we assume that a labor union under a union shop agreement has no constitutional right to use a part of the members' dues to support political policies or candidates that the members oppose, that does not establish the plaintiffs' right to relief in this case. There is an important distinction between the political activities of a labor union and extracurricular activities at a university.

The University officials determined, as they had a right to do, that additional services and facilities were essential to the creation of a better educational environment. As a result, a program was developed which is financed by mandatory student fees. The speakers program sponsored by the Nebraska Union is a part of this program and is a noncredit or extracurricular educational service furnished to the students. The conferences sponsored by the ASUN are another part of this program.

The University officials further determined that the acquisition, understanding, and interpreting of knowledge could be facilitated by the study and evaluation of controversial positions. As might be expected, some of the speakers participating in the program from time to time have expressed views that are not acceptable to many of the students, including the plaintiffs. But the fact that the plaintiffs may disagree with the views expressed by some of the speakers brought to the campus is not controlling. If such views are expressed only as a part of the exchange of ideas and there is no limitation or control imposed so that only one point of view is expressed through the program, there is no violation of the constitutional rights of the plaintiffs. Within reasonable limits, it is appropriate that many

different points of view be presented to the students. As we view the record, there does not appear to be a genuine issue as to any material fact in this regard. The plaintiffs' evidence does not support their assertion that the entire activity has been directed toward a particular point of view.

The situation with respect to the Daily Nebraskan is somewhat different. The staff of the paper is made up of students, but the paper has no connection with the Journalism Department of the University. The business affairs of the paper are controlled by the Publications Board of the University but the paper is editorially independent.

The paper derives about one-half of its support from student fees. It appears to enjoy a campus monopoly although limited distribution facilities are available for other student newspapers. The combination of limited supervision and substantial financial subsidy would seem to create a situation readily subject to abuse. However, the issues of the paper which the plaintiffs offered in evidence at the hearing on the motions do not appear to support their contention that the paper stresses only one political point of view.

The mandatory fees that are involved in this case are not private funds. § 85-125, R. R. S. 1943. They are public funds subject to many restrictions as to how they may be expended. We do not question the right of the University to furnish partial support for a campus newspaper from the student fees, but such a newspaper should not be allowed to become a vehicle for expressing a single political point of view. Where a university newspaper is supported by mandatory student fees, or by other university funds, reasonable supervision is required by the university authorities with a view to promoting and permitting the reflection of a broad spectrum of university life and reasonable representation of the various aspects of student thought and action.

Much of the plaintiffs' evidence centers around three

events: A student "strike" against the foreign policy of the United States in May 1970; a "Time-Out Conference on Human Sexuality"; and a birth control "handbook" purchased by the ASUN but, apparently, not distributed by ASUN. These incidents might be said to indicate a lack of sound judgment in some respects but they hardly furnish a basis for injunctive relief against the defendants as requested by the plaintiffs.

There are other considerations that enter into the determination of this case. Injunction is an extraordinary remedy and ordinarily will not be granted except in a clear case where there is an actual and substantial injury. 42 Am. Jur. 2d, Injunctions, § 23, p. 755. The right must be clear and the damage irreparable. Muchemore v. Heflin, 187 Neb. 217, 188 N. W. 2d 713. Relief may be denied if in the discretion of the court it is likely to inflict greater injury than the grievance complained of. City of Omaha v. Rubin, 177 Neb. 314, 128 N. W. 2d 814.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROY KELLOGG, APPELLANT.
204 N. W. 2d 567

Filed February 23, 1973. No. 38601.

1. **Criminal Law: Appeal and Error: Attorney and Client.** A public defender may apply to the court to withdraw from representation of a defendant on appeal when he deems such appeal to be wholly frivolous.
2. ———: ———: ———. If counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court - not counsel - then proceeds, after a full examination

of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw.

3. **Criminal Law: Sentences: Post Conviction.** Sentences imposed within statutory limits furnish no basis for post conviction relief.

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

William F. Ryan, for appellant.

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

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

NEWTON, J.

This is a post conviction action challenging proceedings had pertaining to defendant's conviction for robbery. It is contended that the district court erred in permitting defendant's counsel to withdraw pending appeal and thus denied defendant the effective aid of counsel. It is also asserted that the sentence imposed was excessive. We affirm the judgment of the district court denying post conviction relief.

At his trial the defendant was represented by the public defender. Subsequent to defendant's conviction, a motion for new trial was filed and overruled and all necessary proceedings had to lodge an appeal in this court in forma pauperis. The public defender then moved to withdraw as counsel for defendant stating: "* * * that he has thoroughly and conscientiously examined the records in said case, has briefed all legal issues which might arguably support an appeal, has found none of them to be arguable on their merits, and has concluded that an appeal can only be considered wholly frivolous." A brief setting out the public defender's views on the various facets of the case accompanied the motion. The motion and brief were duly served on the defendant who filed a statement or brief

on the subject with the court. After hearing and full examination of all proceedings, the court found the proposed appeal to be frivolous and permitted the withdrawal of counsel. A copy of the order was immediately served on the defendant. After the lapse of 2½ months and notice to defendant his appeal was dismissed for failure to file a brief on appeal.

Section 29-1804.03, R. S. Supp., 1972, specifically provides that a public defender may apply to the court to withdraw from representation of a defendant on appeal when he deems such appeal to be wholly frivolous. In Anders v. California, 386 U. S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493, in respect to withdrawal of counsel under similar circumstances, it was held: "* * * if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court - not counsel - then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw * * *." In the present instance the statute and the "Anders" requirements have been fully complied with. The appeal is frivolous.

In regard to the criticism of the sentence imposed, we have previously held that: "Sentences imposed within statutory limits furnish no basis for post conviction relief." State v. Birdwell, 188 Neb. 116, 195 N. W. 2d 502.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

MONROE T. SIMMONS, SPECIAL ADMINISTRATOR OF THE ESTATE OF ROSE WILKINS, DECEASED, APPELLANT, V. LOUIS N. MURRAY, APPELLEE.

204 N. W. 2d 800

Filed March 2, 1973. No. 38582.

1. **Courts: Rules of Court: Appeal and Error: Evidence.** The rules of practice in a district court cannot enter into a determination of a question presented in the Supreme Court unless incorporated in the bill of exceptions, since the Supreme Court will not take judicial notice of the rules of practice of a district court.
2. **Contracts: Compromise and Settlement.** A parol agreement of compromise which has been executed is of equal effect with one in writing.

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

Mohummed Sadden, for appellant.

Neil R. McCluhan, for appellee.

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

SPENCER, J.

This is an action by Monroe T. Simmons, special administrator of the estate of Rose Wilkins, deceased, for the specific performance of an oral settlement agreement which had been partially performed by the plaintiff. The trial court found that the parties had entered into the settlement agreement but because the agreement had not been reduced to writing as required by local court rule he held it to be unenforceable and rendered judgment for Louis N. Murray, defendant. We reverse.

The original action, filed September 2, 1966, was to set aside a deed given by the incompetent to defendant on December 23, 1965. The attorneys had discussed the settlement on previous occasions but when no agreement could be reached the trial court set the case for trial for September 11, 1968. On September 10, Robert G.

Scoville, plaintiff's then counsel, was invited to the law office of Norris G. Leamer, then attorney for defendant, where in the presence of the defendant and the defendant's secretary he discussed settlement with Mr. Leamer. A settlement agreement was reached and Mr. Scoville left the office to permit Mr. Leamer to discuss the proposed agreement with the defendant. When Mr. Scoville returned he was told that the settlement was accepted. The attorneys then agreed that Mr. Scoville was to call the judge and tell him that the case would not be tried as it had been settled. This Mr. Scoville did. Before the settlement agreement was actually performed, Mr. Scoville left town. During his absence, Mrs. Wilkins died. When he returned the defendant refused to proceed with the settlement.

The decision not to enforce the settlement was based on a Rule of Practice of the Eighth Judicial District of Nebraska. The rule was not introduced in evidence and is not a part of the record herein. Defendant's brief would indicate that it reads as follows: "All stipulations and private agreements of counsel or of parties to a suit, unless made in open court during trial, must be reduced to writing and signed by the parties or their attorneys making the same or they will not be enforced."

The difficulty with defendant's position herein is that the local court rule he relies on, if material, is not before us. It was not introduced in evidence nor made a part of the bill of exceptions herein. While the local court could take judicial notice of its rules of practice, that is not the situation here.

As early as 1899, this court held in Dunn v. Bozarth, 59 Neb. 244, 80 N. W. 811, that the Supreme Court "will not take judicial notice of the rules of practice of the district court."

In Federal Farm Mtg. Corp. v. Hughes (1940), 137 Neb. 820, 291 N. W. 475, we said that the rules of practice in a district court cannot enter into a determination of a question presented in the Supreme Court unless in-

corporated in a bill of exceptions, since the Supreme Court will not take judicial notice of the rules of practice of a district court. See, also, Nile Valley Fed. Sav. & Loan Assn. v. Schank (1962), 174 Neb. 35, 115 N. W. 2d 774.

The trial court specifically found that the agreement had been made. We accept that finding. The obvious inconsistency of the defendant's evidence makes that conclusion inevitable. The agreement was made in the presence of the defendant, and it must be inferred that he consented to it. In performance of the agreement, Mr. Scoville told the judge that the case had been settled and would not be tried. As early as 1881, in Boyce v. Berger, 11 Neb. 399, 9 N. W. 545, this court said: "A parol agreement of compromise which has been executed is of equal effect with one in writing." As we said in Stuart v. Torrey (1921), 106 Neb. 608, 184 N. W. 215: "The law favors and encourages settlements, and in the absence of fraud, error, or mistake, they should not be set aside."

An attorney normally has the power to make agreements regarding procedural and fact issues, and we assume the rule in question refers to such procedural agreements. The agreement herein, however, is not a procedural agreement but is one settling the litigation. The New York court, faced with an identical issue, said: "Neither was the agreement in this case required to be in writing under Rule 4 of the Rules of Civil Practice requiring stipulations to be in writing unless made in open court. That rule is applicable only to agreements relating to matters in the action and it does not apply to an agreement completely disposing of the action and of the claim upon which it is based." Langlois v. Langlois (1957), 169 N. Y. S. 2d 170, 5 App. Div. 2d 75. See, also, In re Gardiner's Estate (1953), 126 N. Y. S. 2d 121, 204 Misc. 884.

The Georgia court in a like situation, said: "'* * * The rule of court, that no consent between attorneys or

parties, if denied, will be enforced if not in writing, has no application to an oral agreement and compromise of a pending suit. The settlement of doubtful issues involved in a pending cause is a sufficient consideration to support an agreement of settlement and compromise.'" Kapiloff v. Askin Stores Inc. (1947), 202 Ga. 292, 42 S. E. 2d 724. See, also, Herndon v. Herndon (1971), 227 Ga. 781, 183 S. E. 2d 386.

The judgment is reversed and the cause remanded to the trial court with directions to enter a judgment for specific performance of the agreement.

REVERSED AND REMANDED.

NEWTON, J., dissenting.

I respectfully dissent from the majority opinion.

Section 7-107, R. R. S. 1943, provides in part: "An attorney or counselor has power: * * * (2) to bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court; * * *." It will be noted that a client is bound *only* when an in-court stipulation is entered into, the agreement is in writing, or the attorney verifies by his statement that he entered into an agreement which he had authority to make and thereby bound his client. Here the defendant's attorney *does not so state* but rather denies the agreement.

There is considerable Nebraska authority on the subject. In German-American Ins. Co. v. Buckstaff, 38 Neb. 135, 56 N. W. 692, it is held: "Oral agreements of attorneys, entered into out of court, to submit matters in suit to arbitration will not be enforced when objection is made thereto. The only competent proof to establish an agreement made by an attorney in regard to the disposition of a cause is the evidence of the attorney himself, his written agreement signed and filed

with the clerk, or an entry thereof upon the records of the court."

In Drake v. Ralston, 137 Neb. 72, 288 N. W. 377, it is stated: " 'Written agreements of attorneys, or those entered into by them in open court, in regard to the disposition of cases, will be enforced; but oral agreements, entered into out of court, will not be recognized or considered.' " See, also, State ex rel. Nebraska State Bar Assn. v. Bachelor, 139 Neb. 253, 297 N. W. 138.

Oddo v. Fred F. Shields Co., 144 Neb. 111, 12 N. W. 2d 659, is similar to the present case in that there was a dispute as to whether an agreement had been entered into by plaintiff and the opposing attorney. The court there states: "Defendant's evidence consisted of the testimony of its then attorneys specifically denying the plaintiff's testimony.

"Section 7-107, Comp. St. 1929, provides: 'An attorney * * * has power: * * * Second. To bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; *but no evidence of any such agreement is receivable, except the statement of the attorney himself,* his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court; * * *.' (Emphasis supplied.)

"Without regard to other errors assigned, it becomes apparent that, if plaintiff's testimony of his conversation with the attorney was incompetent, the trial court erred in receiving the same when proper objection was made and plaintiff's action must fail for want of proof. It is just as apparent that the evidence was incompetent.

"In German-American Ins. Co. v. Buckstaff, 38 Neb. 135, 56 N. W. 692, this court construing the statute said: 'A client is only bound by the oral stipulations of his attorney made out of court, when the same are established by the testimony of the attorney making the same.' " See, also, Swartz v. Meredith Publishing Com-

pany, 254 Iowa 518, 117 N. W. 2d 898; Jorgensen v. Howland, 325 Mich. 440, 38 N. W. 2d 906. There are similar decisions in 25 other states.

A peculiar situation exists in this case. An attorney for plaintiff brought an action to set aside a deed. That action *is still* pending. A settlement was discussed. Plaintiff's then attorney says a settlement was arrived at and trial postponed. Defendant, and defendant's secretary, both deny that a settlement was agreed to and further deny that defendant's then attorney was ever authorized to effect a settlement. Defendant's then attorney agrees a discussion occurred with a view to settling the case but states no agreement for settlement was arrived at.

Both attorneys, the defendant, and the defendant's secretary were present at the original discussion. Plaintiff's then attorney states he left without any agreement being arrived at but later returned and was told by defendant's then attorney that suggested terms of settlement were agreeable to defendant. *The record does not disclose that the defendant was present at this time.* It therefore does not appear from this record that the alleged agreement was arrived at directly between the plaintiff's then attorney and the defendant as has been suggested. Only an alleged agreement between the attorneys is testified to. It was not entered in the records of the court, is not in writing, and is denied by defendant's then attorney. The evidence is clearly barred by the statute. We have here a situation where the defendant denies his attorney was authorized to make any settlement. His then attorney agrees with this and further denies making any settlement. All this is verified by the defendant's secretary.

This case had been pending for 2 years and trial was further postponed. The reason for the postponement is disputed. In any event, a settlement agreement has not been proved by clear and convincing evidence and

it stretches the term to hold it was proved by even a "preponderance" of the evidence.

This is the very type of situation which statutes such as ours seek to avoid. In Mogote-Northeastern Consolidated Ditch Co. v. Gallegos, 69 Colo. 221, 193 P. 670, the court stated that it could not try a question of veracity of attorneys as to their oral agreements made out of court, nor correct their misunderstandings, and that if they trusted to such uncertainties, and did not take the prescribed and certain methods of written stipulations or regular orders made upon notice or appearance, they must understand that each was relying solely upon the other, and that in case of dispute the stipulation could not be enforced.

In Farmers State Sav. Bank v. Miles, 206 Iowa 766, 221 N. W. 449, the court held that understandings arrived at from conversations between counsel could not be considered, unless reduced to writing and filed in the case, or consented to in open court, the court stated that this was a wise rule, since the time of the court should not be taken in controversial matters of this character; that the court could not sit in judgment as to the veracity of reputable affiants as attorneys in the court, and determine misunderstandings between them; and that the theory of estoppel could not find its predicate on alleged conversations affirmed on one side and expressly denied by the other.

In Manowitz v. Gaenslen (Tex. Civ. App.), 142 S. W. 963, the court stated that the rule for the government of the court required agreements to be in writing to be enforceable, that the spectacle of counsel contradicting each other as to the existence of an agreement illustrated the reason why the rule was adopted, since the court could not be called upon to determine the merits of an issue of this kind.

The law favors settlements but not disputes in regard to them between attorneys. Misunderstandings frequently occur, even between very careful practitioners.

If we are to hear and heed such disputes, settlements will be discouraged. Attorneys will be afraid to discuss settlements for fear of being misunderstood or wrongfully quoted.

I believe this judgment should be set aside as not a final determination of the cause and that the case be remanded for trial on the original petition to set aside the deed.

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

SOUTH OMAHA PRODUCTION CREDIT ASSOCIATION, APPELLEE, V. TYSON'S INC., APPELLANT.
204 N. W. 2d 806

Filed March 2, 1973. No. 38629.

1. **Security Interest: Parties: Conversion.** The holder of a security interest is the real party in interest in an action in trover or conversion to recover for property subject to the security interest and wrongfully converted.
2. **Security Interest: Sales: Words and Phrases.** "Proceeds" includes whatever is received when collateral is sold or disposed of including an account for the purchase price.
3. **Security Interest: Sales: Waiver.** A secured party which consents to liquidation by the debtor by means of an auction sale does not waive its security interest or its right to the proceeds of the sale.
4. **Security Interest: Sales: Conversion.** A purchaser of collateral which refuses to pay the purchase price is guilty of a conversion.
5. **Security Interest: Sales: Words and Phrases.** A purchaser of farm machinery and equipment at a farm auction sale is not a buyer in the ordinary course of business.

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

O'Hanlon & Martin, for appellant.

Anderson & Anderson, for appellee.

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

NEWTON, J.

This is an action to recover the value of property, subject to security agreements, which was purchased by defendant at a farm sale but not paid for. Summary judgment for plaintiff was entered in the district court. We affirm that judgment.

Plaintiff had security agreements filed October 25, 1965, and March 13, 1970, covering all livestock, feed, crops, farm machinery and equipment, and the proceeds thereof, belonging to Terry and Diane Uhing, hereinafter referred to as the debtors. On March 8, 1971, defendant obtained a judgment against Terry Uhing under which an execution was levied upon the debtor's property covered by the security agreements. The debtors had, prior to the levy of execution, agreed with plaintiff that they would have a farm auction sale to clear up their indebtedness and had made arrangements for the sale which was to be clerked by the Burt County State Bank. On March 8, 1971, defendant's attorney prepared an agreement directed to the bank authorizing it to pay out of the proceeds of the sale, as "first priority," the sum of $38,356.73, with interest, to plaintiff; as "second priority," the net sale proceeds of a combine and cornhead to Massey-Ferguson Company on an indebtedness of from $5,000 to $6,000; as "third priority," the sum of $7,761.15, with 6 percent interest from March 8, 1971, to defendant; and as "fourth priority," the sum of $709.61 to Anderson & Anderson. This was approved by plaintiff's attorney and signed by Terry Uhing. Defendant's execution was then released. At the farm sale defendant bid in and removed certain property covered by plaintiff's security agreements. The amount bid was $5,940. It has not been paid. Proceeds of the sale received by plaintiff left a deficit owing plaintiff in excess of the sum of $5,940. Plaintiff seeks to recover the amount bid by defendant.

Defendant contends that a summary judgment should not have been entered because all genuine issues as

to material facts had not been resolved. Perusal of the record discloses that this contention is without merit.

A question is raised as to whether plaintiff can maintain the action as the real party in interest. Ordinarily, one who acquires, by purchase or otherwise, property subject to a perfected security interest, the sale or transfer of which has not been authorized or consented to by the holder of the security interest, is liable in trover or conversion for the value of the property or the amount paid. See, § 9-306 (1), (2), U. C. C.; United States v. Pete Brown Enterprises, Inc., 328 F. Supp. 600; Doenges-Glass, Inc. v. General Motors Acceptance Corp. (Colo.), 488 P. 2d 879; Waldrip v. Associates Financial Services Co., Inc., 126 Ga. App. 560, 191 S. E. 2d 302; United States v. Pirnie, 339 F. Supp. 702. Section 9-306 (1), U. C. C., provides: "'Proceeds' includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of. The term also includes the account arising when the right to payment is earned under a contract right." On failure of defendant to pay for the property purchased an account arose which is designated as "proceeds." See, also, Farnum v. C. J. Merrill, Inc. (Me.), 264 A. 2d 150.

It is asserted that the sale was authorized by plaintiff and is therefore a valid sale in which the purchaser takes free of the security interest. This is partially correct. It was the understanding between plaintiff and the debtors that a public sale would be held and the proceeds applied to the payment of the indebtedness. The security interest also covered proceeds. Defendant was a party to this understanding as evidenced by the written authorization given to the bank clerking the sale in regard to the priority of liens. When defendant refused to pay for the property it bid in, it became guilty of a conversion. Defendant was well aware that plaintiff had not released its security interest and that its consent to the sale was conditioned upon payment of the sale price of the items purchased.

Defendant was not a buyer in the "ordinary course of business" under section 9-307 (1), U. C. C. As mentioned in comment 2, this ordinarily contemplates a purchase from inventory. Section 1-201 (9), U. C. C., provides: " 'Buyer in ordinary course of business' means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker." As hereinbefore pointed out, the security agreement also covered as "proceeds" the account arising on failure of the defendant to pay for the items purchased and defendant has no grounds for an offset against the holder of the security interest.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT ROMELL, APPELLANT.
204 N. W. 2d 573

Filed March 2, 1973. No. 38631.

Rules of Court. Judgment affirmed. See Rule 20, Revised Rules of Supreme Court.

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

Charles F. Fitzke and James T. Hansen, for appellant.

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

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

SPENCER, J.

Defendant, Robert Romell, prosecutes this appeal

from his conviction for operating a motor vehicle while under the influence of alcoholic liquor, third offense. We affirm.

Defendant premises his appeal on two grounds. They appear in his brief as follows: "(A) The trial court erred in admitting evidence that the defendant had refused to submit to chemical tests for blood alcohol content. (B) The trial court erred in refusing to direct a verdict for the defendant at the conclusion of all the evidence."

We have examined the record in this cause and find that the motion for a directed verdict was properly overruled. The evidence was sufficient to require the submission of the issue of defendant's guilt or innocence to the jury.

The court did not err in admitting evidence that the defendant had refused to submit to chemical tests for blood alcohol content. This issue is fully covered in State v. Meints (1972), *ante* p. 264, 202 N. W. 2d 202, and State v. Manley (1972), *ante* p. 415, 202 N. W. 2d 831.

Judgment affirmed. See Rule 20, Revised Rules of Supreme Court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHNNY JOHNSON, APPELLANT.
204 N. W. 2d 558

Filed March 2, 1973. No. 38635.

Criminal Law: Trial. There is no prejudice to a defendant when asked whether he had mentioned a material fact to police officers after his arrest if it appears objections to the questions were sustained and the questions are not so phrased as to indicate that he stood mute.

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

Frank B. Morrison, Sr., Bennett G. Hornstein, and Stanley A. Krieger, for appellant.

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

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

NEWTON, J.

Defendant was convicted of second degree murder. The only assignment of error deals with two questions asked defendant on cross-examination regarding whether or not he had told the police about a knife he alleges was used by the victim in threatening him. We affirm the judgment of the district court.

Defendant testified that the person killed had a knife and approached defendant in an angry and threatening manner. On cross-examination he was asked: "Q. What did the Police Department say when you told them about the knife? * * * Q. Did you tell the Police when you were arrested about the knife?" Objections were promptly made and sustained to each question.

The following was included in one instruction given to the jury: "In determining any questions of fact presented in this case, you should be governed solely by the evidence introduced before you. You should not indulge in speculation, conjectures, or inferences not supported by the evidence. You should not consider any evidence which has been stricken from the record; you should not b (sic) influenced by statements of counsel not supported by evidence."

The questions asked do not in themselves indicate whether or not the defendant talked with the police about the alleged knife. They will not support an inference that defendant stood mute and consequently are not within the ruling made in State v. Brown, 185 Neb. 389, 176 N. W. 2d 16, to the effect that it is prejudicial error and a violation of a defendant's Fifth Amendment privi-

lege to use the fact that he stood mute or claimed his privilege. The court not only sustained objections to the questions but also cautioned the jury not to indulge in speculation, conjecture, or inferences not supported by the evidence.

There was no prejudicial error and the judgment of the district court is affirmed.

AFFIRMED.

T & N P CO., INC., DOING BUSINESS AS SARPY TAVERN, APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.
204 N. W. 2d 809

Filed March 2, 1973. No. 38636.

1. **Administrative Law: Statutes: Intoxicating Liquors.** The power to regulate all phases of the control of the distribution and sale of alcoholic liquors is vested generally in the Nebraska Liquor Control Commission. § 53-116, R. R. S. 1943.
2. **Administrative Law: Licenses: Intoxicating Liquors.** The Nebraska Liquor Control Commission has a broad discretion in determining whether applications for licenses should be granted or denied. Courts are without authority to interfere with that discretion unless it has been abused.

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

Clarence A. H. Meyer, Attorney General, and Robert R. Camp, for appellant.

Dean J. Jungers of Hascall & Jungers, for appellee.

Heard before WHITE, C. J., BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ., and HASTINGS, District Judge.

BOSLAUGH, J.

This is an appeal from an order of the district court reversing an order of the Nebraska Liquor Control Commission and directing that an on-and-off sale beer li-

cense be issued to the plaintiff. The commission appeals.

The plaintiff is a corporation. Thelma Pilege owns 75 percent of the stock. Nick Pilege, her son, owns 25 percent of the stock. He has been employed as a bartender by the former owners. In 1966, he was convicted of burglary in Douglas County, Nebraska.

The plaintiff's application was filed with the commission on January 13, 1972. A protest to the issuance of the license was filed by the chief enforcement officer of the commission.

A hearing on the application was held on April 20, 1972. Thelma Pilege testified she had purchased the tavern, which is located in Sarpy County, and had employed a manager who would come in and oversee the operation of the business on a daily basis; Nick Pilege would be employed as a bartender; and she intended to be at the tavern three or four nights a week. On cross-examination she admitted she had told John Duprey, an agent for the commission, that Nick Pilege actually was going to operate and run the bar for her. She testified further, however, the manager would run the place; Nick Pilege would be just a bartender; and she would be there on Sundays.

Nick Pilege testified he had been employed by the former owners and licensees; a customer had been "rolled" or robbed in the parking area at the tavern on February 28, 1972; and if a license was granted to the plaintiff, he expected to be employed as a bartender.

John Duprey testified Thelma Pilege had told him she had a full-time job in Omaha, Nebraska; Nick Pilege would oversee the tavern when she was not there; and Nick Pilege had stated that he would be just an employee. Duprey further testified he was at the tavern on October 31, 1971, when Nick Pilege was present and a person 18 years old was tending bar and selling liquor to another minor; the tavern had a poor reputation; and there had been a lot of difficulty as far as policing was concerned.

At the hearing in the district court Nick Pilege testified he was not present at the time of the incident on October 31, 1971, but came on duty later that day. There was other evidence, but the foregoing is a summary of the evidence material to the consideration of this appeal.

The power to regulate all phases of the control of the distribution and sale of alcoholic liquors is vested generally in the Nebraska Liquor Control Commission. § 53-116, R. R. S. 1943. The commission has a broad discretion in determining whether applications for licenses should be granted or denied. Courts are without authority to interfere with that discretion unless it has been abused. City of Lincoln v. Nebraska Liquor Control Commission, 181 Neb. 277, 147 N. W 2d 803; Allen v. Nebraska Liquor Control Commission, 179 Neb. 767, 140 N. W. 2d 413.

The plaintiff contends that since all requirements of sections 53-125, R. S. Supp., 1972, and 53-126, R. R. S. 1943, were met, the commission had no right to refuse to issue a license to the plaintiff. Section 53-125, R. S. Supp., 1972, provides that no license shall be issued to a corporation if a stockholder owning more than 25 percent of the stock has been convicted of a felony. The fact that the commission was not prohibited by the statute from issuing a license in this case does not mean that the commission was required to grant the application.

In the exercise of its discretion the commission was entitled to consider the history of the operation of the tavern, particularly since Nick Pilege had been an employee of the former owners. The commission could also consider the conflicts in the testimony and the statements made to its agents when the application was being investigated. We think the evidence established that it was within the discretion of the commission to refuse to issue the license and that its action was not unreasonable or arbitrary.

The plaintiff further contends that the trial court

could reverse the order of the commission without finding that its action was unreasonable or arbitrary. The plaintiff relies on section 53-1,116, R. R. S. 1943, which provides in part that appeals to the district court shall be "heard and tried de novo" as in equity and that additional testimony may be received. The statutory provision refers to the procedure on the trial of the appeal rather than the determination of the appeal.

The purpose of the appeal is to review the action of the commission. The power to regulate is vested in the commission, not the courts. If the commission has not abused its discretion, the courts should not interfere. City of Lincoln v. Nebraska Liquor Control Commission, *supra*; Allen v. Nebraska Liquor Control Commission, *supra*.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment affirming the order of the Nebraska Liquor Control Commission.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND E. BAZER, APPELLANT.
204 N. W. 2d 799

Filed March 2, 1973. No. 38639.

Criminal Law: Trial: Indictments and Informations. The ruling of the trial court upon a motion for consolidation or severance of criminal prosecutions that might have been properly joined in a single indictment, information, or complaint will not be disturbed in the absence of an abuse of discretion.

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

Frank B. Morrison, Sr., Thomas M. Kenney, and Stanley A. Krieger, for appellant.

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

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

SMITH, J.

In a criminal prosecution a jury found Raymond E. Bazer guilty, and he appeals. He asserts improper consolidation of his case with that against Thomas Turner for trial and insufficiency of the evidence.

The ruling of the trial court upon a motion for consolidation or severance of criminal prosecutions that might have been properly joinable in a single indictment, information, or complaint will not be disturbed in the absence of an abuse of discretion. See, § 29-2002, R. R. S. 1943; State v. Clark, *ante* p. 109, 201 N. W. 2d 205 (1972). Nothing tended to show an abuse of discretion. Much of the evidence related to Turner alone, but that circumstance did not prejudice Bazer. See State v. Clark, *supra*. The consolidation was proper.

A jury might properly find Bazer guilty beyond a reasonable doubt, although the evidence was mostly circumstantial. See, State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970); State v. Houp, 184 Neb. 206, 166 N. W. 2d 117 (1969).

The judgment is affirmed.

AFFIRMED.

BURDETTE S. JOHNSEN, APPELLEE, V. CHARLES L. PARKS, APPELLANT.
204 N. W. 2d 804

Filed March 2, 1973. No. 38663.

1. **Demurrer: Pleadings.** A demurrer reaches only defects which appear on the face of the petition.
2. ———: ———. The objection that there is another action pending between the parties for the same cause may be raised

by demurrer to a petition only when the pendency of the former action is shown on its face.

3. **Venue: Motions, Rules, and Orders: Statutes.** A motion to transfer under section 25-409, R. S. Supp., 1972, is properly overruled where the record does not show that the action was commenced in the wrong county.
4. **Appeal and Error: Motions, Rules, and Orders: Statutes: Venue.** Where the record does not show an abuse of discretion, a ruling on a motion to transfer under section 25-410, R. S. Supp., 1972, will not be disturbed.

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

Christensen & Glynn and Richard L. Schmeling, for appellant.

Friedman & Berry, for appellee.

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

BOSLAUGH, J.

This was an action for damages for assault and battery. The plaintiff recovered judgment in the amount of $3,000 and the defendant appeals. The assignments of error relate only to the venue of the action.

The assault occurred in Saunders County, Nebraska, on February 6, 1971. On February 24, 1971, the plaintiff commenced an action in Saunders County. On or about April 1, 1971, the defendant moved to Lancaster County, Nebraska. On October 20, 1971, while the action in Saunders County was still pending, the plaintiff commenced this action in Lancaster County.

The defendant demurred to the petition on the ground that another action was pending between the same parties for the same cause in Saunders County. On November 19, 1971, the trial court ordered the demurrer sustained unless the action in Saunders County was dismissed within 7 days. Apparently, the plaintiff had filed a dismissal in the action in Saunders County on November 7, 1971.

On January 13, 1972, the defendant moved to transfer the action to Saunders County in accordance with sections 25-409 and 25-410, R. S. Supp., 1972. Section 25-409, R. S. Supp., 1972, permits the transfer of an action for tort that has been brought in the wrong county. Section 25-410, R. S. Supp., 1972, permits the transfer of a civil action "for the convenience of the parties and witnesses or in the interest of justice." This motion was overruled and the action proceeded to trial and judgment.

The defendant contends that the trial court erred in overruling the special demurrer and the motion to transfer.

A demurrer reaches only defects which appear on the face of the petition. § 25-806, R. R. S. 1943. Since it did not appear on the face of the petition that another action was pending between the same parties for the same cause, the special demurrer was properly overruled. Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874.

The record does not show that this action was commenced in the wrong county or that a transfer of the action to Saunders County was required for the convenience of the parties and witnesses or in the interest of justice. Where the record does not show an abuse of discretion, the ruling on a motion to transfer under section 25-410, R. S. Supp., 1972, will not be disturbed.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID TOMMY GENE SUGGETT, APPELLANT.
204 N. W. 2d 793

Filed March 2, 1973. No. 38665.

1. **Criminal Law: Trial: Evidence.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution,

it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence.

2. **Criminal Law: Trial: Instructions.** It is the duty of the trial court to aid the jury to determine the guilt or innocence of the accused by plain and clear instructions, and if the jurors are in doubt as to the meaning of instructions given, it is entirely proper for them to request, and for the trial court to give, additional explanatory instructions.

3. ———: ———: ———. The repetition of an instruction is not reversible error, unless its effect is to mislead the jury.

4. **Criminal Law: Trial: Prosecuting Attorneys: Waiver.** It is only in the most flagrant cases of improper conduct by a prosecuting attorney, even in the prosecution of capital offenses, that defendant's counsel can apparently acquiesce in such conduct by remaining silent until the trial is finished, and then cause the trial and verdict to be set aside by complaining of conduct to which he seemed at the time to consent.

5. **Criminal Law: Trial: Witnesses: Evidence.** It is error to exclude evidence which has a tendency to impeach a witness on a material fact sworn to by him, the proper foundation having been laid therefor.

6. ———: ———: ———: ———. **In the cross-examination of a defendant who voluntarily becomes a witness in his own behalf, considerable judicial discretion is committed to the trial court to go beyond the literal scope of the direct examination in matters testing the accuracy, memory, or credibility of the witness.**

7. ———: ———: ———: ———. **The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court, and the ruling concerning it is not reason for reversal of the judgment in the case in the absence of an abuse of discretion.**

8. **Statutes: Intent.** In determining the legislative intent, all statutes relating to the same subject should be construed and considered together.

9. ———: ———. When the intent of the Legislature is clear, it is the duty of the courts to construe it in accordance with such intent. A sensible construction will be placed upon it to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.

10. **Statutes: Sentences: Criminal Law.** Section 83-170, R. R. S. 1943, is not applicable to the imposition of sentence by the trial court.

11. ———: ———: ———. Section 83-1,105, R. S. Supp., 1972, is not applicable in cases where the maximum sentence fixed by law is a life sentence.

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

W. A. Stewart, for appellant.

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.

NEWTON, J.

This is a prosecution for second degree murder. Following an argument in a bar between Benjamin L. Martinez and the defendant the altercation was resumed in the street. Martinez struck the defendant twice with his open hand and defendant retaliated by stabbing Martinez three times, inflicting fatal wounds. A jury found the defendant guilty of homicide in the second degree and he received an indeterminate sentence of 20 to 30 years. We affirm the judgment of the district court.

Defendant challenges the sufficiency of the evidence to sustain the verdict and judgment. We will not attempt to set out the extensive evidence contained in the record. It was conflicting in several particulars. Suffice it to say that after a careful perusal of the record, we find the State's evidence, if believed by the jury as it evidently was, ample to sustain the conviction. "In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence." State v. Rose, 188 Neb. 84, 195 N. W. 2d 215.

In the instructions to the jury, the court gave the standard instructions on self-defense and malice. The

latter instruction stated: "B. 'Malice' is defined as that condition of the mind which is shown by intentionally doing a wrongful act without just cause or excuse. It means any willful or corrupt intention of mind." The jury asked for clarification of the meaning of the term "without just cause or excuse." In response, the following instruction was given: "You have asked me the following question,"

" 'Define "without just cause or excuse" under Instruction No. 8-B'.

"As his principal 'just cause or excuse' for the killing of Benjamine (sic) L. Martinez the defendant contends that he acted in self defense. Self-defense is defined and discussed in Instruction No. 10, to which you are referred.

"In addition thereto, you are instructed that killing in self-defense is grounded upon necessity. The right exists only in extremity where no other practicable means to avoid the threatened harm is apparent to the person resorting to it. If there is no real or apparent necessity for the killing, the defense fails. In order to be entitled to assert self-defense as an excuse or justification for the killing, the defendant must have been in imminent danger of death or great bodily harm at the time of the commission of the act. In order to justify or excuse a killing in self-defense, the defendant must not only have entertained the belief that his life was in danger, or that he was in danger of suffering great bodily harm, but the belief must have been reasonable and in good faith. It is for you, the jury, to determine whether or not the defendant killed Benjamine (sic) L. Martinez in fear of death or of suffering great bodily harm, or, on the other hand, whether or not the killing was motivated by anger, punishment, or vengeance." The instruction although not recommended is not erroneous in context with NJI No. 14.33. See State v. Goodseal, 186 Neb. 359, 183 N. W. 2d 258. It is true that to some extent the instruction was repeti-

tious. This was unavoidable under the circumstances. "It is the duty of the trial court to aid the jury to determine the guilt or innocence of the accused by plain and clear instructions, and if the jury are in doubt as to the meaning of instructions given, it is entirely proper for them to request, and for the trial court to give, additional explanatory instructions." Brown v. State, 111 Neb. 486, 196 N. W. 926.

"The repetition of an instruction is not reversible error, unless its effect is to mislead the jury." Robinson v. State, 71 Neb. 142, 98 N. W. 694. See, also, Brown v. State, *supra*.

The knife used in the encounter was not found and no knife was placed in evidence. There was evidence that a knife had been observed in defendant's hand at the time of and immediately after the encounter. It was also shown that on one other occasion the defendant, during an argument, produced a knife. During argument the State's attorney produced and used a knife to demonstrate what occurred. There was no objection made to this procedure. Under the circumstances here, the use of a knife during a demonstration of what had occurred, although not to be recommended, or approved, could scarcely have prejudiced the jury and was not error. In any event, the failure to object waived the objection now urged. We said in Clark v. State, on motion for rehearing, 79 Neb. 482, 113 N. W 804: "It is only in the most flagrant cases of the use of improper language by a prosecuting attorney, even in the prosecution of capital offenses, that defendant's counsel can apparently acquiesce in the language used by remaining silent until the trial is finished, and then cause the trial and verdict to be set aside by complaining of statements to which he seemed at the time to consent."

On cross-examination the defendant testified that he had never had or used a switchblade knife and never pulled one on anyone. Rebuttal witnesses testified to

one previous occasion on which, during an argument, defendant produced such a knife. Since it was the defendant's contention that he had no knife at the time of the assault but took the knife used from Martinez, this evidence was material and a proper subject for cross-examination. It was held in State ex rel. Jensen v. Turnquist, 101 Neb. 417, 163 N. W. 329, that: "It is error to exclude evidence which has a tendency to impeach a witness on a material fact sworn to by him, the proper foundation having been laid therefor."

In O'Connor v. State, 123 Neb. 471, 243 N. W. 650, this court held: "In the cross-examination of a defendant who voluntarily becomes a witness in his own behalf, considerable judicial discretion is committed to the trial court to go beyond the literal scope of the direct examination in matters testing the accuracy, memory or credibility of the witness." This evidence was also pertinent from the standpoint of testing the credibility of the defendant as a witness. "The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court, and the ruling concerning it is not reason for reversal of the judgment in the case in the absence of an abuse of discretion." Hampton v. Struve, 160 Neb. 305, 70 N. W. 2d 74.

A question is raised as to the correctness of the sentence imposed in view of recently adopted statutes. Section 83-1,105, R. S. Supp., 1972, requires that when a court imposes an indeterminate sentence, the minimum fixed "shall not be *less* than the *minimum provided by law* nor more than *one-third of the maximum term* * * *." (Emphasis supplied.) In referring to the minimum term, it clearly specifies "the minimum provided by law." It seems clear that this is also the intent with reference to the "maximum term."

How can this be reconciled with section 83-170, R. R. S. 1943, adopted in 1969? This section provides in subsection (4) that "maximum term" means the max-

imum sentence provided by law, *or imposed by a court,* whichever is shorter. In essence, this means the maximum sentence imposed by the court since any sentence in excess of the statutory maximum would be erroneous. Subsection (5) provides that "minimum term" shall mean the minimum sentence provided by law or *the minimum sentence imposed,* whichever is longer. Again we find a similar situation. A sentence shorter than the statute permits is erroneous, but if a sentence longer than the statutory minimum is imposed, it may be the one to be followed.

The two statutes are clearly in conflict *if both are construed as governing courts in the imposition of sentences.* One defines minimum and maximum terms as those fixed by statute, the other as *either the statutory or court-imposed terms.* It is apparent that no court could comply with section 83-170, R. R. S. 1943, in imposing a sentence as whether the court-imposed sentence is longer or shorter than that provided by statute cannot be determined *until after* the sentence is imposed.

It is the rule that: "In determining the legislative intent, all statutes relating to the same subject should be construed and considered together. * * *

"When the intent of the Legislature is clear, it is the duty of the courts to construe it in accordance with such intent. A sensible construction will be placed upon it to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent." Keller v. State, 184 Neb. 853, 172 N. W. 2d 782.

It appears clear that section 83-1,105, R. S. Supp., 1972, is designed to apply to court-imposed sentences. It is likewise clear that section 83-170, R. R. S. 1943, could not, by any stretch of the imagination, be used at the time of sentencing, but it could be, and evidently was designed to be, used as a guideline for the Board of Parole.

One question remains. Is section 83-1,105, R. S. Supp.,

1972, applicable in cases such as second degree homicide where the maximum sentence fixed by law is a life sentence? There is no way to determine the true length of a life sentence. Even taking into account such matters as age, health, and life expectancies, no true measurement can be arrived at. Since the length in years of a life sentence is impossible to determine, so too is it impossible to determine what one-third of such a sentence should be in terms of years. We can only conclude that this section was not legislatively designed to apply in cases of this type.

We find other assignments of error to be without merit.

The judgment of the district court is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein for three reasons: (1) Misconduct of the prosecuting attorney; (2) prejudicial instruction on self-defense; and (3) the erroneous interpretation of section 83-1,105, R. S. Supp., 1972.

I am unable to agree with the majority that the use of a switchblade knife by the prosecuting attorney in giving the jury his idea of what occurred could scarcely have prejudiced the jury and was not error. A switchblade knife is a vicious instrument. Possibly some members of the jury would not appreciate its real character. No knife, and consequently no switchblade knife, had been offered in evidence nor would it have been admissible if it had been. The prosecuting attorney used one in his argument for only one purpose — to inflame the jury. I cannot help but feel that this conduct was much more flagrant than that in some of the cases in which we have reversed for misconduct of the prosecutor.

In its instructions the court gave the usual and a proper instruction on self-defense. In response to a question as to the meaning of "without just cause or excuse," the court gave what is in my judgment a prejudicially er-

roneous instruction. The majority opinion states that the instruction, *although not recommended,* is not erroneous in context with NJI No. 14.33. The difficulty is that the jury is not composed of lawyers and judges who can draw the fine distinction drawn by the majority opinion. They will read the instruction in the light of what it apparently states. I specifically object to the following language: "In order to be entitled to assert self-defense as an excuse or justification for the killing, the defendant *must have been in imminent danger* of death or great bodily harm at the time of the commission of the act." (Italics supplied.) This is an incorrect statement. The defendant *must have believed that he was in imminent danger* of death or great bodily harm. There is a vast distinction in the mind of the ordinary layman between these two statements. The court, in this instruction, reiterated, restated, and overemphasized the instruction on self-defense to such an extent as to raise a question in the minds of the jurors as to whether the defense was actually available. To me this is prejudicial error.

I also question the opinion's interpretation of section 83-1,105, R. S. Supp., 1972. The only place I see a possibility of conflict with section 83-170, R. R. S. 1943, is where the minimum sentence imposed by the court is more than one-third of the maximum. Section 83-1,105, R. S. Supp., 1972, was adopted in 1972. It is the last word of the Legislature on the subject. Note, it starts off, "Except where a term of life is required by law, * * *." This indicates the section is applicable in every instance except where a life sentence is imposed. The word "maximum" must therefore be interpreted as it is defined in section 83-170, R. R. S. 1943. This would mean the maximum provided by law or imposed by the court, whichever is shorter. Consequently, even if the case were not reversed, the minimum would have to be reduced from 20 to 10 years.

McCOWN, J., joins in this dissent.

CLINTON, J., joins in the portions of the dissent by Spencer, J., dealing with reasons (2) and (3).

STATE OF NEBRASKA, APPELLEE, V. MERVIN WHIPPLE, APPELLANT.
204 N. W. 2d 572

Filed March 2, 1973. No. 38688.

1. **Criminal Law: New Trial: Evidence.** In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible which might have changed the result of the trial and which the exercise of due diligence could not have discovered and produced at the trial.
2. ———: ———: ———. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown, its determination will not be disturbed.

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

Charles F. Fitzke and James T. Hansen, for appellant.

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

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

MCCOWN, J.

The defendant has appealed from an order of the district court overruling his motion for a new trial upon the ground of newly discovered evidence.

The defendant was originally convicted on one count of assault and battery and one count of assault with intent to commit robbery. The convictions were affirmed on appeal to this court. See State v. Whipple, *ante* p. 259, 202 N. W. 2d 182. The facts of the crime are set out in that case. Approximately one month after the defendant's trial, Richard Colgrove, a companion, was

tried on similar charges arising out of the same events. He was found guilty of simple assault but was acquitted on the robbery charge.

The defendant Whipple now asserts that he is entitled to a new trial on the ground of newly discovered evidence because the victim's testimony as to the words used by Whipple in demanding the pickup differed slightly at the two trials. He also asserts there was evidence at the second trial that an individual other than Whipple or Colgrove had cut the victim at the time of the assault. The testimony at both trials clearly establishes that the defendant Whipple demanded the victim's pickup and when he was refused, he hit and beat the victim, and, with his companions, took the pickup.

The only evidence which could arguably be of any possible importance was the victim's testimony at both trials as to Whipple's demands and language. It is obvious that cross-examination at Whipple's trial could have produced the identical evidence that appeared at Colgrove's trial on this point. In both trials the general impact of Whipple's words as related by the victim was exactly the same. The defendant seeks to conjure up a magic mountain from a linguistic molehill. In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible which might have changed the result of the trial and which the exercise of due diligence could not have discovered and produced at the trial. Gates v. State, 160 Neb. 722, 71 N. W. 2d 460. Here there is only a colorable assertion that due diligence could not have discovered the evidence and an even less colorable contention that the evidence might have changed the result of the trial. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown, its determination will not be disturbed. State v. Evans, 187 Neb. 474, 192 N. W. 2d 145. There is no abuse of discretion here.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT LAVERNE COLEMAN, APPELLANT.
204 N. W. 2d 787

Filed March 2, 1973. No. 38693.

Statutes: Words and Phrases. In statutory construction this court considers the ordinary meaning of the words in context and the mischief to which it attributes the remedy.

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

Paul E. Watts, Stephen Greenberg, and J. Joseph McQuillan, for appellant.

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

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

SMITH, J.

A jury found defendant guilty of kidnapping and the court sentenced him to imprisonment for an indeterminate period of 25 to 40 years. After expiration of the time for appeal defendant unsuccessfully moved the court to vacate the sentence on the ground that the jury alone possessed authority to sentence him under the statute. This appeal ensued.

The sequence of events is as follows. The information in Count II charged that defendant on July 9, 1969, had imprisoned Nancy Lusins for the purpose of compelling the performance of an act by Valdis Lusins. After the verdict of guilty and on December 26, 1969, the court sentenced defendant on Count II to imprisonment for life. Our mandate in June 1971 ordered re-

sentence of defendant on the count under section 28-417, R. S. Supp., 1969. See State v. Coleman, 186 Neb. 297, 183 N. W. 2d 225 (1971). On July 1, 1971, the sentence for the indeterminate period was accordingly determined and pronounced by the district court.

Prior to September 19, 1969, the term of imprisonment for the offense committed by defendant was life. In event of injury or threatened injury to the victim the penalty was life imprisonment or death at the discretion of the jury. See Laws 1901, c. 88, § 1, p. 487. The Legislature by L.B. 700 amended the statute, effective March 19, 1969, to require the court without a jury, to fix the punishment. Laws 1969, c. 216, § 1, p. 836. It again amended the statute, effective September 19, 1969, by decreasing the term of imprisonment for the offense committed by defendant, from life to minimum and maximum terms of 3 to 50 years. See, § 28-417, R. S. Supp., 1969; Laws 1969, c. 215, § 5, p. 832.

The Legislature again amended the statute, effective May 7, 1971, respecting a degree of the offense that defendant had not committed, the provision reading in part: "Whoever shall kidnap . . . out of this state any person . . . or shall . . . imprison any person . . . with the intention of having such person . . . carried out of the state, unless it be in pursuance of the laws thereof, shall be confined . . . not less than three nor more than twenty years. Whoever shall unlawfully . . . imprison any person . . . for the purpose of compelling the performance of any act . . . by any other person . . . shall . . . be imprisoned . . . not less than three nor more than fifty years. Whoever, having for any of the purposes aforesaid unlawfully . . . imprisoned any person, shall in furtherance of any such purpose, do or threaten to do any injury to the person so . . . imprisoned, such person so offending shall . . . suffer death if the jury shall so direct, or be imprisoned . . . for not less than three nor more than fifty years as determined by the court. If the accused is found guilty by a jury, they

shall fix the punishment by their verdict; upon a plea of guilty, or after a finding of guilt by the court sitting without a jury, . . . the punishment shall be fixed by the court. Whoever shall threaten to . . . imprison any person for the purpose of extorting money . . . shall . . . be imprisoned . . . not less than one nor more than twenty years." § 28-417, R. S. Supp., 1972.

In statutory construction this court considers the ordinary meaning of the words in context and the mischief to which it attributes the remedy. See State v. Simants, 182 Neb. 491, 155 N. W. 2d 788 (1968).

The amendment of March 19, 1969, and a similar amendment of the provision relating to murder in the first degree were enacted the same day. See Laws 1969, c. 213, § 1, p. 829. The Attorney General at a committee hearing had testified in support of L.B. 700. The amendment was responsive to his doubts relating to the sweep of United States v. Jackson, 390 U. S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). The case decided that the death penalty only for a defendant who asserted the right to contest his guilt before a jury was constitutionally impersmissible.

Section 28-417, R. S. Supp., 1972, imposed the duty upon the court - not the jury - to determine the sentence for the offense committed by defendant.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM RANCE RANDOLPH, APPELLANT.
204 N. W. 2d 789

Filed March 2, 1973. No. 38692.

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

Hotz, Byam & Kellogg and William J. Tighe, for appellant.

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

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

SMITH, J.

Judgment is affirmed on authority of State v. Coleman, *ante* p. 725, 204 N. W. 2d 785.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SIDNEY ABRAHAM AND FUD FERRIS, JR., APPELLANTS.
205 N. W. 2d 342

Filed March 9, 1973. No. 38406.

1. **Indictments and Informations: Criminal Law.** An information charging an offense in substantially the words of the statute is generally sufficient.
2. **Pleadings: Motions, Rules, and Orders: Criminal Law.** All defects that may be excepted to by a motion to quash are taken to be waived by a defendant pleading the general issue.
3. **Indictments and Informations: Motions, Rules, and Orders: Criminal Law.** An indictment or information alone need not be full protection against double jeopardy because a defendant may allege and prove facts outside the record in support of a plea of former adjudication.
4. **Evidence: Receiving Stolen Goods: Intent: Criminal Law.** In a prosecution for receiving stolen property, when facts known to a defendant were such that a man of the age, intelligence, and experience of the defendant would know the property to have been stolen, the trier of fact may properly find the defendant possessed guilty knowledge.

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

McGrath, North, Nelson, Shkolnick & Dwyer, Miller &

Rowen, Arthur D. O'Leary, J. Thomas Rowen, and J. Patrick Green, for appellants.

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.

The two defendants were charged under section 28-508, R. R. S. 1943, with receiving stolen property with the intent to defraud the owner. The case was tried to the court sitting without a jury, and from a judgment of guilty and sentence thereon, the defendants appeal. We affirm the judgment and sentence of the district court.

The defendants' first contention on appeal is, in essence, that the descriptive allegations in the information of the character of the goods received are so general as not to charge the statutory offense with the requisite certainty. Because of this, they argue, the information was fatally defective and so their motion in arrest of judgment should have been sustained even though they had not attacked the information by demurrer or motion to quash prior to trial.

The information provides in part as follows: "Sidney Abraham and Fud Ferris, Jr. * * * did * * * feloniously receive *goods of the value of over $100.00 that had been stolen*, with the intent to defraud the owner thereof, the said Sidney Abraham and Fud Ferris, Jr. knowing the goods to have been stolen." (Emphasis supplied.)

An information can be challenged by way of a motion in arrest of judgment if it fails to state facts sufficient to constitute an offense. § 29-2104, R. R. S. 1943. However, the information in the instant case is phrased in substantially the identical language of the statute. The rule is that where, as here, the statute states the elements of the offense, it is sufficient if the informa-

tion describes the offense in the language of the statute. State v. Levell, 181 Neb. 401, 149 N. W. 2d 46; State v. Adams, 181 Neb. 75, 147 N. W. 2d 144; Stage v. Jarrett, 177 Neb. 459, 129 N. W. 2d 259.

Since the information here, although phrased in general language, is sufficient to state an offense, the defendants' challenge really goes only to the requisite certainty and particularity of the information for the preparation of their defense. It is not such a challenge as can be brought by way of motion in arrest of judgment. Instead, a motion to quash is the proper method of attack. § 29-1808, R. R. S. 1943; Matters v. State, 120 Neb. 404, 232 N. W. 781. The defendants failed to avail themselves of this procedure and pleaded not guilty. All defects that may be excepted to by a motion to quash are taken to be waived by a defendant pleading the general issue. § 29-1812, R. R. S. 1943; State v. Fiegl, 184 Neb. 704, 171 N. W. 2d 643; Nelson v. State, 167 Neb. 575, 94 N. W. 2d 1; Green v. State, 116 Neb. 635, 218 N. W. 432. We are aware that an information must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense. State v. Huffman, 181 Neb. 356, 148 N. W. 2d 321; State v. Adams, *supra*. However, if the information here was not sufficiently specific to satisfy the defendants, they were afforded a remedy by motion to quash. It must be presumed that they were aware of the nature and cause of the charges against them since they were willing to proceed to a defense on the general issue without further clarification of the charges being requested. As to whether this information was sufficient to enable the defendants to plead the judgment as a bar to any subsequent prosecution, we apply the rule of State v. Adams, *supra*, which says: "An indictment or information alone need not be full protection against

double jeopardy because a defendant may allege and prove facts outside the record in support of a plea of former adjudication." The defendants' assignment of error in the overruling of their motion in arrest of judgment is therefore without merit.

The defendants' remaining contentions are addressed to the sufficiency of the evidence to sustain their convictions. The defendants first assert that the evidence will not support beyond a reasonable doubt a finding that the meat the defendants possessed was stolen.

It was found at trial that a trailer was stolen from the storage lot of the Iowa Beef Processors' plant at Dakota City in the early morning of May 23, 1971. The trailer contained some 30,000 pounds of meat identified as 200 boxes of chuck tenders and 300 boxes of chuck rolls. On the late evening of May 27, or the early morning of May 28, 1971, the defendants were at the St. Christopher's Inn in Valentine, Nebraska, which is owned by the defendant Ferris. It is undisputed that, while there, the defendants consummated a purchase of some 15,000 pounds of chuck rolls and chuck tenders, which normally sells for around 65 cents per pound wholesale, for 45 cents per pound. The defendants claimed at trial that the meat was bought from a truck driver who said his refrigeration unit was malfunctioning and, being unable to find storage facilities for the meat, was authorized by his superiors to sell at a loss. At any rate, the driver would accept only cash in payment for the meat and has not been heard from since.

The defendants initially stored the meat in the party room at the St. Christopher's Inn, but, being unable to keep it properly cooled, they sold it the next day to William Joseph, the owner of the Corner Market located in Valentine. On June 3, 1971, the supervisor of security for Iowa Beef Processors, in response to a phone call from state agent Vern Omer, went to the Corner Market in Valentine, Nebraska. He inspected the meat which Joseph had bought from the defendants

and observed on the meat remnants of the federal inspection stamp 245-C, which was the number assigned to the Iowa Beef Processors' Dakota City plant. The meat was found to be wrapped in cryovac bags, which is the type of plastic bag used by the Iowa Beef Processors. Samples of the metal clamps crimping the cryovac bags on the meat found in the Corner Market were forwarded to the F.B.I. in Washington, D.C., along with samples of crimped clamps from the Dakota City plant. A laboratory expert from the F.B.I. concluded that the crimped clamps matched up. The security supervisor testified that he had no reports from anyone in his organization as to any other loss of meat of this type.

The evidence clearly establishes a chain of circumstances which reasonably leads to the conclusion that the meat which passed through the hands of the defendants was stolen. While the evidence was all circumstantial, a conviction may be based upon circumstantial evidence when the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. State v. Morgan, 187 Neb. 706, 193 N. W. 2d 742; Hoffman v. State, 162 Neb. 806, 77 N. W. 2d 592. This 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 fact. State v. Embrey, 188 Neb. 649, 198 N. W. 2d 322. The evidence here was sufficient to sustain the finding of the trial court that the meat which passed through the hands of the defendants was that which was stolen from the Iowa Beef Processors plant in Dakota City.

The defendants' final contention is that there was insufficient evidence to establish guilty knowledge on the part of either defendant. Defendant Ferris is 40 years of age and the defendant Abraham is 43 years of age. Both are experienced businessmen. They were

approached on business in the middle of the night by a man they did not know and they made no attempt to ascertain his identity or who he worked for. They bought the meat at a price substantially below the going rate and, at the insistence of the unidentified vendor, paid in cash. No bills of lading were checked by the defendants; no bill of sale was made out; and no receipt was given for the cash paid. In a prosecution for receiving stolen property, when facts known to a defendant were such that a man of the age, intelligence, and experience of the defendant would know the property to have been stolen, the trier of fact may properly find the defendant possessed guilty knowledge. State v. Alcorn, 187 Neb. 854, 194 N. W. 2d 798; State v. McKee, 183 Neb. 754, 164 N. W. 2d 434.

Perhaps even more significant and incriminating is the testimony in the record that Ferris, while talking to a police officer during the unloading of the meat, stated "We have been waiting for this damn truck for two hours." The trial judge was entitled to believe this testimony. It indicates clearly that the meat was delivered to the two defendants under a prior agreement. It indicates that the agreement was entered into prior to the actual arrival of the meat and that it was not an impromptu arrangement necessitated by an unanticipated mechanical failure. It not only indicates a prearranged sale at a significantly reduced price of the meat, but it also indicates the falsity of the defendants' attempted explanation of how they came into possession of the stolen goods. Both inferences are not only reasonable conclusions to be made by the trier of fact, but are highly pertinent under our relevant decisions to the determination of intent. In conclusion, it may be said that everything connected with the sale of the meat involved in this case was of such a nature as to arouse the suspicions of all but the most naive of men. We come to the conclusion that the evidence is amply sufficient to sustain the trial court's finding that the

goods were stolen and that there was guilty knowledge on the part of both defendants.

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

AFFIRMED.

FIRST NATIONAL BANK OF OMAHA, A CORPORATION, APPELLEE, V. FIRST CADCO CORPORATION, A CORPORATION, ET AL., APPELLEES, PATRICIA LUCAS, INTERVENER-APPELLANT.
205 N. W. 2d 115

Filed March 9, 1973. No. 38566.

1. **Trusts: Contracts.** When an act or agreement of the beneficiary of a spendthrift trust would disappoint or frustrate the purposes of the settlor by diverting a property or income from the purpose prescribed, such act or agreement is void ab initio.
2. **Trusts: Garnishment.** When the period of the spendthrift trust has expired and the beneficiary has the unrestricted right to demand the trust res the property may be reached by garnishment even though the trustee has delayed making actual distribution.
3. **Trial: Garnishment: Evidence.** In a garnishment proceeding an intervener or third party claimant normally has the burden of proving his claim by a preponderance of the evidence, and this rule has application even where the intervener or claimant has possession of the property if the judgment debtor and the claimant are closely related.
4. **Trial: Judgments: Appeal and Error.** Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed unless clearly wrong.
5. **Trial: Evidence.** Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.
6. **Trial: Evidence: Witnesses.** Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false.

7. **Trial: Evidence.** A substantial conflict may arise even though all the evidence is produced by one party.
8. **Trial: Evidence: Witnesses.** The credibility of witnesses and the weight to be given their testimony are for the triers of fact.

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

Young, Kuhn, Person & Liakos, for intervener-appellant.

Swarr, May, Smith & Anderson and Dwight J. Moore, for appellee First Nat. Bank of Omaha.

Thomas D. Sutherland, Richard M. Duxbury, Harry B. Otis, L. J. Tierney, Keith Miller, and Richard D. Meyers, for appellees First Cadco Corp., et al.

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

CLINTON, J.

This is an appeal by Patricia Lucas, a garnishee and intervener in a garnishment proceeding, from an order directing that certain stock certificates held by her and the corpus of a trust held by the Omaha National Bank as trustee, be delivered to the plaintiff First National Bank of Omaha as garnishor. We affirm the order of the trial court.

A brief résumé of the background will aid in understanding the issues. On January 2, 1970, the plaintiff obtained a judgment against Evelyn Lucas and others. The judgment was founded upon a promissory note executed on July 2, 1965. The judgment became final and the plaintiff took steps by garnishment to reach securities in the hands of Patricia Lucas alleged to belong to Evelyn Lucas, her mother-in-law. Patricia Lucas answered the interrogatories in garnishment, stating that she was in possession of the certificates belonging to Evelyn Lucas and that she held them as collateral for a loan.

The plaintiff also caused garnishment to be issued against the Omaha National Bank to reach the corpus of the trust of which Evelyn Lucas was the beneficiary. The trust corpus was approximately $14,000. Patricia Lucas intervened in that proceeding, alleging an interest in the corpus by reason of a prior assignment from Evelyn Lucas.

The garnishments and the issues made by the petition in intervention were tried together. Two issues are before the court on this appeal. The first is whether the finding of the trial court, that a certain promissory note of Evelyn Lucas payable to Patricia Lucas in the amount of $15,000 dated June 25, 1965, and due 60 months after date did not evidence a valid debt between the parties, is supported by the evidence. The note pledged the stock in question. The second is whether the related assignment of the trust corpus by Evelyn Lucas to Patricia Lucas, also dated June 25, 1965, and purportedly given to secure the same debt, was valid. The latter question involves a construction of the testimentary trust of which Evelyn Lucas was the beneficiary and it presents a question of law only. We will treat the last issue first.

The will bequeathed 200 shares of General Motors Corporation stock in trust to Omaha National Bank. The pertinent portions of the will are:

"To collect all the dividends from said stock after the close of my estate and the receipt of said stock by my trustee and after the payment of all expenses and personal taxes, to pay the net income to Evelyn Lucas, until she shall have reached the age of seventy (70) years, at which time my trustee shall assign and deliver said stock to her . . . .

". . . Neither the principal nor the income of the trust shall be liable for the debts of any beneficiary thereof, and no beneficiary hereunder shall have any power to sell, assign, transfer, encumber, or in any other manner to anticipate or dispose of his or her interest in the

trust fund or the income produced thereby, prior to the actual distribution thereof by the trustee to said beneficiary."

Evelyn Lucas became 70 years of age on September 12, 1970. However, no distribution of trust corpus was made at that time and no distribution had been made when the garnishment was served on the trustee on January 18, 1971. The garnishee contends the assignment, independent of any question of its contractual authenticity, by Evelyn Lucas to Patricia Lucas is invalid because it contravenes the spendthrift provisions of the trust which prohibits the beneficiary from anticipating the distribution "prior to the actual distribution thereof by the trustee to said beneficiary," and that the assignment is void ab initio. It cites Weller v. Noffsinger, 57 Neb. 455, 77 N. W. 1075; and Lancaster County Bank v. Marshel, 130 Neb. 141, 264 N. W. 470. Patricia Lucas, on the other hand, points to the language just quoted and argues that the garnishment is void because there had been no actual distribution of the trust proceeds, citing Erickson v. Erickson, 197 Minn. 71, 266 N. W. 161, 163; and concludes that since the assignment is prior in time it also becomes prior in right.

The spendthrift provisions of the trust are valid. Weller v. Noffsinger, *supra*. In Lancaster County Bank v. Marshel, *supra*, we held: "When an act or agreement of parties disappoints the purpose of the settlor by diverting a property or income from the purpose named, such act or agreement is void ab initio," citing Bixby v. St. Louis Union Trust Co., 323 Mo. 1014, 22 S. W. 2d 813. In the case at hand, the assignment was a clear violation of the restriction against alienation and comes within the ambit of our holding in Lancaster County Bank v. Marshel, *supra*, since it was executed prior to the time the beneficiary had any right to demand the trust corpus.

Even though the assignment was void we must deter-

mine whether the garnishment did reach the proceeds since the trust period had expired and the beneficiary had the right to demand the proceeds. Did the beneficiary's failure to demand distribution make the garnishment ineffective? We conclude it did not on the basis of our holding in Miles v. Miles, 120 Neb. 436, 233 N. W. 249, cited by the plaintiff, and II Scott on Trusts (3d Ed., 1967), §§ 153, 156, pp. 1116, 1192.

It is true the language of the instrument in Miles v. Miles, *supra,* is different from the language in the will we are here considering, since in Miles no conveyance was required to be made by the trustee and here the instrument does impose the duty to "assign and deliver." However, a construction which would allow the spendthrift protection to continue after the termination of the trust period and during the time when the beneficiary had the right to demand delivery would, in effect, allow her to establish a spendthrift trust for herself. It is uniformly held to be against public policy to permit a person to tie up his own property in such a way that he can still enjoy it but can prevent his creditors from reaching it. II Scott on Trusts (3d Ed., 1967), § 156, p. 1192. For analogous principle contained in the statutes of Nebraska, see section 36-201, R. R. S. 1943. We hold that the garnishment of the trustee was valid and effective.

We now turn to the question of the evidence supporting the trial court's finding that no valid debt existed between Evelyn Lucas and Patricia Lucas. Patricia Lucas answered the interrogatories in garnishment, acknowledging that she had in her possession certain stock certificates which were the property of Evelyn Lucas and asserting therein that she held the same as collateral for a loan. In the garnishment of the trustee she intervened alleging the lien by virtue of the assignment of the trust corpus. The note and the assignment were received in evidence and supported by the testimony of the two parties. They both testi-

fied that on June 25, 1965, Patricia Lucas made to Evelyn Lucas a loan of $15,000 in cash. Patricia Lucas testified she had the $15,000 in cash in her safe in her home and had taken it out and delivered it to Evelyn Lucas; and that Evelyn Lucas executed the note and assignments and delivered the pledged stock. Evelyn Lucas' testimony was to the same effect.

The only direct contradiction of this testimony is some of the contents of a financial statement signed by Evelyn Lucas bearing date of January 27, 1967, listing assets and obligations of herself and her husband. Evelyn Lucas acknowledged the execution of this statement on the date it bears. The statement described the stock held in the trust as well as that described in the answers of Patricia Lucas to the garnishment interrogatories and on which she claimed a lien of $15,000. The only liability listed in the statement was a real estate mortgage to an insurance company in the amount of $8,240, covering property included in the assets described in the statement and described as 4308 Grover Street. The statement did not describe the claimed $15,000 indebtedness to Patricia Lucas nor a claimed substantial equity which Patricia Lucas had in the 4308 Grover Street property by virtue of a claimed oral contract to purchase.

The evidence indicates that 4308 Grover Street was residential property which Patricia Lucas and her husband occupied, apparently since 1962 immediately following her graduation from college at age 22. Patricia Lucas testified that she entered into possession of this property, which had been acquired on October 16, 1962, by J. F. Lucas and Evelyn Lucas as joint tenants, pursuant to the provisions of an oral contract of purchase between her and J. F. Lucas. She stated that she paid down on the oral contract $6,000 in cash and paid the balance at the rate of $100 or more per month. These installments were paid in cash or by check. No checks were offered. Evelyn Lucas testified she knew nothing of this oral contract of purchase. Later, on June 4,

1969, Evelyn Lucas quitclaimed the property to J. F. Lucas, her husband. She stated that at this time she did not know of the oral contract of sale. On August 29, 1969, Evelyn Lucas and J. F. Lucas conveyed the property to Patricia Lucas as trustee for Robert F. Lucas, II. Patricia Lucas testified that at that time the property was fully paid for and that the mortgage had been paid by her father-in-law from the payments she had made. The total purchase price was testified to have been $19,200. Robert Frederick Lucas, II, is the son of Patricia Lucas and apparently is a young minor who, Patricia testified, has agreed to let his parents live in the property without payment of rent. The explanation given for taking title in this fashion was: "Because I intend for it to be for my son when he grows up; and it will be for the two boys now." There was no instrument setting forth the terms of the trust.

The financial statement, in addition to describing the items of property previously mentioned and other property, indicated the elder Lucases had an annual income of approximately $36,000 and a net worth of $237,548. The explanation for the claimed $15,000 loan from Patricia Lucas to Evelyn Lucas was that Evelyn Lucas was making a loan of that amount to her own daughter. There is no indication whether or not the daughter was available as a witness.

As we have already indicated, the question before us is whether, under the above state of the evidence, the findings of the trial court that there was no indebtedness are sufficiently supported or whether those findings must be set aside.

This court has held that in a garnishment proceeding an intervener who claims the garnisheed fund has the burden of proving his claim by a preponderance of the evidence. Brunke v. Gruben, 84 Neb. 806, 122 N. W. 37; Racek v. First Nat. Bank of North Bend, 62 Neb. 669, 87 N. W. 542. This appears also to be the majority rule in cases where a third party claims a possessory lien on

property taken under execution, although in some jurisdictions the execution creditor has the burden where the claimant or intervener is in possession at the time the execution is levied. 33 C. J. S., Executions, § 185, p. 405. Where the judgment debtor and the third party claimant or intervener are closely related, it appears salutary to place the burden of proof on the claimant or intervener even where the claimant is in possession when the garnishment or execution lien attaches. We accordingly hold that, at least where the parties are closely related, the burden of proving the interest or lien is upon the third party claimant in a garnishment proceeding even where the claimed lien is evidenced by possession.

The following principles also apply: Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed unless clearly wrong. Mathiesen v. Bloomfield, 184 Neb. 873, 173 N. W. 2d 29.

Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. Teresi v. Filley, 146 Neb. 797, 21 N. W. 2d 699.

Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false. Teresi v. Filley, *supra*.

A substantial conflict may arise even though all the evidence is produced by one party. Teresi v. Filley, *supra*.

The credibility of witnesses and the weight to be given their testimony are for the triers of fact. Highway Equipment & Supply Co. v. Jones, 182 Neb. 234, 153 N. W. 2d 859.

The trial judge obviously did not believe the testi-

mony of the two witnesses as to the loan transaction. The determinations of credibility were for the trial judge and not for this court. On this general subject see "The Doubtful Omniscience of Appellate Courts," 41 Minn. L. Rev., p. 751, 758.

AFFIRMED.

LOIS WHITE, APPELLANT, V. REBECCA KLUGE ET AL., APPELLEES.
204 N. W. 2d 789

Filed March 9, 1973. No. 38588.

1. **Motor Vehicles: Highways.** A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.
2. ———: ———. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view.
3. ———: ———. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger.
4. **Motor Vehicles: Negligence.** If a motorist entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law.

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

Homer E. Hurt, Jr., and James A. Gallant, for appellant.

Thomas J. Walsh and Michael R. O'Malley of Walsh, Walentine, Wolfe & Miles, for appellees.

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

WHITE, C. J.

The basic question presented in this case is whether the plaintiff, a passenger in a car driven by her sister, Kay Moeller, is entitled to a directed verdict on the issue of liability arising out of an automobile-tractor accident occurring on June 8, 1970, on a county road stop sign intersection about 3 miles east of North Bend, Nebraska, and 10 miles north of U.S. Highway No. 30. The district court submitted the issues of negligence and proximate cause to a jury which found for the defendants, and the court entered judgment accordingly. We reverse the judgment of the district court and remand the cause with directions to direct a verdict for the plaintiff on the issue of liability.

The Moeller car, northbound, in which the plaintiff was riding, crossed the crest of a hill and approached an intersection at the base of a downgrade. The Moeller car was traveling on the arterial and the intersection is protected by stop signs on the east-west road. It is also obstructed as there is a grove of trees along the east side of the north-south road which prohibits northbound drivers from seeing westbound drivers, and vice versa. The evidence is that the plaintiff indicated to her sister that was the point at which they must turn right in order to return to Scribner, Nebraska, and the plaintiff testified she felt the car slow down as her sister let up on the foot-feed. The plaintiff looked to the right to see if the intersection was clear but could not tell because of the grove of trees which obstructed her view. The evidence is undisputed that the defendant, Rebecca Kluge, driving an Oliver farm tractor and pulling a hayrack was approaching the intersection from the east. Rebecca was then 12 years old, and had been helping her father haul hay from a field some 8 miles from their farm. By her own admission she failed to

stop at the stop sign, even though she could not see the north-south road to her left because of the trees. She testified that the first time she saw the Moeller car her tractor was in the middle of the intersection and the Moeller car was skidding toward her. A collision resulted. The right front of the Moeller vehicle struck the left rear of the tractor throwing the plaintiff against the windshield and injuring her.

Without further recitals of the detailed evidence, the evidence in this case conclusively shows that although the view from the stop sign was obstructed, the defendant Rebecca did not stop at the right-of-way line required by the statute, section 39-724, R. R. S. 1943; Dale v. Omaha & C. B. St. Ry. Co., 154 Neb. 434, 48 N. W. 2d 380; or at a point where she could see the approaching car in her range of danger, Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333. This case is controlled by our holdings in Steinberg v. Pape, 181 Neb. 806, 150 N. W. 2d 912; Nistor v. Therkildsen, 181 Neb. 817, 151 N. W. 2d 443; Nichols v. McArdle, 170 Neb. 382, 102 N. W. 2d 848. The controlling rules of law are that the driver of an automobile entering an intersection is obligated to look for approaching automobiles and to see any vehicle within the radius which denotes the limit of danger, and if he fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. A motorist approaching a highway protected by stop signs must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for a motorist to proceed into the intersection. Nistor v. Therkildsen, *supra;* Steinberg v. Pape, *supra;* Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652; Nichols v. McArdle, *supra;* Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701; Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751. It is the duty of the driver of a vehicle approaching an arterial highway protected by stop signs to look for vehicles ap-

proaching on the arterial highway and this duty implies the duty to see what is in plain sight. Nichols v. McArdle, *supra*; Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501.

This was an obstructed intersection, the same situation that was present in Nistor v. Therkildsen, *supra*. Therein we held that a plaintiff driver on the arterial was entitled to a directed verdict on the issue of liability in a similar situation. This case is much the stronger because it is not even contended that the plaintiff herself was guilty of any contributory negligence which was the proximate cause of this accident. The evidence in this case is conclusive that had Rebecca stopped at the right-of-way line, as required by section 39-724, R. R. S. 1943, or at a point sufficiently beyond the trees so as to permit her an unobstructed view of the northbound highway, she could have observed the Moeller car as it traveled at a distance of well over 1,000 feet in plain view. She took no action whatsoever because, by her own admission, she never saw the vehicle in which the plaintiff was riding at all during this critical period of time. Undisputedly, the vehicle on the arterial was traveling in the range of danger, Rebecca failed to see her, and the collision resulted. Rebecca was not only legally compelled to stop and look before she went onto the arterial highway, but the duty imposed upon her was mandatory before she went thereon that she see what was in plain sight within the range of danger and what could have been seen by any normal person reasonably and effectively complying with the obligations of the law as we have pronounced them herein. See, Nistor v. Therkildsen, *supra;* Nichols v. McArdle, *supra*. We point out that this, undisputedly, is not a case where the evidence supports an inference of a reasonably formed judgment that the vehicle approaching on the arterial was outside the range of danger and therefore it would be prudent to proceed. It is rather a case of an entire failure to see and avoid a collision with a ve-

hicle which, by the defendant Rebecca's own admission, was undisputedly within the range of danger at the time she was about to enter the intersection. There is no evidence in this case that the defendant Rebecca even observed the approaching vehicle at some point in the distance on the arterial highway. We have no difficulty in coming to the conclusion that the defendant Rebecca was guilty of negligence as a matter of law and that such negligence was a proximate cause of the collision.

Although it is clear under our holdings in Steinberg v. Pape, *supra;* Nichols v. McArdle, *supra;* and Nistor v. Therkildsen, *supra,* that the driver of plaintiff's vehicle was not guilty of any contributory negligence, it is not necessary for us to examine that issue in this case, inasmuch as the plaintiff was a passenger and it is not contended that she was guilty of independent contributory negligence. It further appears that the defendant Rebecca Kluge was driving the tractor under the direction and control of her defendant father and under the principles of respondeat superior, the defendant father was liable for her negligence.

The judgment of the district court is reversed and the cause is remanded for a new trial with directions that the defendants, as a matter of law, were guilty of negligence proximately causing the accident, and that the sole issue for retrial is one of damages and injuries proximately caused by the accident.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. HUBERT W. FINCHER, APPELLANT.
204 N. W. 2d 927

Filed March 9, 1973. No. 38597.

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

Hubert W. Fincher, pro se.

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.

This is an appeal from denial of post conviction relief by the district court. The appellant was found guilty by a jury of assault with intent to commit great bodily harm. On direct appeal the conviction was affirmed. State v. Fincher, 188 Neb. 376, 196 N. W. 2d 909.

The trial court, after examining the files and records in the case, determined that they showed the appellant was entitled to no relief and denied without an evidentiary hearing the appellant's motion to vacate the conviction. This was proper under sections 29-3001, et seq., R. S. Supp., 1972, and our holdings in State v. LaPlante, 185 Neb. 816, 179 N. W. 2d 110; and State v. Pilgrim, 184 Neb. 457, 168 N. W. 2d 368.

We have reviewed the whole record and find that the record affirmatively shows there was no denial or infringement of the appellant's rights rendering the judgment void or voidable under either the Constitution of the State of Nebraska or the Constitution of the United States.

Only one issue of constitutional significance is raised by the appellant's motion and his assignments of error on this appeal and that involves alleged incompetence and ineffectiveness of counsel. The record demonstrates that counsel was competent and effective. Other assignments involve jury instructions and alleged failure of proof. The instructions were proper and in any event did not involve any fundamental unfairness which would have made the assignments cognizable in the post conviction proceedings. Higgins v. Wainwright,

424 F. 2d 177; State v. Carpenter, 186 Neb. 605, 185 N. W. 2d 663.

The alleged failure of proof does not exist.

AFFIRMED.

IN RE APPLICATION OF SOUTHROADS BANK.
FIRST NATIONAL BANK OF BELLEVUE, APPELLANT, V. SOUTHROADS BANK ET AL., APPELLEES.
205 N. W. 2d 346

Filed March 9, 1973. No. 38616.

1. **Administrative Law: Appeal and Error.** Where it appears in an error proceeding that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the administrative agency will be affirmed.
2. **Administrative Law: Banks and Banking.** An order of the Department of Banking denying an application for a bank charter does not amount to an adjudication for the future and is not res judicata as to another application of the same nature subsequently filed.

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

Schmid, Ford, Mooney, Frederick & Caporale, for appellant.

Monen, Seidler, Ryan & Festersen, Cline, Williams, Wright, Johnson & Oldfather, Clarence A. H. Meyer, Attorney General, Ralph H. Gillan, and Acklie & Peterson, for appellees.

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

MCCOWN, J.

This is a proceeding to review an order of the Department of Banking of the State of Nebraska granting a charter to Southroads Bank, Bellevue, Nebraska. The district court affirmed the order of the Department of

Banking and dismissed the proceedings. The First National Bank of Bellevue has appealed.

On April 20, 1971, the Southroads Bank filed an application for a state bank charter in accordance with the provisions of section 8-120, R. R. S. 1943. After publication of notice as required, a public hearing was held on the application extending over a period of 4 days in June of 1971. On September 24, 1971, the Department of Banking entered its order granting the application. It found that the stockholders and officers of the Southroads Bank were parties of integrity and responsibility; and that "the public necessity, convenience, and advantage will be promoted by permitting such corporation to engage in business as a bank."

The extensive evidence presented at the hearing in June 1971, dealt almost entirely with the issue of public necessity, convenience, and advantage in having a bank at the Southroads Shopping Center location. Much of the evidence dealt with facts or information related to the time span between a former hearing in December 1969, and the 1971 hearing. There was also evidence relating to previous periods of time as well as general evidence not specifically related to a definite time period. The evidence of the applicant tended to establish public necessity, convenience, and advantage while the evidence of the protestants tended to demonstrate that the existing banks were adequately serving the public and that the public necessity, convenience, and advantage would not be promoted by granting the application.

The proceedings for judicial review of the order of the Department of Banking granting the Southroads Bank charter were conducted before the district court without a jury on the record of the Department of Banking. The district court specifically found that there was competent, material, and substantial evidence to support the order of the Department of Banking, including the findings of fact and conclusions of law; and

that the order was not arbitrary or capricious. The district court affirmed the order of the Department of Banking and dismissed the proceedings for judicial review.

Other critical background facts should be noted. The hearing in June 1971, on this application was the third hearing involving this applicant. Its first application was filed April 26, 1968. Hearing on that application was in July of 1968. On August 26, 1968, the Department of Banking entered its order denying the application. On September 18, 1969, a new application was filed. That hearing was held in December 1969. The order denying the application was entered February 24, 1970. A third application was filed on January 28, 1971, but dismissed on motion without a hearing. The application which is now involved was filed April 20, 1971. The hearing was in June 1971, and the order of the Department of Banking granting the application was entered September 24, 1971.

The appellant contends that Southroads Bank failed to prove the statutory requirements of "public necessity, convenience, and advantage" and that the evidence proves also that the appellant will suffer irreparable damage if Southroads Bank is granted a charter. An examination of more than 800 pages of testimony taken at the hearing and the numerous exhibits introduced in evidence refutes those contentions. There was competent evidence to establish that the parties requesting the charter are parties of integrity and responsibility; that the public necessity, convenience, and advantage will be promoted by permitting the corporation to engage in business as a bank; and that all other statutory requirements have been met. In cases such as this, the determination of public necessity, convenience, and advantage has been committed to the discretion and expertise of the Department of Banking. This court is not a super-regulatory body to review the policy or wisdom reflected in determinations made by the De-

partment of Banking as to such issues. Where it appears in an error proceeding that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the administrative agency will be affirmed. First Nat. Bank & Trust Co. of Beatrice v. Ley, 182 Neb. 164, 153 N. W. 2d 743.

The major portion of the appellant's argument on appeal is directed to the contention that the doctrine of res judicata applies to administrative proceedings and should be applied here. The thrust of the argument is that the former order of the Department of Banking denying a previous application should be treated as a final judicial disposition of the Southroads Bank charter which prevents further inquiry into the issue in this proceeding.

The appellant concedes that the doctrine of res judicata is not applicable where there has been a substantial or material change in the circumstances or conditions intervening between the two decisions. The appellant maintains, however, that since both rulings related to the issue of obtaining a charter for a bank in the Southroads Shopping Center, there is therefore no substantial change of circumstances shown and the doctrine should be applied. This ignores the fact that there was substantial additional or new evidence relating to the period of time after the prior hearing in 1969 and also ignores the fact that the critical subject matter with which the rulings were concerned was the matter of public necessity, convenience, and advantage at the time of determination. That issue must be determined within a specific time reference and is seldom static. There is no record of the evidence presented at the prior hearing in 1969. The evidence here reflects a rapidly growing, fluid metropolitan area. If any inferences are to be drawn, they would point to the probability of changes in circumstances and conditions over

a period of time of more than a year and a half between the 1969 and the 1971 hearing.

The statutes contain no requirements limiting the number of applications which can be made nor requiring that any certain period of time expire after the denial of an application before another application may be filed. We find no logical distinction between the Department of Banking and the Nebraska State Railway Commission as to the nature of their functions when they act upon an application to operate a business regulated under their respective jurisdictions, based upon a determination of public convenience and necessity. Both are administrative agencies charged with the regulation of specific businesses within specific statutory limits, and both exercise similar functions as to licensing, supervision, and regulation. This court has held in many different contexts that the doctrine of res judicata does not apply to the denial of an application by the Nebraska State Railway Commission. The case of Union Pacific R.R. Co. v. Nebraska State Railway Commission, 149 Neb. 575, 31 N. W. 2d 552, demonstrates the time frame reference of orders involving issues of public convenience and necessity. In that case, the Union Pacific Railroad Company made an application in 1943 to discontinue an agency station. The application was denied. In 1947, the railroad made another application which was also denied. In reversing the commission's ruling, this court said: "The ruling of the railway commission or of this court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented." See, also, Missouri Pacific R.R. Co. v. Zimmerman Feed Yards, 176 Neb. 501, 126 N. W. 2d 679; Holmberg v. Chicago, St. P. M. & O. Ry. Co., 115 Neb. 727, 214 N. W. 746.

Subsequent applications of the same nature involving issues of public convenience and necessity were considered in the case of Canada v. Peake, Inc., 184 Neb. 52, 165 N.W. 2d 587. There this court said: "An order of the Nebraska State Railway Commission is not res judicata as to another application of the same nature subsequently filed, nor does it require an independent proceeding." While the case might be distinguished on procedural grounds, it is nevertheless in point on the issue of res judicata.

While there is a great variance between courts as to the extent, if at all, that the doctrine of res judicata should be applied to administrative proceedings, there is thorough agreement that the doctrine should not apply to all administrative proceedings. Davis, Administrative Law Text (3d Ed., 1972), § 18.02, p. 360, states: "As a matter of principle, it is completely clear that the reasons behind the doctrine of res judicata as developed in the court system are fully applicable to *some* administrative proceedings. The reasons against a second litigation between the same parties of the same claims or issues are precisely the same for *some* administrative determinations as they are for most judicial determinations. The sound view is therefore to use the doctrine of res judicata when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in its favor." (Emphasis ours.)

It is not necessary to reach the issue of which administrative determinations may be subject to the doctrine of res judicata in order to determine that the reasons against invoking the doctrine here far outweigh those in its favor. We therefore hold that an order of the Department of Banking denying an application for a bank charter does not amount to an adjudication for the future and is not res judicata as to another application of the same nature subsequently filed.

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

AFFIRMED.

WHITE, C. J., and SPENCER, J., not participating.

NEBRASKA DEPARTMENT OF ROADS EMPLOYEES ASSOCIATION, AN UNINCORPORATED ASSOCIATION, ET AL., APPELLANTS AND CROSS-APPELLEES, V. DEPARTMENT OF ROADS, STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT.

205 N. W. 2d 110

Filed March 9, 1973. No. 38617.

1. **Court of Industrial Relations: Labor and Labor Relations.** 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.
2. **Court of Industrial Relations: Employer and Employee.** A uniquely personal termination of employment does not constitute an industrial dispute.
3. **Public Officers and Employees.** It is a settled principle that governmental employment, in the absence of legislation, can be revoked at the will of the appointing officer.
4. **Labor and Labor Relations: Employer and Employee.** No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization.
5. **Court of Industrial Relations: Jurisdiction.** Where the court has no jurisdiction of the subject matter of the action, all proceedings in such action are void.

Appeal from the Court of Industrial Relations. Affirmed.

Marti, Dalton, Bruckner, O'Gara & Keating and Douglas Marti, for appellants.

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.

WHITE, C. J.

This is an appeal from a judgment of the Court of Industrial Relations of the State of Nebraska dismissing, on jurisdictional grounds, an action by the Nebraska Department of Roads Employees Association and by Richard Kiernan, a member of that organization. This action was commenced following the discharge from employment of the plaintiff, Richard Kiernan, by Thomas D. Doyle, Director-State Engineer of the Department of Roads, on September 8, 1971. The Court of Industrial Relations decided the controversy on jurisdictional grounds, found that the issue involved did not constitute an "industrial dispute" within the meaning of section 48-810, R. S. Supp., 1972, and that therefore the court was without jurisdiction, and dismissed the petition. We affirm the judgment of dismissal by the Court of Industrial Relations.

In order to understand the precise issue involved in this case, it is necessary to narrate the general background of the controversy and the development of the tension or friction between the plaintiff Kiernan and Thomas D. Doyle, the State Engineer, from the month of January 1971.

In January of 1971 the plaintiff Kiernan became interested in forming an employees' organization within the Department of Roads. He began by distributing a petition around the central complex of the department in order to determine how many of his coworkers would be interested in joining such a union. Donald O. Swing, one of Mr. Kiernan's immediate superiors, learned of these organizational efforts and reported them to the administrative deputy state engineer, Roy Gardner. By February of 1971 the matter had come to the attention of State Engineer Doyle.

Between April of 1971 and August 1971 the plaintiff Kiernan actively participated in the affairs of the fledgling union, acting first as chairman of the "Steering Committee for the Formation of the Department of Roads

Employees Association," then as chairman of the "Constitutional Committee," and finally as chairman of the "Board of Directors" of the association. During this period Doyle was kept advised of the public activities of the union. A copy of each published notice or information letter to be circulated among the employees was delivered to Doyle's office by Kiernan marked "Mr. Doyle: For your information. Richard Kiernan."

The first confrontation between Doyle and Kiernan concerned a flier announcing the first organizational meeting of the association to be held on April 16, 1971, in the cafeteria of the Department of Roads central building. Kiernan was called into Doyle's office and was told that the association could not have the use of the cafeteria for the purpose of holding its meeting because, Doyle said, the notice specifically provided that no personnel with a rating of Grade V engineer or higher could attend, and that under the circumstances he could not allow such a meeting to be held. Doyle testified that he was not sure whether he had the right to allow a closed meeting to be conducted on state property.

At this same meeting Doyle advised Kiernan that the organization did not have permission to post its notices on the departmental bulletin boards, but that permission would be granted in individual situations if supervisory personnel were given an opportunity to examine the notices prior to posting. The organization chose not to post its newsletters or notices rather than submit to supervision, and all subsequent notices bear the legend "NOT FOR BULLETIN BOARD POSTING." Deputy state engineer Roy Gardner testified that Doyle prohibited such posting because to permit it "would have opened it up for any type organization to come out and make use of a bulletin board, he didn't want to give them the right and deny others."

In the ensuing months a series of meetings took place between Doyle and Kiernan. In August 1971 Kiernan was called into Doyle's office and questioned concern-

ing one of the constitutional committee's information letters. The letter, in urging department employees to join the new association, contained the following: "In ALL categories except one, Nebraska was below average. THE ONE EXCEPTION BEING THE OFFICE OF STATE ENGINEER. Nebraska did not rate better than 35th in any category and rated in the 40's in 16 categories." Doyle was sufficiently concerned by this newsletter that he prepared a rebuttal in the form of a comparison of the salaries of most of the fifty state highway department heads, and based it upon more recent information than that contained in the newsletter. Furthermore, Kiernan was called into Doyle's office and asked whether he had considered how this would affect his future with the Nebraska Department of Roads, or something to that effect.

On August 12, 1971, Doyle issued a memorandum to all employees of the Department of Roads in which he alleged that the new association was spreading information "which implies that a new grievance procedure has been established within the Nebraska Department of Roads." He warned the employees that the only proper grievance procedures were those provided by the Personnel System rules, and that future statements or representations by the association in this vein "should be critically examined before employees rely upon them to the extent that their legal rights thereunder might be placed in jeopardy." On August 15, 1971, Kiernan was elected chairman of the board of directors of the N.D.R.E.A., and the constitution and by-laws of that organization were adopted.

The controversy between Kiernan and Doyle finally came to a head in late August and early September of 1971. On August 28, 1971, Kiernan attended a meeting of the Professional Engineers in Government Section of the Professional Engineers of Nebraska. This was a closed meeting, and no press representatives were invited or present, nor was any publicity intended. At

one point in the meeting, after a discussion of the proper role for P.E.G. in future political appointments, Larry Brown, a Department of Roads employee, asked what P.E.G. intended to do about the State Engineer's situation. W. R. Meyer, Jr., chairman of the meeting, expressed the opinion that perhaps P.E.G. should have made some recommendations or taken some action at the time of the appointment, but that it was too late to take any such action now. Kiernan then stood up and commented that he felt Doyle was not qualified to hold the post of State Engineer, but agreed that it was probably too late to do anything about it at the time. According to Mr. Meyer, the entire discussion involved no more than 5 minutes, and Kiernan made no more comments at the meeting concerning Doyle.

Doyle learned of Kiernan's comments through Eldon Green, a personal friend of Doyle's who had attended the meeting. Doyle admits that neither Kiernan nor anyone else gave any publicity to the remarks made there.

On September 1, 1971, W. R. Meyer, Jr., was summoned to Doyle's office and asked if Kiernan had questioned Doyle's qualifications at the P.E.G. meeting. After receiving an affirmative reply, Doyle inquired whether Lyle Nelson or Russ Reinig, two other active members of the N.D.R.E.A., had said anything, to which Meyer replied that he did not believe so. Doyle mentioned no other names and never asked exactly what Kiernan said. Doyle indicated to Meyer that he was considering disciplinary action against Kiernan.

After a brief conference with Reinig, Doyle called Donald Swing, Kiernan's immediate superior, and asked him to accompany Kiernan and deputy state engineer Roy Gardner to his office. At the meeting, Doyle asked Kiernan if he had made the remarks in question and asked him if he would care to repeat or elaborate on such remarks. In answer to this question, Kiernan said, "I'll be honest, it is my contention that you're

not qualified to fill the position of Director-State Engineer, and it is my further contention that it was inappropriate for Governor Exon to have appointed you to that position." Kiernan made it clear that the opinion was based upon the fact that Doyle was not a civil engineer, and did not have the necessary education or experience to fill the job. No voices were raised during the discussion and there was nothing threatening or otherwise objectionable about Kiernan's demeanor.

Doyle told Kiernan that he did not believe Kiernan could conscientiously carry out his duties in view of his attitude, and at approximately 4:55 p.m. on that date he informed Kiernan that he was suspended as of 5 p.m. on that date. A letter of suspension was immediately prepared by Doyle. The letter recites the activities which took place at the meeting and advised Kiernan that the suspension would last until a final determination was made by Doyle within the next week to 10 days.

W. R. Meyer, Jr., testified that he went back to Doyle's office to inform him that Kiernan had not been the one to raise the subject of his qualifications at the meeting, but he arrived after the suspension had already taken place. He nonetheless advised Doyle of this fact, whereupon Doyle replied that it did not matter because Kiernan had already been suspended. Doyle never did inquire as to who brought up the subject.

Either late September 7th or early September 8th a letter of termination was sent to Kiernan by certified mail. The letter cited as reasons for the termination: "1. Direct insubordination 2. Conduct unbecoming a State employee 3. For the good of the classified service." On September 8th Doyle presented a speech to a Lancaster County Democratic luncheon which, as Doyle knew, was attended by local newspaper reporters. Even though it was unlikely that Kiernan had received formal notice of his termination, Doyle nonetheless announced his decision at the luncheon. Doyle went on to say

that "we can not afford obstructionists" in the Department of Roads and that "we are trying to identify (those persons who are not good, dedicated employees) to convince them of the administration's point of view or encourage them to seek employment elsewhere."

During the period after Kiernan's termination, Doyle made known his opinion that supervisory personnel should not belong to an organization such as the N.D.R.E.A., which also includes among its membership nonsupervisory personnel. During this period at least six supervisors who had been very active in the N.D.R.E.A. resigned from the organization.

The basic controversy here is whether or not the dismissal of the plaintiff Kiernan by Doyle under the circumstances above set forth involved an "industrial dispute" within the meaning of section 48-810, R. S. Supp., 1972, which gives *jurisdiction* to the Court of Industrial Relations *only* when such industrial dispute is involved. Section 48-810, R. S. Supp., 1972, 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." (Emphasis supplied.) From this language alone, it is clear that a uniquely personal termination of employment does not constitute an industrial dispute within the meaning of the statute. We are not called upon in this case to either explore or decide any possible close questions involving the precise meaning of the term "industrial dispute" in other factual contexts. The interest of a government employee in retaining his job can be summarily denied. It is a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. Jones v. Hopper, 410 F. 2d 1323 (1969), cert. den. 397 U. S. 991, 90 S. Ct. 1111, 25 L. Ed. 2d 399; Vitarelli v. Seaton, 359 U. S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012. Consequently, we are presented in this case with only a ques-

tion of fact. The Court of Industrial Relations is an administrative agency within the purview of the Administrative Procedures Act. School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N. W. 2d 752. On review de novo of the findings of an administrative agency granted the power to determine and dispose of industrial disputes, this court is without authority to interfere with that power unless it has been abused. Stated otherwise, if there is evidence in the record to support the administrative agency's findings and its determination is not unreasonable or arbitrary, this court is without authority to interfere with its judgment. The plaintiff Kiernan argues that the statute requires that appeals to this court shall be "heard and tried de novo." This is a familiar contention and has long since been disposed of in the cases in this court involving appeals from administrative agencies. We have recently held that this statutory provision refers to the procedure on the trial of the appeal rather than the standards of judicial review determinative of the appeal. T & N P Co., Inc. v. Nebraska Liquor Control Commission, *ante* p. 708, 204 N. W. 2d 809; Mid-Plains Education Assn. v. Mid-Plains Nebraska Tech. College, *ante* p. 37, 199 N. W. 2d 747 (1972); Keenan v. Keenan, 187 Neb. 686, 193 N. W. 2d 568 (1972); City of Lincoln v. Nebraska Liquor Control Commission, 181 Neb. 277, 147 N. W. 2d 803.

We again briefly review the pertinent evidence with relation to whether the determination of the Court of Industrial Relations is supported by the evidence. The evidence does disclose something more than the simple discharge of an employee by his superior. Of course, it is true, that there is no allegation that Kiernan's performance prior to the time he became involved in union activities was anything less than superior. But, as the court below noted in its findings and order, and as the evidence we have reviewed clearly demonstrates, there developed a substantial and apparently irreconcilable

personality conflict between Doyle and Kiernan. The court below said: "We do not analyze this evidence in detail nor reach a conclusion as to 'fault,' because interpreted most favorably to Mr. Kiernan it could only support the further inference that Mr. Doyle's letter purporting to remove Mr. Kiernan from his employment was motivated by *anti-Kiernan* animus rather than by anti-labor organization animus. It is clear that Mr. Kiernan gave no indication that he was acting or speaking for the Association when he did any of the things Mr. Doyle found offensive." (Emphasis supplied.)

We agree. We hold, as did the court below, that the discharge of Richard Kiernan from his employment from the State of Nebraska, Department of Roads, constituted a uniquely personal termination of employment and not an industrial dispute. The plaintiffs simply fail adequately to show reasons for the discharge other than the direct insubordination and a clear personality conflict between Doyle and Kiernan. Accordingly, the Court of Industrial Relations was correct in finding that it lacked jurisdiction over the subject matter of this action under section 48-810, R. S. Supp., 1972.

The same argument disposes of the plaintiffs' contention that Doyle's action in dismissing Kiernan violated rights guaranteed to Kiernan under Article XV, section 13, of the Constitution of the State of Nebraska, and section 48-837, R. S. Supp., 1972. The former provides: "No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization * * *." The latter provides: "Public employees shall have the right to form, join and participate in * * * any employee organization of their own choosing." The finding by the Court of Industrial Relations that no antiunion animus was shown to have prompted Kiernan's dismissal dictated a finding that Kiernan had not been denied rights under either of these provisions. The two findings rest

on the same factual base, and were necessary to determine the jurisdictional issue.

Since the court below lacked jurisdiction over the subject matter it was correct in refusing to decide whether or not Kiernan was in fact guilty of insubordination, or whether other constitutional violations were present. It is elementary that where a court has no jurisdiction over the subject matter of the action, the proceedings in such action are void. Wolski v. Lippincott, 147 Neb. 944, 25 N. W. 2d 754 (1947).

Since we have found that the court below had no jurisdiction over the subject matter, it is unnecessary for us to consider the other issues raised on this appeal or the cross-appeal. The judgment is correct and is affirmed, and the cross-appeal is dismissed.

AFFIRMED.

DENNIS R. EDELMAN, APPELLANT, V. RALPH PRINTING AND LITHOGRAPHING, INC., A CORPORATION, ET AL., APPELLEES.
205 N. W. 2d 340

Filed March 9, 1973. No. 38649.

Workmen's Compensation: Employer and Employee. Under the Workmen's Compensation Act if an employee accepts any payment from his employer or from any insurance company carrying the risk, on account of personal injury, such action ordinarily constitutes a release to the employer of all claims or demands at law, if any, arising from the injury.

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

Daniel G. Dolan of Lathrop, Albracht & Dolan, for appellant.

C. L. Robinson of Fitzgerald, Brown, Leahy, McGill & Strom, for appellees.

Heard before WHITE, C. J., BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ., and RONIN, District Judge.

SMITH, J.

A personal injury action by an employee against his employer under statutory requirements relating to safety devices for machinery was dismissed on demurrers. A ground of dismissal was failure of plaintiff's amended petition to state a cause of action.

Plaintiff appeals, assigning for error the ruling as follows: "The trial court erred in sustaining the demurrer . . .; the legislature may not constitutionally bar the plaintiff's cause of action under the Factory Act." See §§ 48-409 and 48-422, R. R. S. 1943.

According to the amended petition, the employer, Ralph Printing and Lithographing, Inc., in 1967 had installed a printing machine equipped with guards for the printing cylinders. Ralph Printing voluntarily removed these guards in spite of the opposite recommendation by the manufacturer. On December 20, 1971, plaintiff, an employee of Ralph Printing since May 1971, sustained the personal injuries which the removal of the guards caused.

The amended petition also alleged the following facts. Plaintiff had never elected not to become subject to the Workmen's Compensation Act. The workmen's compensation carrier of Ralph Printing, on account of the injuries, had paid total temporary benefits of $802 to plaintiff and medical expenses of $12,853.65.

The amended petition attacked the constitutionality of only one provision of the Workmen's Compensation Act, namely, the section that denied recovery under the act to an employee injured by reason of his intentional willful negligence or intoxication, section 48-127, R. R. S. 1943. The provision, plaintiff alleged, denied him equal protection of the law.

The Workmen's Compensation Act provides as follows: "If any employee . . . accepts any payment from such employer, or from any insurance company carrying such risk, on account of personal injury . . ., such action shall constitute a release to such employer of

all claims or demands at law, if any, arising from such injury." § 48-148, R. R. S. 1943.

Recovery under the factory act was denied in Navracel v. Cudahy Packing Co., 109 Neb. 506, 191 N. W. 659 (1922), on the ground of the employee's election to be subject to the Workmen's Compensation Act. To the extent it may imply a necessarily different result under the Workmen's Compensation Act compulsory upon the employee, we disapprove it. Section 48-148, R. R. S. 1943, is effective whether the Workmen's Compensation Act is voluntary, semi-voluntary, or compulsory.

It is immaterial whether section 48-127, R. R. S. 1943, is constitutional. The payment of benefits and medical expenses by statute released Ralph Printing from the present claim. The amended petition alleged nothing to render section 48-148, R. R. S. 1943, inoperative.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN MEDINA, APPELLANT.
204 N. W. 2d 785

Filed March 9, 1973. No. 38655.

1. **Criminal Law: Evidence: Confessions.** Where evidence as to what occurred immediately prior to and at the time of the making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducements or threats, the confession is voluntary and may be received.
2. **Criminal Law: Evidence: Appeal and Error: Confessions.** A finding that a statement of an accused is voluntary will not ordinarily be set aside unless the finding is clearly erroneous.
3. **Trial: Evidence: Appeal and Error.** If there is any element of science or skill in a matter being investigated before a trial jury, it is not reversible error for the court to admit expert testimony thereon, even though the element of science is slight.
4. **Criminal Law: Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears in the record.

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

Charles F. Fitzke and James T. Hansen, for appellant.

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

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

WHITE, C. J.

The defendant was charged with second degree arson in the burning of a lumber shed owned by the S & V Lumber Company of Minatare, Nebraska. Upon a trial of the case in the district court for Scotts Bluff County, the jury returned a verdict of guilty and the defendant was sentenced to 1 to 2 years in the Nebraska Penal and Correctional Complex. We affirm the judgment and sentence of the district court.

The defendant's first contention on appeal is that the confession given by him to the sheriff after he had been arrested was involuntary and therefore the failure to exclude the confession from the evidence was error.

The record shows that the defendant signed two separate waivers of his rights after these rights had been read and explained to him, and he then proceeded to confess to the act of arson. No instances of improper inducements or threats or use of violence were cited by the defendant as occurring prior to or during the taking of this confession. The defendant's contention that the confession was involuntary rests solely upon his statements at trial to the effect that he was "pretty will shook up" and under pressure when the confession was taken.

The record shows that at no time did the defendant testify that the confession was anything but free and voluntary. Nevertheless, the jury was very thoroughly instructed that before it could consider the confession it must first find that the confession was freely and voluntarily given. The term "freely and voluntarily," was defined. to which no objection was made by the defendant. The court also instructed the jury as to what the

defendant's rights were and before it could consider the confession it must find that the defendant was first advised of these rights.

Where evidence as to what occurred immediately prior to and at the time of the making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducements or threats, the confession is voluntary and may be received. State v. Ransom, 182 Neb. 243, 153 N. W. 2d 916; State v. Erving, 180 Neb. 824, 146 N. W. 2d 216. In the instant case, witnesses were called to relate the circumstances surrounding the taking of the defendant's confession and the confession was then admitted into evidence over the defendant's objection. The admission of the confession into evidence shows the trial court's independent determination that the confession was voluntary. State v. Davis, 180 Neb. 830, 146 N. W. 2d 220; State v. Erving, *supra*. A finding that a statement of an accused is voluntary will not ordinarily be set aside unless the finding is clearly erroneous. State v. Holland, 183 Neb. 485, 161 N. W. 2d 862. Not only is the trial court's finding of voluntariness supported by the evidence, and not clearly erroneous, but the record in this case indicates that there is no evidence to support the defendant's contention that the confession was made involuntarily. There is no merit to this assignment of error.

The defendant next assigns as error the trial court's refusal to exclude testimony by an expert witness, a deputy state fire marshal, that the fire at the lumber shed could possibly have been started by dropping a burning paper sack on a pile of sawdust, as claimed by the State's witness. The defendant asserts that the expert in so testifying was allowed to suggest and lend support to a conclusion which the jury alone was to accept or reject. The expert did not, however, render an opinion upon the ultimate question before the jury, i.e., whether or not the fire was of incendiary origin, but instead merely testified that the State's theory of the

origin of the fire was not an impossible one. If there is any element of science or skill in a matter being investigated before a trial jury, it is not reversible error for the court to admit expert testimony thereon, even though the element of science is slight. Clawson v. State, 96 Neb. 499, 148 N. W. 524.

The defendant next attacks the sufficiency of the evidence to sustain a verdict. A sufficient answer to this contention is that not only was there testimony of an eyewitness, Tryon, as to how the fire was or may have been started by the defendant, but there is also the confession of the defendant given to the sheriff after a full and complete statement having been given to the defendant as to his rights. The evidence was not only sufficient to sustain the verdict but was far short of a "total failure of competent proof" necessary to justify the trial court in directing a verdict of not guilty. State v. Martin, 177 Neb. 209, 128 N. W. 2d 583; State v. Chaney, 184 Neb 734, 171 N. W. 2d 787.

The defendant's final contention is that the sentence of 1 to 2 years is excessive. The statute, section 28-504.02, R. R. S. 1943, provides for a penalty of not less than 1 nor more than 10 years. It is almost apparent on its face that the sentence imposed could not be "excessive." We observe that the court had available to it a presentence investigation, and there is no evidence in this record of any nature whatsoever of an abuse of discretion by the trial court in imposing the sentence that it did. A sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears in the record. State v. Etchison, 188 Neb. 134, 195 N. W. 2d 498; State v. Meloy, 188 Neb. 98, 195 N. W. 2d 173. There is no merit to this contention.

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

AFFIRMED.

CARL KENT ET AL., APPELLANTS, V. INSURANCE COMPANY OF NORTH AMERICA ET AL., APPELLEES.
205 N. W. 2d 532

Filed March 16, 1973. No. 38602.

Insurance. Where two fire insurance policies issued by different insurers to a common insured each contain prohibitions against other insurance and a prorating clause, but no express provision voiding the policy for a violation of the prohibition nor suspending the coverage during the time of violation, both policies remain in force and the prorating clauses apply to any covered loss.

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

Respeliers & DiMari, for appellants.

Haney, Wintroub & Haney and John R. Douglas of Cassem, Tierney, Adams & Henatsch, for appellees.

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

CLINTON, J.

The plaintiffs appeal from an order overruling their motion for a new trial which motion followed an order of the district court granting the separate motions of the two defendant insurance companies for judgment on the pleadings and dismissing the plaintiffs' petition.

Plaintiffs on December 13, 1968, were the owners of certain household goods and personal property which on that date were damaged or destroyed by fire. They had previously procured from the defendant The Travelers Insurance Company a policy of fire insurance which, among other things, insured the property for loss or damage to a limit of $13,500. The term of the policy was 4-15-66 to 4-15-69 and the premiums had been paid for the whole policy period. On December 1, 1968, they had procured a policy of insurance from Insurance Company of North America which, insofar as is pertinent here, covered the same property against

the same hazard but in the amount of $17,000. Each company denied liability and the plaintiffs brought action against both companies for the claimed damages in the amount of $11,128.36, and asked for judgment pro rata against both companies.

The petition made the foregoing factual allegations and in addition pleaded and incorporated by reference the two fire insurance policies. Both policies contained the following almost identical provisions.

Travelers

"5. Certain Other Insurance Not Permitted: Other Insurance covering the property insured is not permitted, except against losses not insured against under this policy or unless this policy is otherwise endorsed.

"6. Other Insurance:

"a. Section I—Loss by fire . . .: The Travelers shall not be liable for a greater proportion of any loss from any peril or perils included in this policy than (1) the applicable limit of liability under this policy bears to the whole amount of fire insurance covering the property, or which would have covered the property except for the existence of this insurance, whether collectible or not, and whether or not such other fire insurance covers against the additional peril or perils . . . ."

Insurance Company of North America

"h. Other Insurance . . .

"(Applicable to Tenants Forms) Other insurance covering the property insured hereunder (except insurance against perils not covered by this policy) is not permitted.

"g. Apportionment Clause: This Company shall not be liable for a greater proportion of any loss from any peril or perils (except loss by theft) than (1) the amount of insurance under this policy bears to the whole amount of fire insurance covering the property, whether collectible or not, and whether or not such other fire insurance covers against the additional peril or perils insured hereunder . . . ."

The answer of Travelers admitted issuance of the policy subject to "the conditions and exclusions of the policy." It alleged certain affirmative defenses which are not necessary to note at this point. The answer of INA admitted issuance of its policy and made certain other allegations of fact which are controverted in the plaintiffs' amended reply but which need not be noted at this time.

Both defendants then filed motions for judgment on the pleadings. A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only a question of law is presented. Board of Trustees of York College v. Cheney, 160 Neb. 631, 71 N. W. 2d 195.

Travelers and INA each contend that by virtue of the first quoted provisions of their respective policies there was no effective insurance in force on the date of the loss. Travelers asserts that when plaintiffs procured the INA policy, the policy issued by Travelers became void or voidable at its election. INA specifically relies upon our holding in Quisenberry v. National Fire Ins. Co., 132 Neb. 793, 273 N. W. 197, where we held that the subsequent policy did not go into effect where it contained a provision limiting the total amount of insurance to $2,800 and the total amount of insurance exceeded that amount. Our holding in that case was premised on the theory that compliance with the provision was a "condition precedent" to the effectiveness of the policy. They both contend the provision for apportionment is intended to be applicable only if other insurance has been permitted by endorsement. If their common contentions are correct, then only a question of law is presented and the motions for summary judgment were properly sustained. The other factual issues would be immaterial. If their contentions are not correct then it would be necessary to consider whether the pleadings raise material factual issues which would require trial.

In addition to Quisenberry v. National Fire Ins. Co., *supra,* INA cites Newman v. National Union Fire Ins. Co., 122 Neb. 94, 239 N. W. 464; Slobodisky v. Phenix Ins. Co., 52 Neb. 395, 72 N. W. 483 (1897); Home Fire Ins. Co. v. Wood, 50 Neb. 381, 69 N. W. 941 (1897); Hughes v. Insurance Co. of North America, 40 Neb. 626, 59 N. W. 112 (1894); and Meyers v. German Fire Ins. Co., 101 Neb. 855, 166 N. W. 247 (1917). In those cases we have upheld the validity of policy provisions which provided that the policy would be void if additional insurance existed or was obtained. Slobodisky v. Phenix Ins. Co., *supra;* Home Fire Ins. Co. v. Wood, *supra;* Hughes v. Insurance Co. of North America, *supra.* In Meyers v. German Fire Ins. Co., *supra,* and Newman v. National Union Fire Ins. Co., *supra,* the opinions do not set forth the language of the first policy. We have held that in the absence of waiver or estoppel the violation of the condition against other insurance made the policy voidable only. It appears that in the cases just referred to the policy issued by one of the insurers either did not have a similar provision or the company did not rely on it if it did. The validity of such provisions has been almost universally upheld at least where the provision itself expressly made the policy void or provided that the company should not be liable while other insurance exists.

Travelers or INA or both cite the following cases: Northwestern Fire & Marine Ins. Co. v. Peek, 89 Ga. App. 105, 78 S. E. 2d 879; Roach v. Arkansas Farmers Mut. Fire Ins. Co., 216 Ark. 61, 224 S. W. 2d 48; American Ins. Co. v. Prine, 244 Miss. 69, 140 S. 2d 284; Farmers Mut. Ins. Co. v. Summers, 143 Ind. App. 450, 241 N. E. 2d 154. In each of these cases the policy, in addition to prohibiting other insurance, also contained express provisions either making the policy void or suspending coverage if the prohibition was violated. In Hunter v. United States Fidelity & Guaranty Co. (Fla.), 86 S. 2d 421, the policies contained, immediately

following the sentence prohibiting other insurance, the following: "This Company shall not be liable for loss while the Insured shall have any other fire insurance prohibited by this policy." An examination of numerous other cases discloses similar language.

There are cases, however, which hold that a violation by the insured of the prohibition against other insurance permits the insurer to elect to void the policy even in the absence of an express provision making the policy void or suspending the coverage. Such cases are Aetna Ins. Co. of Hartford, Conn. v. Jeremiah, 187 F. 2d 95; Zepponi v. Home Ins. Co., 248 Miss. 828, 161 S. 2d 524; Northwestern Fire & Marine Ins. Co. v. Peek, *supra*. In none of these cases does it appear that the policy contained pro rata clauses such as we have here. In any event, the possible effect of such a clause on the determination of the effect of the prohibition was not discussed. In none of our own cases, cited by the parties, have we had occasion to consider the question.

The courts which have had occasion to consider the various problems which arise where both policies contain provisions prohibiting other insurance and include an "escape" clause of some nature have reached a variety of results. Some say the first policy remains in effect on the theory that it was, of course, valid when issued, the second policy was void ab initio, and therefore the prohibition in the first policy was not violated and there was nothing to escape from. Quisenberry v. National Fire Ins. Co., *supra*. Others have held that the first policy is voided and the second one is valid. The reasoning in these cases is obscure. Others give effect to both escape clauses. Still others, as in Aetna Ins. Co. of Hartford, Conn. v. Jeremiah, *supra*, both policies were declared void even though there was no escape clause.

In the policies we have under consideration here, two things we believe are significant. The first is the

absence of an express provision voiding the policy or suspending coverage if the other insurance exists or is procured. Such express "escape" provisions seem to have been usual. The second is the positioning of the pro rata clause with reference to the clause prohibiting other insurance. In the Travelers policy these clauses were positioned as we have quoted them. In the INA policy the positioning is reversed. If the insurer in this case had intended that a violation of the prohibition makes the policy void or suspends the coverage it would have been a simple matter to say so. The placing of the pro rata clause immediately after or before the prohibition leads to the conclusion that it was intended to apply if a violation existed or should later occur. It seems to us the policies were designed to avoid the harsh results of such cases as Aetna Ins. Co. of Hartford, Conn. v. Jeremiah, *supra;* and National Union Fire Ins. Co. of Pittsburgh v. Howard (Ky.), 347 S. W. 2d 510; where both policies were declared void. In the first case the carrying of two policies of insurance was apparently inadvertent. In the second a replacement of one of the two policies contained a prohibition against other insurance whereas the policy replaced had no such provision.

The provisions we are here considering also seem designed to avoid the evils of excessive coverage which gave rise to the prohibition and the avoidance clauses in the first instance. They also seem adapted to eliminating problems which rise in connection with the statutes of this state and others, such as sections 44-601 to 44-603, R. R. S. 1943, which prohibit the knowing issuance or procurement of fire insurance policies for amounts exceeding the fair value of the property. If the issuance of a second policy automatically prorates any loss then there is never any excessive coverage nor any possible violation of these statutes.

The language of these policies also would seem to solve problems which arise out of or prevent the evils

of excessive coverage where there are two or more policies of insurance, which contain varying provisions as to other insurance or no such provisions at all. The latter was the fact in some of the older cases decided by our court.

The cases we have cited and others we have read indicate a variety of situations and results, but we hypothesize just one by way of illustration. Assume that Travelers had the identical provision contained in the policy at hand and the INA policy contained specific provision avoiding coverage but no applicable pro rata clause. In such instance Travelers' policy pro rata provision avoids the evils of excessive coverage because it would pay only pro rata, even though under the assumed provisions of the INA policy under the uniform holdings of this court nothing would be collectible from INA. The language in the Travelers' pro rata clause "whether collectible or not" seems, among other things, designed to that end. The phrase in that policy "which would have covered the property except for the existence of this insurance" seems actually to contemplate the situation where the "other" insurance policy contains an "escape clause," in which instance Travelers provides pro rata coverage. This read together with the absence of an escape clause in its own policy would clearly seem to negative any intention that its own provision against other insurance constitutes an "escape" in and of itself.

In the assumed situation the careless insured pays an appropriate penalty and motivation for overinsuring is removed. We must assume that the insured reads and understands the pro rata provisions which do in fact seem quite clear. Provisions such as those in the policies we are considering avoid the gross inequities which may occur when an honest but unwitting insured changes from one insurer to another and there is some overlap in the policy periods, and the loss occurs during the overlap.

The language of these policies seems to us expressly designed to solve the incipient and growing schizophrenia which overwhelms both the insurer and the courts as is evidenced by the excellent summary of the problems in the notes in 12 Stanford Law Review, p. 498, and 38 Texas Law Review, p. 252.

Problems similar to those we have discussed have arisen in connection with liability policies. In this connection after discussing the situation where there is an avoidance of both policies by an escape clause common to both at 8 Appleman, Insurance Law and Practice, § 4912, p. 384, the following observation is made: "It should be noted, however, that the tendency of the more recent policy forms is to avoid such harsh results by the use of clauses which either provide for prorating losses," or otherwise define the coverage.

The commendable objectives which the policy clauses here involved seem expressly designed to accomplish should not be defeated nor the insurer be given the best of both worlds by applying the principles of our old cases, which remain in good standing, to the very different policy provisions which we have here.

We hold that where two fire insurance policies issued to a common insured each contain prohibitions against other insurance and a pro rating clause, but no express provision voiding the policy for a violation of the prohibition nor suspending the coverage during the time of violation, both policies remain in force and the pro rating clauses apply to any covered loss.

One objection by Travelers must be answered. It contends that under the precise language of its policy which provides for endorsing permissions for other insurance the pro rata clause is intended to be applicable only in the case a permission to procure other insurance is endorsed on the policy. It cites Meyers v. German Fire Ins. Co., 101 Neb. 855, 166 N. W. 247.

It is no doubt true that the pro rata clause would apply in case additional insurance had been permitted

by endorsement, but it is not so limited by its language. It would have been simple for the insurer to have provided appropriate limiting language had it so desired. The provision must be construed against the insurer under the usual standards applicable to ambiguous provisions. Meyers v. German Fire Ins. Co., *supra,* is not applicable here where the prohibition against other insurance does not make the policy voidable but is construed with the pro rata clause.

The motions for judgment on the pleadings were improperly granted. The judgment must be reversed and the cause remanded for further proceedings, including the resolution of other issues raised by the pleadings which, in view of our holding, now become material. We note, however, that in the light of our holding it would seem that any issue raised with reference to whether or not INA had knowledge of the Travelers policy at the time it issued its own would not be material.

REVERSED AND REMANDED.

MARGARET JACKSON, APPELLANT, V. CLAIRE EICHENBERGER ET AL., APPELLEES.

205 N. W. 2d 349

Filed March 16, 1973. No. 38641.

1. **Adverse Possession: Landlord and Tenant.** Where possession of real estate is entered upon under an agreement with the owner with reference to the occupancy and not as owner, the occupant cannot assert ownership by adverse possession unless he first surrenders his possession, or by some unequivocal act notifies the landlord that he no longer holds under the agreement made.
2. ———: ———. The mere nondemand and nonpayment of rent are not sufficient to bar the landlord's title.

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

Laurice M. Margheim of Bump & Bump, for appellant.

Michael V. Smith, for appellees.

Heard before WHITE, C. J., BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ., and HASTINGS, District Judge.

HASTINGS, District Judge.

Plaintiff brought this action to quiet title to certain real estate claiming adverse possession as against defendants who are the record titleholders. The trial court found in favor of defendants and against plaintiff, and ordered that plaintiff's action be dismissed. Plaintiff appeals.

The land in dispute is a quarter section of grass land located in the geographic center of Section 27. It was patented to Susan Wilson, of whom the defendants are the only living heirs. The remainder of Section 27 was owned and occupied by James Jackson until his death in 1936, and was occupied by his son Lyle and Lyle's wife, the plaintiff, until she moved to town in 1970, Lyle having died in 1963. The disputed land was not listed in the estate inventory of either James or Lyle Jackson, although the remainder of the section was inventoried in both estates and is now owned of record by plaintiff.

The disputed land has been used by the Jackson family from 1917 to the present time, apparently beginning on some sort of a lease arrangement.

Isaac Jackson, the 80-year-old brother of Lyle, testified that he lived on Section 27 until 1918; that his father James owned all the section except the disputed quarter; that as administrator of his father's estate he paid rent on the interior quarter, and later just paid the taxes. He stated that the arrangement for the land was "$30 a year, and I paid the taxes, and I sent them the rest." He sent the balance to A. E. and I. E. Deal, who apparently were intermediate heirs of Susan Wilson, and "It went into another estate, and I didn't

know where to pay it to, so I just paid the taxes." The James Jackson estate was closed in 1944 and the witness had nothing further to do with the land after that.

Commencing in 1945 the taxes were paid by Lyle until his death in 1963, following which his son Joe, as executor of his estate, paid the taxes until 1966 when he allowed them to become delinquent, and then secured a county treasurer's certificate of tax sale at private sale in November of 1967.

Plaintiff testified that her husband farmed the entire section as one unit and it was not until just before Lyle's death that she knew the interior quarter was titled in someone else's name.

Defendants were aware that Susan Wilson, their first cousin, had owned the property at one time but it was not until Joe had caused a notice to be published in the fall of 1969 preparatory to obtaining a tax deed that they were aware the property was still titled in her name. They then had a court determination of heirship and redeemed the property from the tax sale. When efforts to negotiate a sale or lease of the property between the parties failed, this action was commenced.

Simply stated, plaintiff and her predecessors entered upon the premises under some sort of lease agreement and continued to occupy and use the premises in the same manner up to the time this action was commenced. They complied with one requirement of the agreement, that of paying taxes, which plaintiff now urges as a circumstance to be considered in support of her claim of adverse possession.

The following quotation from Koch v. County of Dakota, 151 Neb. 506, 38 N. W. 2d 397, is particularly pertinent: " 'Where possession of real estate is entered upon under an agreement with the owner with reference to the occupancy and not as owner, the occupant cannot assert ownership by adverse possession unless he first surrenders his possession, or by some unequiv-

ocal act notifies the landlord that he no longer holds under the agreement made.' Garner v. McCrea, 147 Neb. 541, 23 N. W. 2d 731.

"Interveners argue that the refusal to pay the rent in 1937 constitutes the unequivocal act; * * *.

"It has been held as well settled that '* * * when the relation of landlord and tenant has been created, the possession of the tenant is consistent with the title of the landlord, and the mere non-demand and non-payment of rent, are not sufficient to bar the landlord's title * * *. In such cases, possession is presumed to be in accordance with the title, and this presumption will hold until some notorious and unequivocal act of exclusion shall have occurred.' Ehrman v. Mayer, 57 Md. 612. See Barada-Ghio Real Estate Co. v. Keleher (Mo.), 214 S. W. 961."

Plaintiff in this case neither first surrendered possession nor acted unequivocally to notify defendants that she was now holding adversely to their interests. The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIE CRENSHAW, APPELLANT.
205 N. W. 2d 517

Filed March 16, 1973. No. 38658.

1. **Criminal Law: Insane Persons: Trial.** The test of mental competency to stand trial is whether the defendant has capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to such proceedings; and to make a rational defense.
2. ———: ———: ———. If facts are brought to the attention of the court which raise a doubt as to the sanity of the defendant, the question of competency should be determined at that time.
3. ———: ———: ———. The question of competency to stand

trial is one of fact to be determined by the court and the means employed in resolving the question are discretionary with the court.

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

Donald C. Hosford, Jr., 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.

BOSLAUGH, J.

The defendant was convicted of shooting with intent to kill, wound, or maim. He was sentenced to 10 to 15 years imprisonment on March 4, 1970. No appeal was taken from that judgment. A motion to vacate the conviction and sentence was filed on March 3, 1971. After an evidentiary hearing, the trial court found the motion should be denied. The defendant appeals.

The principal issue is whether the defendant was competent to stand trial at the time of his conviction in 1970. The defendant was represented by the public defender throughout the original proceeding but the question of mental competency was not raised at that time.

The defendant does not contend that the conviction and sentence necessarily were void, but rather that the evidence creates a sufficient question to warrant a hearing on the issue of competency. An evidentiary hearing was held on the motion to vacate, and the evidence presented at that hearing is before us for review at this time.

The test of mental competency to stand trial is whether the defendant has capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to such proceedings; and to make a rational defense. State v. Klatt, 187 Neb. 274, 188 N. W. 2d 821.

If facts are brought to the attention of the court which raise a doubt as to the sanity of the defendant, the question of competency should be determined at that time. State v. Anderson, 186 Neb. 435, 183 N. W. 2d 766; State v. Boston, 187 Neb. 388, 191 N. W. 2d 452. The question of competency to stand trial is one of fact to be determined by the court and the means employed in resolving the question are discretionary with the court. § 29-1823, R. S. Supp., 1972; State v. Anderson, *supra*.

At the hearing on the motion to vacate, the defendant testified by deposition and offered the affidavits of five prisoners who had observed him while he was being held in the Douglas County jail or in the Nebraska Penal and Correctional Complex. The affidavits state, in substance, that the defendant appeared to be confused, hallucinating, and without understanding of what had happened.

The record contains a report which shows the defendant was confined in the Lincoln Regional Center from April 16, 1970, to July 31, 1970. The report of the psychiatrist, made at the time of the defendant's discharge to the penal complex, states that "he showed more mental retardation than actual schizophrenia."

Joseph Moylan, who represented the defendant at the trial in 1970, testified the defendant was sullen and uncommunicative; was difficult to understand; and appeared to have a speech impediment. However, the defendant appeared to be rational; was able to recall what had happened at the time of the offense; and indicated the witnesses he wanted called at the trial. Moylan was not aware of anything that would question the competency of the defendant to stand trial.

It is significant that there is no evidence the trial court in the original proceeding entertained any doubt as to the defendant's competency to stand trial. Also, there is no suggestion that any of the psychiatrists who have examined the defendant thought he should not have stood trial.

The defendant has both a lack of normal mental ability and some derangement of the mind. However, this does not establish a lack of competency to stand trial. The record supports a finding that the defendant had the capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to the proceedings; and to make a rational defense. Upon the record before us, the defendant was not entitled to a vacation of the conviction and sentence.

The defendant also contends that he was denied his right to appeal. In this respect the record shows a motion for new trial was filed; the trial court advised the defendant that he had a right to appeal; and defendant's counsel did not withdraw. There is no evidence that the defendant requested an appeal be taken. Defendant's counsel testified affirmatively that he thought an appeal would have been without merit. These circumstances do not show a denial of the right to appeal.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD E. WRIGHT, APPELLANT.
205 N. W. 2d 351

Filed March 16, 1973. No. 38662.

Evidence: Trial: Words and Phrases. The underlying principle of relevance is logical probative value.

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

Frank B. Morrison, Sr., and Lynn R. Carey, Jr., for appellant.

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

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

CLINTON, J.

Defendant was convicted by a jury on a charge of shooting with intent to kill, wound, or maim. The sole question on appeal is whether the trial court erred in admitting certain physical evidence, to wit, the weapon allegedly used and certain shell casings and slugs. The claim is a lack of foundation in that the exhibits are not sufficiently connected to the defendant. The assignment is not well taken and the judgment and sentence are affirmed.

The evidence shows the defendant was tied to the crime by motive, virtual identification by his estranged wife, admissions made to his wife in a telephone conversation after the shooting, and flight. The identification testimony was that she saw a person leaving the scene who appeared to be her husband. This was during hours of darkness. She did not see his face and the identification was based upon clothing and general appearance. She was within a few feet of him, looking through a window in the front door.

The physical evidence consisted of a .22 caliber hand gun, five .22 caliber shell casings, and three .22 slugs, one of which was removed from the victim's head and two from the mattress on which the victim was lying. The victim was the defendant's 4-year-old daughter. The evidence would support the conclusion the wife was the intended victim. It was her practice to watch television while lying on a bed adjacent to the window through which the shooting occurred.

The weapon was given to the police by the defendant's step-father at the step-father's home within 2½ hours of the time the defendant was apprehended there and from which place he sought to flee when the police came to arrest him. The casings were found outside the window through which the shooting occurred. A

ballistics expert with the Federal Bureau of Investigation testified that the casings had been fired in the hand gun and that the slugs, which bore rifling characteristics similar to the characteristics of the rifling in the weapon could have been fired from the weapon, but because the slugs were mutilated he could not positively so testify.

The identification, motive, admissions, and flight tie the defendant to the crime. The casings and the slugs and the expert testimony tie that physical evidence to the crime. The casings and the slugs and the expert testimony connect the gun with the crime. Taken together, the connection of the physical evidence to the defendant was clearly sufficient to justify its admission.

The underlying principle of relevance is logical probative value. McCormick, Handbook of the Law of Evidence, § 151, p. 314.

AFFIRMED.

CHARLES ROUSH ET AL., APPELLEES, V. NEBRASKA PUBLIC POWER DISTRICT, FORMERLY CONSUMERS PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.
205 N. W. 2d 519

Filed March 16, 1973. No. 38666.

1. **New Trial.** Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.
2. **New Trial: Motions, Rules, and Orders.** The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion.
3. **Trial: Verdicts.** 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.
4. **New Trial: Appeal and Error.** The ruling of the trial court on

a motion for a new trial is subject to review in the Supreme Court.

5. **New Trial: Appeal and Error: Motions, Rules, and Orders.** Whether the decision was to grant a new trial or deny one, the questions in the Supreme Court are, do the alleged error or errors appear in the record, were they called to the attention of the trial court by the motion, and do they constitute prejudicial error to the party complaining.
6. **New Trial: Appeal and Error.** Rules of law will be applied to those assignments of error in the Supreme Court with the same requirements whether the decision granted or denied a new trial.
7. ———: ———. An order granting a new trial will be scrutinized in the Supreme Court with the same care as one denying a new trial.

Appeal from the district court for Saline County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Steinacher & Vosoba and Wilson, Barlow & Watson, for appellant.

Ach & Ach and Christensen & Glynn, for appellees.

Heard before WHITE, C. J., BOSLAUGH, SMITH, MCCOWN, NEWTON, and CLINTON, JJ., and RONIN, District Judge.

CLINTON, J.

This is an appeal by the condemner in an eminent domain action in which it had acquired an easement for an electrical transmission line across a 120-acre tract of farmland. The question for jury determination was the difference in value of the land before and after the taking. The jury found the damages to be $5,002. The question presented here is whether the trial court erred in granting the condemnees' motion for a new trial. The answer depends upon whether or not the determination made by the trial court that it had committed prejudicial error in overruling the condemnees' objection to a question asked on cross-examination is correct.

One of the condemnees, a coowner of the land, had

testified to the value of the land at the time of taking. On cross-examination he was asked what per acre valuation he had used and he answered $700. He was then asked: "By the way, Mr. Roush, what did you pay for the land in 1962, how much per acre did you pay for it?" Objection was made on the grounds of remoteness of time and lack of foundation. The objection was overruled and the witness answered, "$22,500." The trial court immediately instructed the jury to take into consideration the fact that the purchase was 8 or 9 years before the taking. All the above occurred at the end of the first day of the 4-day trial.

The following morning before any testimony was heard the court orally instructed the jury as follows: "You probably recall this court allowed evidence of an original purchase price yesterday. You are instructed that the court was—made a mistake by allowing it in and that testimony about the original purchase price should be put out of your minds, discarded, and I plead with you at this point unless it is gotten into evidence at some later time not to consider it in any fashion and completely disregard it. It is a very difficult thing for you to do but that is the law." The condemnees considered the cautionary instruction inadequate and moved for a mistrial which was denied. After the verdict the court granted condemnees a new trial.

As a general rule, evidence of sales of the identical property involved in the eminent domain proceedings is admissible as evidence of market value, provided an appropriate foundation is first laid to show the materiality and relevance of the sale as by showing the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. To a large degree admissibility is within the discretion of the trial court. Schmailzl v. State, 176 Neb. 617, 126 N. W. 2d 821; 1 Orgel on Valuation Under Eminent Domain, p. 581. In this

instance we assume the ruling was erroneous because of remoteness and lack of foundation, and will confine ourselves to considering the question of whether the error was prejudicial. This requires a consideration of the issue the jury was to determine, the instructions pertaining thereto, and the admonitions of the court to the jury to disregard the evidence of purchase price, all in the light of the other evidence of value and damages.

The court instructed properly on the measure of damages as follows: "Just compensation means the difference, as of July 10, 1969, between the fair and reasonable market value of the property before the easement was taken and the fair and reasonable market value of the property after the easement was taken. . . . You must return a verdict for said plaintiffs which in your opinion represents that sum of money which will justly compensate plaintiffs so that they will be neither richer nor poorer by reason of the taking of the easement." Fulmer v. State, 178 Neb. 664, 134 N. W. 2d 798.

There was evidence before the jury which showed the condemnees had after acquiring the land substantially improved it by putting a well on it and adapting it to gravity irrigation. The evidence on before and after value was as follows:

Witness	Value Before	Value After	Damage
Owner's tenant	$86,400	$66,000	$20,400
Owner	84,000	64,800	19,200
Owner's expert witness #1	87,600	69,600	18,000
Condemner's witness #1	72,000	67,500	4,500
Condemner's witness #2	60,000	55,500	4,500
Condemner's witness #3	60,000	58,200	1,800

The foregoing summary makes it clear it is undisputed that the value of the property before the taking on July 10, 1969, was at least $60,000. It appears impossible to determine in what way the admission of the evidence

of a $22,500 purchase price in 1962, some 6 or 7 years earlier, might or could have been applied by the jury in determining the difference in value before and after the taking in 1969 since the undisputed evidence shows the land had been improved and the market value had risen, and the issue which the jury was to determine was clearly defined and could not have been misapprehended by them.

The condemnees cite, and apparently the trial court relied upon, the case of Dietrichs v. Lincoln & N. R. R. Co., 12 Neb. 225, 10 N. W. 718, where this court held that it was prejudicial error to permit evidence of the purchase price of lots in 1877 to be considered in determining the market value of the lots in 1880. In that case the condemner was taking the entire property and the question was the market value in 1880 at the time of the taking. The evidence showed a rapid appreciation in market value between 1877 and 1880. The evidence showed the value in 1877 had no relation to the value in 1880 at all. The owner had purchased the lots at an administrator's sale for $1.50 and the court permitted that fact to be brought out on cross-examination. The owner's testimony was that the market value was $200 for the lots and $400 for the building. The court instructed the jury as follows: " 'In determining the value of the lots in question, you are at liberty to take into consideration the price paid by defendant for them, together with all other evidence given in the case.' " The jury returned a verdict for $450. The evidence was clearly prejudicial in that case for the jury was permitted to and could use the erroneously admitted evidence in determining market value of the land.

In the case at hand the evidence on damages ranges from a high of $20,400 to a low of $1,800. There was no way the jury could have applied the 1962 purchase price figure to affect the evidence because the issue

was the difference in value before and after the taking on July 10, 1969.

The record indicates that the substantial difference in the estimates of the two sets of witnesses as to the damage attributable to the taking rests primarily upon the different consideration or lack of consideration given by them to the effect upon the future unadaptability of the land to pivot irrigation. A substantial portion of the evidence was devoted to that element which the jury was permitted to consider under proper instructions. It is fairly evident that the jury accepted the highest estimates of the condemner's witnesses and added crop damage on which element other evidence was presented. It is clear that the erroneously admitted evidence did not under the circumstances of this case affect the verdict.

In Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, this court said: "Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.

"The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion. . . .

"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.

"The ruling of the court on a motion for a new trial is subject to review here.

"Whether the decision was to grant a new trial or deny one, the questions here are, do the alleged error or errors appear in the record, were they called to the attention of the trial court by the motion, and do they constitute prejudicial error to the party complaining.

"Rules of law will be applied to those assignments of error here with the same requirements whether the decision granted or denied a new trial.

"An order granting a new trial will be scrutinized here with the same care as one denying a new trial."

It appears here the trial court did abuse its judicial discretion. The order granting the new trial is reversed and the cause is remanded with directions to reinstate the verdict and enter judgment thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. FRED L. KIMES, APPELLANT.
205 N. W. 2d 341

Filed March 16, 1973. No. 38690.

Rules of Court. Judgment affirmed. See Rule 20, Revised Rules of the Supreme Court.

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

Merrell L. Andersen, for appellant.

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

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

SPENCER, J.

This appeal is from a resentencing pursuant to the remand in our opinion filed March 3, 1972, State v. Kimes, 188 Neb. 85, 195 N. W. 2d 216. We affirm.

The original sentencing judge had retired and the hearing on the mandate was before the successor district judge. The resentencing procedure was conducted in strict compliance with the letter and spirit of the mandate of this court in the previous appeal.

Judgment affirmed. See Rule 20, Revised Rules of Supreme Court.

AFFIRMED.

LIBBEY-OWENS FORD GLASS COMPANY, A FOREIGN CORPORATION, APPELLEE, V. L & M PAPER COMPANY, A CORPORATION, ET AL., APPELLANTS.

O. J. MILLER, APPELLEE, V. L & M PAPER COMPANY, A CORPORATION, ET AL., APPELLANTS.

HENNINGSEN FOODS, INC., A CORPORATION, APPELLEE, V. L & M PAPER COMPANY, A CORPORATION, ET AL., APPELLANTS.

205 N. W. 2d 523

Filed March 23, 1973. Nos. 38552, 38553, 38554.

1. **Negligence: Proximate Cause.** It is not every intervening act or occurrence which will break the necessary causal connection and insulate the manufacturer from liability from his original negligent act or omission.
2. **Negligence.** Generally, the effect of an intervening negligent act is tested by determining whether it was such as might reasonably have been foreseen as a consequence of the claimed negligence of the original actor.
3. ———. The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen.
4. **Negligence: Proximate Cause.** The question whether negligence is, in view of the intervening negligence of a third person, such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, is a question of fact, rather than a question of law.
5. ———: ———. If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be a result of the original negligence.
6. ———: ———. In an action based on negligence, the question of whether or not there was an intervening cause which removed the negligence of the defendant as the proximate cause is usually one for a jury.
7. **Negligence.** When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage although one of them alone would not have caused it.
8. **Trial: Evidence: Appeal and Error.** Where evidence is conflicting or where reasonable minds may draw different inferences or

conclusions from the evidence, it is within the province of the jury, or the court when the case is tried without a jury, to decide the issues of fact and the Supreme Court may not set aside or direct a verdict in such situation.

9. **Trial: Instructions.** The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal.

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

John R. Douglas of Cassem, Tierney, Adams & Henatsch, Harry B. Otis of Gaines, Spittler & Otis, Gross, Welch, Vinardi, Kauffman, Schatz & Day, and Lee A. Larson, for appellants.

Robert W. Haney of Haney, Wintroub & Haney, for appellees.

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

SPENCER, J.

This appeal involves three consolidated cases to recover for fire losses sustained at Miller's Industrial Center in Omaha, Nebraska. The alleged cause of the fire was a forklift truck manufactured by Yale & Towne, Inc., and sold by Phil D. Fitzwater and Gerald E. Gathmann, doing business as All Makes Forklift Service, to L & M Paper Company, a corporation, the user of the forklift at the time of the fire. Yale & Towne cross-petitioned against All Makes and L & M, and All Makes cross-petitioned against Yale & Towne and L & M. By stipulation of the defendants, the cross-claims were submitted to the court and not decided by the jury. The jury returned a verdict for all the plaintiffs against all the defendants, and the trial court denied all the cross-petitions. We affirm.

Miller's Industrial Center consisted of three adjoining buildings. The fire, which occurred on March 2, 1965, originated in building No. 2, which was leased to L &

M. The other two plaintiffs leased the adjoining buildings. All the buildings are owned by Miller. L & M processed used paper, primarily tabulation cards, which were chopped into small pieces and compressed into bales up to 1,000 pounds. The forklift was used to move the bales from the baling machine to a place of storage, and eventually to load them on railroad cars. L & M had been using a propane-operated forklift truck, also purchased from All Makes. This truck proved inadequate, and was returned. On the recommendation of Fitzwater of All Makes, L & M purchased the Yale & Towne electric forklift truck involved herein. It was received in late November or early December of 1964.

The order for the forklift, as printed, provided for: "dust covers on lift and drive motors." This was crossed out, and the notation made, "enclosed motors." The motors were enclosed. All Makes was well aware of the nature of the business where the truck was to be used, but did not communicate this information to Yale & Towne other than might be inferred from the statement, "enclosed motors."

The forklift was manufactured with a resistor coil located underneath the forklift, within a few inches of the floor, toward the front. It had a V-shaped trough approximately 8 inches in length, located underneath the coil, within 1 to 1½ inches from the coil itself. The purpose of the trough was to protect the coil from damage from being struck by some foreign object on the floor. There was no covering placed over the coil. It was unprotected and exposed from above.

One of Yale & Towne's design engineers testified the coil was designed to heat to 1,200 degrees Fahrenheit. The evidence is undisputed that this information was never communicated to All Makes, the local distributor, nor to L & M, the purchaser. This information was not to be found in any of the written material furnished to the parties, nor was there any warning of this propensity

on the forklift itself. Yale & Towne's design engineer testified the use of a forklift with an exposed coil was dangerous in an atmosphere containing combustible material. The room used by L & M was not provided with automatic sprinklers. They were not aware of the ordinance pertaining to sprinklers. Flammable material was stored in the basement. After paper had been baled, L & M personnel would stack the bales on the north and south of a center aisle awaiting shipment.

Plaintiffs' expert was asked if this type of truck was a proper and safe design for use in a warehouse, i.e., a paper baling warehouse. His response is as follows: "The design for the E type, in this Automatic truck permits dust to collect in a trough underneath the resistor coil, which in a sense is a heater coil during the operation of the unit and therefore is unsafe from a design standpoint, because it can collect an amount of dust in the shield that is protecting it mechanically, and it rests the dust against the resistor which is heated during the operation."

Plaintiffs' expert witness further testified that the paper that could collect in the collector underneath the coil would not necessarily have to be paper that fell on the coil and into the shield, but could be paper that had been brought up from the floor by reason of the draft reaction of the heat. The heat would have a stack effect and would pick up dust and small bits of paper, depending on the amount of the heat and the weight of the paper. If the resistor coil was covered, there would be no way for this accumulation to touch the coil itself.

During the 3 months the forklift was in the possession of L & M, their employees experienced difficulty with it. Various electrical points on the truck broke down or went bad, and the exposed resistor coil would heat up. The resistor coil would get hot enough for the coil to have a red glow. On occasion, it would even become cherry red. When the coil became cherry red, the em-

ployees were instructed not to operate the machine. On other occasions they were instructed to take the forklift over to the air compressor every 2 hours to blow the accumulation off the coil and to keep it and the rest of the machine clean.

All Makes was kept advised of the trouble, and on occasion the truck was taken back to the All Makes shop. The All Makes forklift serviceman thought the cherry red condition was caused by a malfunction of the machine. Neither he nor his employers knew that the machine was designed so that the coil would reach 1,200 degrees Fahrenheit. He believed something mechanical was causing the supposed malfunction and in each instance attempted to repair it. Whenever he returned the forklift to L & M he was under the impression that he had corrected the problem.

The forklift was accelerated by the operator turning the handle through three points. The first of the three points caused the machine to move at a low speed. Most of the electrical energy at this speed would be dissipated through the resistor coil in the form of heat. The handle turned to the second speed allowed additional acceleration, with only half the electrical energy passing through the resistor coil. Upon the handle being turned to the third point, all the electrical energy was applied to the motor and the resistor coil was entirely bypassed.

On the day of the fire, All Makes forklift serviceman was called to L & M's place of business because the truck was again heating up. He replaced the points which were broken. He also took a wire from third, or low speed, so that it would break down the heat resistance. The truck then operated in second and high. What he did had the effect of cutting the heat resistance.

Loose paper was on the floor when the machine was put back into operation. The serviceman told Trachtenbarg, one of the owners of L & M, to keep the machine clean by blowing it off to prevent a fire. It would keep

the paper from building up around the resistor coil. He also advised Trachtenbarg to sweep the aisles and the area where the truck would run.

The fire occurred about 7 p.m. Only one employee was on the premises. He was operating the forklift when a bale broke and scraps of confetti-like paper fell on the resistor coil, ignited, and set fire to the building. He was going to run the broken bale back through the chopper. The chopper has a hydraulic ram which compresses the chopped paper into a bale. He had taken one piece of the broken bale over to the chopper and was going back to get another piece when he noticed smoke coming from the front of the forklift.

The employee observed the smoke coming from between the forks, and got down on his hands and knees to see exactly where the smoke was coming from. He could see a coil of wire with paper around it that was smoking. He tried to put the fire out by smothering it with his hands, but was unsuccessful. The flame was only an inch or 2 high. He then got his old jacket, which was on top of the baler, and tried to smother the fire with the jacket, but was unsuccessful. He then took a fire extinguisher off a nearby post, turned it upside down, but nothing came out. He then read the directions and followed them, but again nothing came out. He shook the fire extinguisher and dropped it on the floor, but still nothing came out. Although the fire extinguisher was not as heavy as he thought it should be, he could hear liquid inside it. When the fire extinguisher would not work, he ran and called the fire department. He believes about 5 minutes transpired from the time he first saw the fire until he called the fire department. The testimony is undisputed there were seven fire extinguishers on the premises which had last been serviced approximately 8 months before the fire.

Yale & Towne's possible liability is premised on three theories of negligence: (1) Negligent construction; (2)

negligent design; and (3) failure to warn the distributor and consumer of the design propensity of the coil to heat to 1,200 degrees Fahrenheit.

We assume negligent construction to include a malfunction in a perfectly-designed product. On this assumption we conclude that no evidence was adduced to sustain this theory of negligence. Yale & Towne's design engineer testified the coil was designed to heat to 1,200 degrees Fahrenheit. If a malfunction was responsible for the fire, that fact is not apparent from the record.

We interpret negligent design as used herein to mean a forklift which is functioning properly but is dangerous due to a faulty design. Yale & Towne's design engineer admitted that the use of a forklift with an exposed coil was dangerous in an atmosphere containing combustible material. Plaintiffs' expert specifically testified that the unit was unsafe from a design standpoint for the use to which it was put.

The third theory of negligence is for failure to warn that the unit could be dangerous for its intended use. In this regard, Yale & Towne argues that the forklift was not defective when sold, but became so only because of its use in a place for which it was not intended. The difficulty with this argument is that the heating range of the resistor was known only to Yale & Towne. It was in no way made evident to the distributor or user, either by printed material or other warning. Unaware of the design propensity of the resistor coil to heat to 1,200 degrees Fahrenheit, All Makes recommended it for use in a paper shredding and baling plant.

Can Yale & Towne avoid liability when it is obvious that because of its failure to warn it was impossible for All Makes or L & M to properly evaluate the functioning of the forklift? The Yale & Towne forklift literature contained warnings in other respects where the danger was not quite so great. The jury could reasonably assume that Yale & Towne's design engineers

should have realized that if all motors were to be enclosed, the forklift was to be used in an area where the atmosphere would include dust and possibly flammable fibers. Without a warning of some nature, Yale & Towne should have known that the distributor and purchaser of its forklift would not realize its dangerous condition.

Yale & Towne further argues that the plaintiffs cannot recover from it because after the defect became obvious, L & M continued to use the product and this relieves the manufacturer from liability. It argues in substance that its negligence could not be the proximate cause of any injury sustained by the plaintiffs but at most any negligence with which it could be charged furnished only a condition by which the injury was made possible.

Yale & Towne relies on the line of cases such as Lock v. Packard Flying Service, Inc. (1970), 185 Neb. 71, 173 N. W. 2d 516, 41 A. L. R. 3d 1313, in which we said: "The causal connection is broken if between the defendant's negligent act and the plaintiff's injury there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff."

The fallacy with Yale & Towne's contention is that it has not met the conditions of the cases on which it places its reliance. Because of Yale & Towne's failure to inform its distributor and purchaser, no one knew the heating of the resistor was a design characteristic and was to be expected. All persons associated with the distributor and the purchaser believed the resistor coil to be heating up because of a malfunction.

Fitzwater testified that he did not realize the forklift was not suitable for use in certain areas, such as L & M Paper Company. All Makes forklift serviceman

testified he had been servicing forklifts for approximately 1 to 1½ years prior to the fire, and he had never been advised that the coil would heat to 1,200 degrees. He felt when the coil got hot something was wrong. This was the first time he had run into a heating resistor so he checked the manual furnished by Yale & Towne for reference to a hot coil, but did not find anything to indicate or cover the problem.

In Driekosen v. Black, Sivalls & Bryson, Inc. (1954), 158 Neb. 531, 64 N. W. 2d 88, a case involving a propane gas system, we adopted the language of Restatement, Torts, § 388, p. 1039, as follows: "'One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied; (b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so.'"

The jury could have found that in the absence of instructions or warnings from Yale & Towne, both All Makes and L & M could reasonably assume the heating up of the resistor coil was a malfunction which was repairable. The distributor's serviceman testified that on the very morning of the fire he repaired the forklift and told L & M that it was working satisfactorily. The evidence presented, including the testimony of Yale & Towne's products reliability manager, leaves no doubt that the forklift in question was defective for its use at the L & M Paper Company. We find Yale & Towne had a duty to warn its distributors and users of the

heating propensity of the exposed resistor coil.

It is not every intervening act or occurrence which will break the necessary causal connection and insulate the manufacturer from liability from his original negligent act or omission. The rule is very clearly stated in Comstock v. General Motors Corp. (1959), 358 Mich. 163, 99 N. W. 2d 627, 78 A. L. R. 2d 449. Generally, the effect of an intervening negligent act is tested by determining whether it was such as might reasonably have been foreseen as a consequence of the claimed negligence of the original actor. We are dealing with such an act here. The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen. The question whether negligence is, in view of the intervening negligence of a third person, such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, is a question of fact, rather than a question of law.

The considerations to be determined in deciding whether an intervening force is a superseding cause are well stated in Restatement, Torts 2d, § 442, p. 467, as follows: "The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

"(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

"(b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;

"(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

"(d) the fact that the operation of the intervening

force is due to a third person's act or to his failure to act;

"(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

"(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion."

We said in Driekosen v. Black, Sivalls & Bryson, Inc. (1954), 158 Neb. 531, 64 N. W. 2d 88: "If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be a result of the original negligence."

In an action based on negligence, the question of whether or not there was an intervening cause which removed the negligence of the defendant as the proximate cause is usually one for a jury. Wax v. Co-Operative Refinery Assn. (1951), 154 Neb. 42, 46 N. W. 2d 769.

When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage although one of them alone would not have caused the result. Umberger v. Sankey (1949), 151 Neb. 488, 38 N. W. 2d 21.

There is no evidence that All Makes actually was aware that the resistor coil was designed to heat to 1,200 degrees Fahrenheit. However, there is evidence from which the jury could conclude that All Makes should have realized the design propensity. All Makes had recommended the forklift for use by L & M, knowing the exact nature of their business. As a distributor All Makes would be presumed to know the characteristic of the equipment it sold. It was well aware that the

resistor coil was heating cherry red for a considerable period before the fire. It made no attempt to communicate with the factory to ascertain if this condition was actually a malfunction.

All Makes forklift serviceman made several attempts to correct the supposed malfunction. On each occasion he though he had done so. Yet, the fact that the condition continued to exist raises a serious question in view of the location where the equipment was operating. All Makes may not have realized the danger, but its frequent occurrence should have alerted All Makes to the danger. If All Makes had consulted with Yale & Towne about the difficulty it was encountering with the forklift, it undoubtedly would have learned the condition was a design propensity rather than a malfunction. We cannot say that the jury was wrong in finding All Makes to be negligent.

L & M had been experiencing difficulties with the lift. They were well aware of its heating propensity. They certainly should have appreciated the possibility of fire. It is true they expected All Makes to repair the malfunction. It is also true that they relied on the recommendation of All Makes that the lift was suitable for their work. However, the problems encountered were sufficient to put them on notice of the danger involved. The fact that they instructed their employees to blow the machine off with compressed air every 2 hours indicated they were aware of the danger. The nature of their business was such that fire would be a constant hazard.

Prior to starting business, L & M purchased six fire extinguishers and had a fire equipment company service and charge them on June 10, 1964. On July 24, 1964, one of them was recharged and another extinguisher was purchased. There is no testimony that the extinguishers were checked after July 24, 1964. It is evident when the fire broke out on the evening of March 2, 1965, 8 months later, that the fire extinguisher

used by the employee was inoperative. On the record, the evidence was sufficient to permit the jury to find negligence on the part of L & M which concurred with the negligence of All Makes and Yale & Towne to produce the fire which caused the plaintiffs' damage.

The cross-claims filed by Yale & Towne and All Makes were denied by the court. Each of the defendants seek to avoid liability by blaming the others for the plaintiffs' damage. The record shows negligence on the part of all three defendants sufficient to sustain the verdict of the jury. Where evidence is conflicting, or where reasonable minds may draw different inferences or conclusions from the evidence, it is within the province of the jury or the court, when the case is tried without a jury, to decide the issues of fact, and the Supreme Court may not set aside or direct a verdict in such situation. See Mustard v. St. Paul Fire & Marine Ins. Co. (1968), 183 Neb. 15, 157 N. W. 2d 865.

L & M asserts error in the jury instructions. If there was any error in instructions it was waived by the parties. The instructions were submitted to all counsel for comment and objection prior to submission to the jury. No objection is reflected in the record as to the alleged erroneous instructions. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Beveridge v. State (1968), 183 Neb. 406, 160 N. W. 2d 229.

The defendants argue that Henningsen Foods is not the real party in interest because the eggs destroyed by the fire were pledged to certain banks. Defendants assert the warehouse receipts issued to the banks pursuant to said pledges gave the banks title to the eggs and the banks therefore were the real parties in interest.

Henningsen pledged its inventory of dried eggs as collateral to the banks. The banks in turn loaned Henningsen 80 percent of the value of the pledged goods. There was no agreement to sell the eggs to the banks.

Henningsen did not need to obtain the approval of the banks before selling the eggs. The arrangement was a credit arrangement only.

Section 88-142, R. R. S. 1943, which was effective until September 1, 1965, provided: "A person to whom a receipt has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods *subject to the terms of any agreement with the transferor.*" (Italics supplied.) The question presented to the jury was: Did the loan agreement between Henningsen and the banks call for transfer of the title to the eggs to the banks? The jury found there was no intention to transfer ownership of the eggs, and we cannot say that it was wrong on the record. The identical question was presented in Mount Tivy Winery, Inc. v. Lewis (1943), 134 F. 2d 120. There the court held: "Under the phrase * * * 'subject to the terms of any agreement with the transferor,' title to the goods would not pass by the transfer of warehouse receipt if the parties expressly agreed that it would not. Here the parties in the collateral agreement, * * * made an agreement for security." See, also, King Cattle Co. v. Joseph (1924), 158 Minn. 481, 198 N. W. 798; Hodges v. Lake Summit Co. (1930), 155 S. C. 436, 152 S. E. 658. Henningsen Foods, being the owner of the eggs at the time of the fire, could maintain an action for damages against third persons for their injury or conversion.

The judgment is accordingly affirmed.

AFFIRMED.

FIRST NATIONAL BANK AND TRUST COMPANY, A CORPORATION, APPELLANT, V. JOHN L. CUTRIGHT, APPELLEE.
205 N. W. 2d 542

Filed March 23, 1973. No. 38610.

1. **Banks and Banking: Negligence: Principal and Agent: Trial.**

Under section 4-406(3), U. C. C., lack of ordinary care on the part of the drawee bank in paying items may be established by proof that the bank's employees failed to exercise care in processing the items.

2. **Trial: Evidence.** Handwriting in question may be compared by the trier of fact with writing of the same person which is proved to be genuine.

3. **Evidence: Appeal and Error.** In law actions conflicts in evidence or findings of fact will not be disturbed on appeal unless clearly wrong.

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

Pilcher, Howard & Dustin, for appellant.

John L. Cutright, pro se.

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

SMITH, J.

The district court on a general finding rendered judgment for a customer-drawer and against the drawee bank under sections 3-406 and 4-406 (1), (2), and (3), U. C. C. On appeal the main question is the sufficiency of evidence of lack of ordinary care on the part of the bank in paying checks with unauthorized signatures of the drawer.

A trial court without being clearly wrong might find these facts. John L. Cutright, the customer-drawer, maintained 4 checking accounts with the drawee, First National Bank of Fremont. His only employee from April 21, 1969, to March 31, 1970, was Lynda McPherson. Without authority she signed 44 checks payable to her from Cutright's personal account with First National by using a rubber stamp with a script signature of Cutright as drawer. She uttered the checks with her blank endorsements. The stamp was so old that Cutright, who at the time of trial in 1972 had been practicing law 48 years, could not remember when he had obtained it. His office girl had been using it daily in signing letters

and legal papers. Neither Lynda nor her predecessors possessed authority to stamp checks. Cutright himself had never drawn a check by using the stamp, and the signature card of the account did not mention a facsimile. Cutright's personal account was active as follows:

Date of Bank Statement	Debits: Lynda's Unauthorized Signatures No.	Sum	Other Debits No.	Sum
9-30-69	1	$ 200.00	17	$ 330.77
10-31-69	8	788.50	18	297.38
11-29-69	8	1,274.50	13	609.64
12-31-69	11	2,049.50	15	547.54
1-31-70	10	2,000.00	12	448.04
2-28-70	6	1,200.00	20	2,233.30

Lynda having been reconciling the records, Cutright discovered the unauthorized checks after noticing the unusually small balance on the February statement. During her employment she had prepared 681 checks that Cutright had drawn on the 4 accounts with defendant, and 206 had been personal checks. She also destroyed the 44 checks in question.

Genuine signatures of Cutright appeared on the signature card of the personal account in the year 1938 and on 4 checks drawn on the account in August 1969. An accurate description or reproduction of the checks in our publication would be impossible.

The First National maintained more than 6,000 deposits, and its daily check and deposit transactions ranged from 4,000 to 6,000. In its business practice the teller examined the drawer's signature. After photography a clerk compared the check with the signature card. Checks and debits on the statement of account were counted several times. Any irregularity noticed by the counter was reported to the manager of the bookkeeping department or to an officer of the bank. The difficulty of de-

tecting unauthorized signatures increased with the introduction of pens with felt tips which widened the lines.

Interrogatories to First National were answered by its cashier as follows: "Q. . . . What certainty . . . is there that . . . (the filing clerk) makes such comparison? A. The presumption that the employee does his duty, plus continued exhortation and instruction. Q. Is such a comparison dependent on her own disposition in that respect ? A. No. Q. Is any supervision made . . .? A. Yes. Q. . . . Would her failure be discovered by any one else in your institution? A. Yes. Q. Is any such supervision . . . continuous . . .? A. Continuous. Q. To what extent can your institution say that all checks are compared as to signatures with the signature card? A. A corporation, whose corporate knowledge is less than the sum of the knowledge of all its officers, agents, and employees, can only rely on the honesty and diligence of these people and presume that they do their duty, human error excepted."

The cashier of First National testified that its procedure for inspection was superior to reasonable commercial standards of banking. The cashier of the Fremont National Bank, which followed a similar practice, corroborated him. The Fremont bank had paid 7 checks drawn on Cutright's account with it and stamped by Lynda with the rubber stamp.

No direct evidence tended to show any of the following facts: (1) Specific instructions to employees on the subjects of handwriting or detection of unauthorized signatures or (2) the number of checks daily compared by each clerk with signature cards. No opinion testimony implied difficulty or ease of a competent clerk exercising ordinary care in detecting the unauthorized signatures made with the rubber stamp.

Under subsection (1) of section 4-406, U.C.C., a bank customer under certain conditions must exercise reasonable care and promptness to examine the bank's statement of account and items to discover his unau-

thorized signature or any alteration on an item and must notify the bank promptly after discovery thereof. Under subsection (2) if the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1), the customer is precluded from asserting against the bank (a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure, and (b) an unauthorized signature or alteration by the same wrongdoer on any other item paid by the bank under certain circumstances. By subsection (3) the preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

Lack of ordinary care on the part of the drawee bank in paying item(s) under subsection (3) of section 4-406, U.C.C., may be established by proof either that the bank's procedures were below standard or that the bank's employees failed to exercise care in processing the items. Clarke, Bailey, and Young, Bank Deposits and Collections, p. 121 (4th Ed., 1972); Penney, "Bank Statements, Cancelled Checks, and Article Four in the Electronic Age," 65 Mich. L. Rev. 1341 at 1350 (1967). The "burden of establishing" a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence. § 1-201 (8), U. C. C.

Handwriting in question may be compared by the trier of fact with writing of the same person which is proved to be genuine. See, §§ 25-1128 and 25-1220, R. R. S. 1943; Penney, op. cit., at 1352.

In law actions conflicts in evidence or findings of fact will not be disturbed on appeal unless clearly wrong. State ex rel. Rittenhouse v. Newman, *ante* p. 657, 204 N. W. 2d 372.

The drawee bank in such circumstances as are before us has been said to be in a position fraught with danger in these respects. Filing clerks may be held to the standard of handwriting experts. It is considerably

easier to detect a forgery among a collection of checks purportedly bearing the same signature than to recognize one isolated forged check in a batch of checks drawn by the customer. The cost of comparing signatures on the large volume of checks processed daily by many banks will increase. See, Penney, op. cit., at 1352 and 1360; Comment, 12 Ariz. L. Rev. 417 (1970); Notes, 50 Boston U. L. Rev. 536 (1970).

Some of the dangers may have been present in this case. Any lack of ordinary care on the part of First National furthermore rested mainly upon the age and nature of the stamp and a comparison of the facsimile with the pen signatures. We nevertheless conclude that the evidence raised questions of fact under sections 3-406 and 4-406, (1), (2), (3), U.C.C. The finding by the district court was not clearly wrong.

AFFIRMED.

NEWTON, J., concurring.

The question of whether the bank acted "in accordance with the reasonable commercial standards of the drawee's or payor's business" as provided in section 3-406, U.C.C.; or if there was a "lack of ordinary care on the part of the bank in paying the item(s)" as provided in section 4-406, U. C. C., is one of fact. The trial court as the trier of fact in this very close case found the bank to be in violation of these provisions and since there is sufficient evidence to sustain this finding, I concur in the opinion of Smith, J.

BOSLAUGH and MCCOWN, JJ., concurring.

This case presents a close question. The evidence of negligence on the part of plaintiff was minimal, consisting primarily of the fact that the signature was stamped. The evidence of negligence on the part of the defendant was substantial and contributed to the loss. See § 3-406, U.C.C., and comment 7. Nevertheless, the evidence presented a question for the trier of fact and the decision cannot be said to be clearly wrong.

NEBRASKA COUNCIL OF EDUCATIONAL LEADERS, APPELLEE, V. NEBRASKA STATE DEPARTMENT OF EDUCATION AND STATE BOARD OF EDUCATION, A GOVERNMENTAL SUBDIVISION, APPELLANTS.

205 N. W. 2d 537

Filed March 23, 1973. No. 38630.

Employers and Employees: Associations: Labor and Labor Relations: Collective Bargaining. Section 25-313, R. R. S. 1943, authorizes an unincorporated association to represent employees in collective bargaining with employers as well as to sue and be sued in the name of the association. However, before it may bring an action in the courts of this state, it must comply with the provisions of section 25-314, R. R. S. 1943.

Appeal from the Court of Industrial Relations. Reversed and dismissed.

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

Moore & Moore, for appellee.

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

SPENCER, J.

This is an appeal from an order of the Court of Industrial Relations finding that the plaintiff is entitled to serve as a bargaining representative for those employees of the defendant who authorize it to act for them, and directing defendant to undertake good faith negotiations in regard to the determination of terms and conditions of employment and the administration of grievances. The order of the Court of Industrial Relations is against "the defendant" without further specificity. We reverse and dismiss.

Plaintiff's petition alleges that it is an unincorporated association formed by the Lincoln-based professional employees of the division of administrative services, division of vocational education, and division of instructional services of the State Department of Educa-

tion of the State of Nebraska for the purpose of representation of said professional employees in all matters of employment relations. It alleges itself to be a labor organization as that term is defined in section 48-801, R. S. Supp., 1969.

Both the State Department of Education and the State Board of Education are governmental agencies of the State of Nebraska, set up by the Constitution of the State of Nebraska. Article VII, sections 14 and 15, Constitution of Nebraska. The State Department of Education has general supervision of administration of the school system of the state. The duties and powers of the State Board of Education are as prescribed by the Legislature.

Plaintiff's petition lists the two agencies as defendants, but the allegations are specifically directed against the State Department of Education. Nowhere in the petition does the plaintiff allege any facts which show a primary right of the plaintiff and a legal wrong done by the State Board of Education which involves that primary right. The order of the Court of Industrial Relations refers only to "the defendant" without specifying which defendant.

The defendants set out four specific assignments of error, one of which involves the legal capacity of the plaintiff to maintain this action. Inasmuch as we find plaintiff did not have sufficient legal capacity to maintain the action, we do not consider the other assignments.

Section 25-314, R. R. S. 1943, so far as material herein, provides as follows: "Provided, when such * * * unincorporated organization does not have a usual place of doing business or activity within the state, nor a clerk or general agent within the state, such * * * unincorporated association shall appoint an agent or agents in this state and before it is authorized to engage in any kind of business or activity in this state such * * * unincorporated organization shall file in the office of the Secretary of State a certified statement setting forth

that such * * * unincorporated organization is doing business or conducting activities in the State of Nebraska stating the nature of the business or activity, and designating an agent or agents within the State of Nebraska, upon whom process, or other legal notice of the commencement of any legal proceeding, or in the prosecution thereof may be served; * * *."

It is undisputed that the plaintiff did not file any kind of a written statement with the Secretary of State of Nebraska. Nor did the plaintiff prove that it had a usual place of doing business, or a clerk or general agent within the state. The main activity for which the plaintiff is formed is to represent its members in the area embraced in these proceedings. This is the purpose of its very existence. We therefore do not agree with the Court of Industrial Relations that this unincorporated association may bring this action, and then subsequently qualify under section 25-314, R. R. S. 1943. The Court of Industrial Relations states plaintiff has not yet engaged in any business or activity. However, it directs the "defendant" to undertake good faith negotiations with the plaintiff on behalf of its employees. This is the sole business or activity for which plaintiff is organized.

Section 25-313, R. R. S. 1943, authorizes an unincorporated association to represent employees in collective bargaining with employers, as well as to sue and be sued in the name of the association. However, before it may bring an action in the courts of this state, it must comply with the provisions of section 25-314, R. R. S. 1943.

The plaintiff, having failed to comply with the provisions of section 25-314, R. R. S. 1943, was not authorized to bring this action. It has no legal capacity to sue. The demurrers should have been sustained. We reverse the judgment of the Court of Industrial Relations and dismiss the action.

REVERSED AND DISMISSED.

CLINTON, J., concurs in result.

McCOWN, J., dissenting.

The majority opinion denies a local unincorporated labor organization the right to sue in the courts of Nebraska because it had not filed a certified statement with the Secretary of State stating the nature of its activities and designating an agent or agents within the State of Nebraska upon whom process might be served. This result is reached on the authority of section 25-314, R. R. S. 1943. That section deals with the service of process on unincorporated organizations. The section authorizes service of process by leaving a copy at the usual place of doing business or conducting activities within the county with one of the members of the association or with a clerk or general agent thereof or with the Secretary of State.

The statute then provides that when the organization "does not have a usual place of doing business or activity within the state, nor a clerk or general agent within the state" then before it is authorized to engage in activities in this State, it shall file with the Secretary of State the certified statement referred to. Failure to file the statement is deemed an appointment of the Secretary of State for service of all legal process against the association growing out of such activities.

Section 25-313, R. R. S. 1943, also referred to in the majority opinion, since 1947 has authorized any company, partnership, or unincorporated labor association, such as the plaintiff, to sue and be sued in the courts of this State. That section was specifically amended in 1947 to include an unincorporated association representing employees in collective bargaining with employers. That amendment obviously came as a result of this court's decision in Hurley v. Brotherhood of Railroad Trainmen, 147 Neb. 781, 25 N. W. 2d 29.

From 1947 to 1959, section 25-314, R. R. S. 1943, provided only that process against any such unincorporated association shall be served by a copy left at its usual

place of doing business within the county with one of the members of such company, firm, or unincorporated association, or with a clerk or general agent thereof. It had no provisions for filing statements, designating agents, or serving the Secretary of State. Amendments in 1959 and 1961 added the provisions applying to organizations which do not have a usual place of doing business or activity within the State, nor a clerk or general agent within the State, and provided for service on the Secretary of State in such cases in the absence of the required certified statement. The legislative history of those amendments makes it very clear that the Legislature intended to make *nonresident* unincorporated organizations amenable to the service of process. There was obviously no intention to require a resident organization which had a usual place of doing business or activity, or had a clerk or a general agent, to register with the Secretary of State before it could invoke the jurisdiction of the courts of Nebraska. The statement in 1959 indicates that the amendment was intended as an expansion of the power to serve nonresidents with process in a fashion similar to service on nonresident employers as provided by section 48-175.01, R. R. S. 1943. In the floor debate in 1961, Senator McHugh, who introduced the 1961 amendment, stated that the effect of the bill was to make available the same process for nonresident associations as was available for foreign corporations.

The interpretation of section 25-314, R. R. S. 1943, now adopted by the majority of this court not only treats resident and nonresident unincorporated associations as exactly the same but also disregards the specific language of section 25-313, R. R. S. 1943. The majority holding now means that resident local partnerships, firms, or unincorporated organizations will all be required to file a certified statement in the office of the Secretary of State announcing the nature of their business or activity and designating an agent or agents in

the State of Nebraska upon whom process may be served. Until they do, all such organizations will be denied the right to file suit in Nebraska courts even though they are specifically authorized to do so by section 25-313, R. R. S. 1943.

It should also be pointed out that section 25-314, R. R. S. 1943, sets out the only statutory consequence of failing to file such a certified statement. The statute itself provides that the doing of business or conducting activities within the State of Nebraska without filing the certified statement and designating an agent shall be deemed an appoinment of the Secretary of State as its true and lawful attorney upon whom may be served all legal process in any action or proceeding against it growing out of such business or activities.

The majority opinion leaps the gulf of establishing the critical fact of whether the plaintiff had a usual place of doing business, or a clerk or general agent in the State by stating: "Nor did the plaintiff prove that it had a usual place of doing business, or a clerk or general agent within the state." It might much more appropriately be said that there is absolutely no proof of any kind that the plaintiff did not have a usual place of conducting activities or a clerk or general agent within the State. There is not even an allegation in the pleadings to support such a conclusion. On the contrary, the exhibits admitted in evidence in the Court of Industrial Relations and the testimony in the record show that the plaintiff is an unincorporated association whose members are all employees of the defendant and based in Lincoln, Nebraska. The plaintiff is a labor organization and is not affiliated with any other labor organization. A copy of the constitution of the plaintiff was in evidence. The names of its executive committee appear and were known to the defendants. To assume that the plaintiff does not have a usual place of doing business or conducting activity within the State nor a clerk or general agent simply disregards the

testimony and every reasonable inference which can be drawn from the evidence. In addition, it is quite clear that the burden of proving that plaintiff was subject to the certified statement requirement of section 25-314, R. R. S. 1943, and had no standing to use the courts of Nebraska in the absence of such a statement rested on the defendants and not on the plaintiff.

The majority opinion not only reaches an erroneous result in this case but unduly and unnecessarily complicates future litigation by and against resident Nebraska unincorporated companies, associations, partnerships, and organizations.

STATE OF NEBRASKA, APPELLEE, V. LUCIA GRECO, APPELLANT.
205 N. W. 2d 550

Filed March 23, 1973. No. 38650.

Criminal Law: Probation and Parole: Appeal and Error. The suspension of sentencing and the granting of probation is discretionary with the trial court and in the absence of an abuse of discretion the trial court's determination will not be disturbed.

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

Schrempp & Bruckner, for appellant.

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

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

CLINTON, J.

The defendant, aged 20, pled guilty to the unlawful possession of a controlled substance, amphetamines. An earlier plea of not guilty was withdrawn and a guilty plea entered as a consequence of plea negotiations between the defendant's counsel and the prosecutor. The bargain was that for the plea of guilty the prosecutor

would dismiss a charge of a like offense allegedly committed while she was free on bond from and 3 weeks after the offense to which the plea was entered. The bargain was that the second charge would be dismissed and the prosecutor would not oppose probation. The bargain was kept.

The court made a determination of the voluntariness of the plea of guilty and the existence of the factual basis for it, and accepted the plea and imposed a sentence of 1 to 2 years in the State Reformatory for Women. A presentence report had been made and it recommended against probation.

Several assignments of error are made, but the substance of them is that the trial court abused its discretion in denying probation. We have carefully examined the record, including the presentence report and the sworn statements of witnesses furnished by the defendant's counsel in support of the request for probation. Having done so we cannot come to the conclusion that the trial court abused its discretion in denying probation. State v. Jurgens, 187 Neb. 557, 192 N. W. 2d 741.

AFFIRMED.

McCOWN, J., dissenting.

A. B. A. Standards Relating to Sentencing Alternatives and Procedures, standard 2.2 provides: "The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."

Standard 2.3(c) provides: "A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary." That standard has been adopted by this court. State v. Shonkwiler, 187 Neb. 747, 194 N. W. 2d 172.

Commentary e, to standard 2.3(c), at page 72, emphasizes the preference for probation, particularly in the case of first offenders, and especially where there is less

than a realistic program of rehabilitation provided in the confinement institution.

In this case, a 20-year-old woman, with no prior criminal record of any kind except for one traffic offense, pleaded guilty to a charge of possession of a controlled substance (amphetamines). The State made no recommendation, but agreed that it would not resist an application for probation. None of the affirmative reasons justifying total confinement set out in the Standards Relating to Sentencing Alternatives and Procedures are present here. It is highly improbable that a year of imprisonment will be more effective in protecting society or in rehabilitating the defendant drug user than would probation under reasonable conditions and restrictions for a proper term, and imprisonment would be considerably more expensive. Under the A. B. A. Sentencing Standards adopted by this court, probation should have been granted here.

STATE OF NEBRASKA, APPELLEE, V. PAUL P. PIERSON, APPELLANT.
205 N. W. 2d 549

Filed March 23, 1973. No. 38673.

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

Paul P. Pierson, pro se.

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

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

PER CURIAM.

The defendant appealed from a judgment whereby he was sentenced to a term of 3 to 5 years imprison-

ment on a burglary count, 3 to 5 years on a forgery count, and 3 to 5 years on a count of uttering a forged instrument, the sentences imposed on the forgery counts to run concurrently with the burglary count in the event the defendant makes restitution. The sentences were imposed upon the defendant's plea of guilty to each of the three counts. The pleas of guilty were a result of plea bargaining. In open court, the terms of the plea bargain were explicitly delineated by the county attorney and agreed to by the defendant's attorney and by the defendant, who said he understood the terms and that the agreement was satisfactory to him. The terms were that if the defendant pleaded guilty to each of the three counts, and agreed to make restitution as to the two forged checks, the county attorney would recommend a sentence of 3 to 5 years on each count, to be served concurrently.

On appeal, the defendant contends that the terms of the plea bargain were that he would plead guilty to the charge of burglary, for which he would receive a sentence of from 1 to 3 years, and the two counts of forgery would be dismissed. He complains that the court failed to dismiss the two forgery counts, and that he received a sentence of 3 to 5 years on each count to run concurrently.

The facts conclusively establish to the contrary. The plea bargain was fully complied with in every respect, and the plea was voluntary. State v. Thompson, *ante* p. 115, 201 N. W. 2d 204.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH W. COX, APPELLANT.
205 N. W. 2d 546

Filed March 23, 1973. No. 38680.

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

T. Clement Gaughan and Richard L. Goos, 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.

PER CURIAM.

The defendant appeals from a conviction of willfully failing to return to the Nebraska Penal and Correctional Complex from a 27-hour furlough granted him by the Director of Corrections. § 83-184, R. R. S. 1943. He was sentenced to a term of 1 year imprisonment, to be served consecutively to the sentence he was serving at the time of this offense. The defendant assigns as error that the sentence was excessive and that there was insufficient evidence to support the finding of guilt.

We have examined the record and determined that the judgment in this jury waived case is based on findings of fact which are clearly not erroneous, and that the sentence was not excessive. We have also determined that a detailed opinion would have no precedential value.

The judgment is accordingly affirmed. See Rule 20, Revised Rules of the Supreme Court.

AFFIRMED.

HAROLD C. SPATH, APPELLANT, V. DENNIS R. COON, APPELLEE.
205 N. W. 2d 541

Filed March 23, 1973. No. 38686.

Negligence: Trial: Instructions. Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence.

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

Homer E. Hurt, Jr., and James A. Gallant, for appellant.

Deutsch & Hagen and Thomas H. DeLay, for appellee.

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

NEWTON, J.

This is an action to recover damages resulting from an automobile accident. A verdict was returned and judgment entered for defendant. We reverse the judgment.

On December 26, 1967, at about 6:25 p.m. an accident occurred on U. S. Highway No. 275 a short distance from West Point, Nebraska. The paved portion of the highway was 24 feet in width, it was dark, snowing, and although some of the snow had been pushed off, the road was snow covered. There was a grade at the point of the accident but the angle or pitch does not appear. Plaintiff was driving south and defendant north, plaintiff at a speed going-up grade of about 30 to 35 miles per hour and defendant down-grade at about 25 miles per hour. Each party testified he saw the other when 200 to 300 feet apart. Defendant drove off the edge of the pavement. When he pulled back on his car went into the left hand lane, then turned sideways and slid into plaintiff's car. The left front corner of

plaintiff's and the left rear of defendant's automobiles were damaged. The center of the debris was found to be 5½ feet from the west edge of the pavement. Plaintiff's testimony as to the location of his car was contradictory but the location of the debris indicates it was partially off the pavement when struck. His undisputed statement is that he had applied his brakes, and was slowing down and pulling to his right. Of necessity very few seconds elapsed between the time defendant's car went out of control and the occurrence of the collision. The testimony of plaintiff's wife, also uncontradicted, is that the accident happened in a matter of seconds, also that her husband remarked "the car was coming toward us and was going to hit us and about that time it did."

Defendant charged plaintiff with contributory negligence in driving at an excessive speed and in failing to avoid the accident. These allegations were erroneously submitted to the jury. Plaintiff's automobile did not at any time go out of control but rather proceeded in its own traffic lane. Its speed was not a proximate cause of the accident. As to failure to avoid the accident the theory seems to be that plaintiff failed to come to a stop or pull out on the shoulder of the highway. The uncontradicted evidence is that he tried to do both. The record is barren of any evidence of contributory negligence. On the contrary, it clearly reflects that the sole proximate cause of this accident was the negligence of the defendant in driving off the pavement edge, losing control of his automobile, and crossing into the left hand lane. Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. Hopwood v. Voss, 172 Neb. 204, 109 N. W. 2d 170 (1961).

The judgment of the district court is reversed and the cause remanded with instructions to enter judg-

ment for plaintiff on the issue of liability and grant a new trial on the issue of damages.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DONALD JOHNSON, APPELLANT.

205 N. W. 2d 548

Filed March 23, 1973. No. 38689.

1. **Post Conviction: Pleadings.** In a post conviction proceeding a defendant must allege facts which, if proved, would constitute an infringement of his constitutional rights.
2. ———: ———. Conclusions, not substantiated by allegations of fact with some probability of verity, are not sufficient tc warrant a hearing.

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

Alan Saltzman and Henry Grether, 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.

NEWTON, J.

This is a post conviction proceeding wherein the defendant charges his personally selected attorney with incompetence due to a failure to call certain alleged witnesses. He further states the prosecuting attorney wrongfully suppressed evidence. He fails to specify what witnesses were not called, what they could have testified to, or what evidence was suppressed. We affirm the judgment denying the defendant relief.

In a post conviction proceeding a defendant must allege facts which, if proved, would constitute an infringement of his constitutional rights. See State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765.

In Harris v. Thomas, 341 F. 2d 560 (6th Cir., 1965), it is stated: "The witnesses to whom the petitioner refers are not named and there are no allegations of facts about which they would testify, nor in what manner they would have been pertinent to petitioner's case.

" 'Conclusions, not substantiated by allegations of fact with some probability of verity, are not sufficient to warrant a hearing.' "

The appeal is without merit and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WAYNE MENARD, APPELLANT.
205 N. W. 2d 547

Filed March 23, 1973. No. 38715.

Post Conviction: Records. Where the files and records in a post conviction proceeding show that the prisoner is entitled to no relief, an evidentiary hearing is not required.

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

Wayne Menard, 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.

PER CURIAM.

Wayne Menard moved for post conviction relief on the ground of ineffective assistance of counsel. The court dismissed the motion without an evidentiary hearing, and Menard appeals.

The motion is related to the conviction of Menard in a prosecution for assault with intent to commit

robbery. The court granted counsel, the public defender, leave to withdraw after the sentencing hearing. The court found that counsel had performed all duties incumbent upon him. The court, the same judge presiding, in the present proceeding, in addition found from the files and records that Menard was entitled to no relief upon his motion.

Menard's complaint is that the public defender failed to call an eyewitness and the victim's physician. The evidence against Menard was overwhelming, and nothing suggests that any such testimony would have affected the result.

Where the files and records in a post conviction proceeding show that the prisoner is entitled to no relief, an evidentiary hearing is not required. See, State v. Virgilito, 187 Neb. 328, 190 N. W. 2d 781 (1971); State v. Fugate, 180 Neb. 701, 144 N. W. 2d 412 (1966). Denial of Menard's motion was correct.

AFFIRMED.

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36. Unless abuse of discretion appears, sentence within statutory limits will not be disturbed on appeal. State v. Weidenfeller ---------- 505
37. Sentence imposed within statutory limits will not be disturbed in absence of abuse of discretion. State v. Six ---------- 538
38. In equity, Supreme Court when reviewing findings of trial court will, where evidence in conflict, consider that trial court heard and observed witnesses and must have accepted one version of facts rather than another. This rule, however, has no application where, although belief of trial court apparent, its decision founded upon question of sufficiency of evidence and not its credibility. First Nat. Bank v. First Cadco Corp. ---------- 553
39. Suspension of sentence and granting of probation discretionary with trial court, and in absence of abuse of discretion trial court's determination will not be disturbed. State v. Jurgens ---------- 574
40. Sentence within limits prescribed by statute will not be disturbed in absence of abuse of discretion. State v. Jurgens ---------- 574
41. A holding of Supreme Court on a first appeal becomes law of the case on retrial of same issues unless on second trial facts materially and substantially different. State v. Jurgens ---------- 574
42. In cases involving determinations of child custody, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless there is clear abuse of discretion. Lanz v. Lanz ---------- 578
43. Under provisions of Laws 1972, L.B. 820, no-fault divorce law, when appeal in action under prior divorce statutes filed in Supreme Court, it is invested with original de novo jurisdiction and required to disregard judgment of district court and make independent determinations of issues presented to district court, and therefore the provisions of L.B. 820 applicable to such determination by Supreme Court. Lienemann v. Lienemann ---------- 626
44. Taking of appeal to Supreme Court in divorce action vests it with jurisdiction and requires it to disregard judgment and action of district court and enter new, independent, and final judgment determining issues of case. Lienemann v. Lienemann ---------- 626

45. Supreme Court may reduce sentence rendered by district court against accused, when in its opinion sentence excessive, and it shall be duty of Supreme Court to render such sentence against accused as in its opinion may be warranted by evidence. State v. Stroh ---------- 637
46. Where punishment of offense left to discretion of court within prescribed limits of statute, sentence prescribed within such limits will not be disturbed unless there appears to be abuse of such discretion. State v. Stroh ---------- 637
47. In error proceeding from inferior court or tribunal to district court, and on appeal therefrom to Supreme Court, error cannot be predicated on sufficiency or insufficiency of evidence as matter of law to affirm or reverse findings and judgment of inferior court or tribunal from which error was prosecuted, unless all material and relevant evidence properly presented in bill of exceptions. Lanc v. Douglas County Welfare Administration ---------- 651
48. Where alleged errors of law dependent upon evidence are asserted, it will be conclusively presumed that evidence adduced in inferior court or tribunal supports judgment or final order therein made in absence of proper bill of exceptions. Lanc v. Douglas County Welfare Administration ---------- 651
49. Provision of statutes requiring plaintiff in error to file with his petition authenticated transcript of proceedings containing final order sought to be reversed, vacated, or modified jurisdictional and mandatory. Lanc v. Douglas County Welfare Administration ---------- 651
50. Discretion of trial court with respect to changing custody of minor children subject to review, but determination of the court will not ordinarily be disturbed unless there is clear abuse of discretion or it is clearly against weight of evidence. Bennett v. Bennett ---------- 654
51. Fundamental that mandamus is law action and that conflicts in evidence or findings of fact based thereon will not be disturbed on appeal unless clearly wrong. State ex rel. Rittenhouse v. Newman ---------- 657
52. Consideration of cause on appeal limited to errors assigned and discussed. McClellen v. Dobberstein .. 669
53. Not duty of reviewing court to search record for purpose of ascertaining if there is prejudicial error;

every reasonable presumption will be indulged in favor of correctness of judgment that is entered; and any ruling alleged to be prejudicially erroneous must be specifically pointed out. McClellen v. Dobberstein ---------- 669

54. Public defender may apply to court to withdraw from representation of defendant on appeal when he deems such appeal to be wholly frivolous. State v. Kellogg ---------- 692

55. If counsel finds his case to be wholly frivolous, after conscientious examination of it, he should so advise court and request permission to withdraw; request must, however, be accompanied by brief referring to anything in record that might arguably support appeal; copy of counsel's brief should be furnished indigent and time allowed him to raise any points that he chooses; court - not counsel - then proceeds, after full examination of all proceedings, to decide whether case wholly frivolous; if it so finds, it may grant counsel's request to withdraw. State v. Kellogg ---------- 692

56. Rules of practice in district court cannot enter into determination of question presented in Supreme Court unless incorporated in bill of exceptions, since Supreme Court will not take judicial notice of rules of practice of district court. Simmons v. Murray - 695

57. Where record does not show abuse of discretion, ruling on motion to transfer under section 25-410, R. S. Supp., 1972, will not be disturbed. Johnsen v. Parks ---------- 712

58. Where law action tried to court without jury, finding of court has effect of jury verdict and will not be disturbed unless clearly wrong. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734

59. Where appears in error proceeding that administrative agency has acted within its jurisdiction and is some competent evidence to sustain its findings and order, order of administrative agency will be affirmed. First Nat. Bank of Bellevue v. Southroads Bank ---------- 748

60. Finding that statement of accused voluntary will not ordinarily be set aside unless finding clearly erroneous. State v. Medina ---------- 765

61. If there is any element of science or skill in matter being investigated before trial jury, not reversible error for court to admit expert testimony

thereon, even though element of science slight. State v. Medina ---------- 765
62. Sentence imposed within statutory limits will not be disturbed unless abuse of discretion appears in record. State v. Medina ---------- 765
63. Ruling of trial court on motion for new trial subject to review in Supreme Court. Roush v. Nebraska P. P. Dist. ---------- 785
64. Whether decision was to grant new trial or deny one, questions in Supreme Court are, do alleged error or errors appear in record, were they called to attention of trial court by motion, and do they constitute prejudicial error to party complaining. Roush v. Nebraska P. P. Dist. ---------- 785
65. Rules of law will be applied to those assignments of error in Supreme Court with same requirements whether decision granted or denied new trial. Roush v. Nebraska P. P. Dist. ---------- 785
66. An order granting new trial will be scrutinized in Supreme Court with same care as one denying new trial. Roush v. Nebraska P. P. Dist. ---------- 785
67. Where evidence conflicting or where reasonable minds may draw different inferences or conclusions from evidence, within province of jury, or court when case tried without jury, to decide issues of fact and Supreme Court may not set aside or direct verdict in such situation. Libbey-Owens Ford Glass Co. v. L & M Paper Co. ---------- 792
68. In law actions, conflicts in evidence or findings of fact will not be disturbed on appeal unless clearly wrong. First Nat. Bank & Trust Co. v. Cutright ---------- 805
69. Suspension of sentencing and granting of probation discretionary with trial court and in absence of abuse of discretion, trial court's determination will not be disturbed. State v. Greco ---------- 817

Arrest.

1. Peace officer may arrest person without warrant if officer has reasonable cause to believe that person has committed misdemeanor and has reasonable cause to believe that person will not be apprehended unless immediately arrested, may cause injury to others unless immediately arrested, or may destroy or conceal evidence of commission of misdemeanor. State v. McCune ---------- 165
2. When officer makes arrest, reasonable for him to

search person arrested and seize any evidence on arrestee's person in order to prevent its concealment or destruction; that justification absent where search remote from arrest. State v. McElroy ---------- 376

3. Peace officer may arrest person without warrant if he has reasonable cause to believe that felony being committed or has been committed. State v. Brooks ---------- 592

4. Where peace officer has reasonable cause to believe that sale of narcotics taking place inside a residence, exigent circumstances may justify his entering residence for purpose of making arrest without prior disclosure of his authority and purpose. State v. Brooks ---------- 592

Assistance, Writ of.

Writ of assistance nothing more than process by which court of equity finally carries its judgment or decree into effect. State Fire Marshal v. Village of Dorchester ---------- 464

Associations.

Section 25-313, R. R. S. 1943, authorizes unincorporated association to represent employees in collective bargaining with employers as well as to sue and be sued in name of association; however, before it may bring an action in courts of this state, it must comply with provisions of section 25-314, R. R. S. 1943. Nebraska Council of Educational Leaders v. Nebraska Department of Education ---------- 811

Attorney and Client.

1. Public defender may apply to court to withdraw from representation of defendant on appeal when he deems such appeal to be wholly frivolous. State v. Kellogg ---------- 692

2. If counsel finds his case to be wholly frivolous, after conscientious examination of it, he should so advise court and request permission to withdraw; request must, however, be accompanied by brief referring to anything in record that might arguably support appeal; copy of counsel's brief should be furnished indigent and time allowed him to raise any points that he chooses; court - not counsel - then proceeds, after full examination of all proceedings, to decide whether case wholly frivolous; if

it so finds, it may grant counsel's request to withdraw. State v. Kellogg ---------- 692

Attorneys at Law.

1. License to practice law in this jurisdiction granted on implied understanding that party receiving it shall at all times demean himself in proper manner and abstain from such practices as cannot fail to bring discredit to himself, the profession, and the courts. State ex rel. Nebraska State Bar Assn. v. Strom ---------- 146
2. Violation of any ethical standards relating to practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitute grounds for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Strom ---------- 146
3. Amount of attorney's fees allowed rests in sound discretion of district court, considering elements of amount involved, responsibility assumed, questions of law raised, time and labor necessarily required in performance of duties, professional diligence and skill required, and result of services performed. Insurance Co. of North America v. Omaha Paper Stock, Inc. ---------- 232
4. Where an insurer brings action for declaratory judgment to have coverage determined and insured prevails, latter entitled to attorney's fee under provisions of section 44-359, R. S. Supp., 1972. State Farm Mut. Auto. Ins. Co. v. Selders ---------- 334
5. Under section 48-118, R. R. S. 1943, where employer and employee join in suit against third person, district court has jurisdiction to determine all disputes between employer and employee, including setting and allocation of attorney's fees and expenses. Gillotte v. Omaha Public Power Dist. ---------- 444
6. Under section 48-118, R. R. S. 1943, subrogated interest of employer, for computation and allocation of fees and expenses, not restricted to workmen's compensation benefits actually paid, but measured by workmen's compensation liability relieved or discharged by recovery against third party. Gillotte v. Omaha Public Power Dist. ---------- 444

Automobiles.

Nebraska Implied Consent Law constitutional. State

v. Williams ---------- 127

Bailments.

1. Generally, agreement to return identical property makes contract one of bailment and not of sale, and title to property not changed. Simpkins v. Ritter ---------- 644
2. It is very essence of contract of bailment that it shall contemplate return of property bailed. Simpkins v. Ritter ---------- 644
3. Term "bailment" comprehensively defined as delivery of personalty for some particular purpose, or on mere deposit, upon contract, express or implied, that after purpose has been fulfilled it shall be redelivered to person who delivered it or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be. Simpkins v. Ritter ---------- 644

Banks and Banking.

1. Order of Department of Banking denying application for bank charter does not amount to adjudication for future and is not res judicata as to another application of same nature subsequently filed. First Nat. Bank of Bellevue v. Southroads Bank ---------- 748
2. Under section 4-406 (3), U.C.C., lack of ordinary care on part of drawee bank in paying items may be established by proof that bank's employees failed to exercise care in processing the items. First Nat. Bank & Trust Co. v. Cutright ---------- 805

Bills and Notes.

1. Although Installment Loan Act applies primarily to those who have been licensed under the act, its inhibitory provisions apply to nonlicensees as well. Seldin v. Northland Mortgage Co. ---------- 175
2. Real question of whether transaction installment loan is question for trier of fact under the circumstances. Seldin v. Northland Mortgage Co. ---------- 175

Boundaries.

1. When fence constructed as boundary line between two properties, and parties claim ownership of land up to fence for full statutory period and not interrupted in their possession or control during that time, they will, by adverse possession, gain

title to such land as may have been improperly enclosed with their own. Abood v. Johnson ------ 87
2. Where location and boundaries of county zoning district can be determined only from an official zoning map or maps, maps must contain sufficient information to permit person of ordinary intelligence to locate on map any specific legally described tract of land, and to determine with reasonable accuracy and precision boundaries of any zoning district. Deans v. West ---------- 518
3. Failure to comply with statutory requirements for publication of official county zoning map prevents zoning regulations, of which map a part, from becoming valid, effective, or enforceable, at least where boundaries of zoning districts can only be determined from map. Deans v. West ---------- 518

Buildings.

Not negligence to maintain, under appropriate circumstances, different levels and approaches to places of business. Graham v. Simplex Motor Rebuilders, Inc. ---------- 507

Classification.

1. Public utility may classify its users for rate purposes if classification reasonable and not unjustly discriminatory. Reimer v. City of O'Neill ------ 151
2. Hotels and motels may be classified separately from trailer courts and apartment houses for purpose of fixing rates for water and sewer service. Reimer v. City of O'Neill ---------- 151
3. Municipality furnishing water and sewer service to its residents must treat all customers in same class equally. Reimer v. City of O'Neill ---------- 151
4. Legislature may classify for purposes of legislation if classification rests upon substantial difference of situation or circumstance. Pepsi Cola Bottling Co. v. Peters ---------- 271
5. Reasonable classification under federal constitutional guarantee of equal protection includes all persons in similar situations with respect to purpose of the law. Norden Laboratories, Inc. v. County Board of Equalization ---------- 437

Clerks of Court.

All records in juvenile court pertaining to proceed-

ings relating to a particular child may be filed together. State v. Miller ---------- 383

Collective Bargaining.

Section 25-313, R. R. S. 1943, authorizes unincorporated association to represent employees in collective bargaining with employers as well as to sue and be sued in name of association; however, before it may bring an action in courts of this state, it must comply with provisions of section 25-314, R. R. S. 1943. Nebraska Council of Educational Leaders v. Nebraska Department of Education --- 811

Common Law.

Statutory provisions may cut across issue and claim preclusion at common law. Pedersen v. Westroads, Inc. ---------- 236

Compromise and Settlement.

Parol agreement of compromise which has been executed is of equal effect with one in writing. Simmons v. Murray ---------- 695

Confessions.

1. In determining admissibility of confession, all evidence on subject must be considered and mere fact that evidence conflicting not a bar to its admission. State v. Hutchison ---------- 158
2. When accused has been informed of his constitutional rights and thereafter freely and voluntarily confesses, confession ordinarily admissible in evidence. State v. Hutchison ---------- 158
3. Doctrine of Miranda v. Arizona comes into play when individual first subjected to police interrogation while in custody. State v. Moore ---------- 354
4. If person in custody indicates that he wishes assistance of counsel before an interrogation, authorities cannot ignore that request and he must be offered counsel. State v. Moore ---------- 354
5. Once Miranda warnings have been given, procedure clear; if individual indicates prior to or during questioning that he wishes to remain silent, interrogation must cease. State v. Moore ---------- 354
6. If individual held for interrogation by police states that he wants an attorney, interrogation must cease until an attorney present and person must have

opportunity to confer with attorney and to have him present during subsequent questioning. State v. Moore ---------- 354
7. Express declaration that individual held for interrogation by police willing to make statement and to do so without attorney being present, followed closely by statement, may constitute waiver of privilege against self-incrimination and right to counsel. State v. Moore ---------- 354
8. That police who knew that defendant was represented by attorney and failed to give attorney notice of intended interview of defendant did not under evidence in this case make inadmissible statements made by defendant because violative of right to counsel where defendant clearly, intelligently, knowingly, and voluntarily waived his right to have counsel present. State v. Moore ---------- 354
9. Where evidence as to what occurred immediately prior to and at time of making of confession shows that it was freely and voluntarily made and excludes hypothesis of improper inducements or threats, confession is voluntary and may be received. State v. Medina ---------- 765
10. Finding that statement of accused voluntary will not ordinarily be set aside unless finding clearly erroneous. State v. Medina ---------- 765

Constitutional Law.

1. Municipal corporation may not, without sanction of state by constitutional provision or legislative enactment, annex territory to its corporate area or change its boundaries. State ex rel. Andersen v. Leahy ---------- 92
2. It is only violation or infringement of constitutional rights which is cognizable under Post Conviction Act. State v. Williams ---------- 127
3. Fifth Amendment privilege against self-incrimination protects accused only from being compelled to testify against himself or otherwise provide State with evidence of testimonial or communicative nature, and withdrawal of body fluid and use of its analysis does not involve compulsion. State v. Williams ---------- 127
4. Nebraska Implied Consent Law constitutional. State v. Williams ---------- 127
5. Imposition of sentence of 10 to 15 years which

sentence to be consecutive to life sentence previously imposed for unrelated crime not a cruel and unusual punishment such as to be in conflict with Eighth Amendment to Constitution of United States. State v. Crooks ---------- 344

6. If an act complete and independent in itself, it may incidentally amend, modify, or have impact upon provisions of existing statutes without controverting provisions of Constitution relating to amendments set out in Article III, section 14. Bodenstedt v. Rickers ---------- 407

7. If statute subject to more than one reasonable construction, court will adopt one which will make act constitutional. Bodenstedt v. Rickers ---------- 407

8. Implied Consent Law, enacted in 1971, constitutional. State v. Manley ---------- 415

9. Fifth Amendment privilege protects accused from being compelled to testify against himself only as to evidence of testimonial or communicative nature. State v. Manley ---------- 415

10. Withdrawal of blood, and use of analysis in evidence, does not involve compulsion within Fifth Amendment. State v. Manley ---------- 415

11. Duty of Supreme Court to give a statute an interpretation which meets constitutional requirements if it can. State v. Manley ---------- 415

12. Depressant and Stimulant Drugs Act of 1967 did not violate Article III, section 14, Constitution of Nebraska. State v. Waechter ---------- 433

13. Free port law in force in 1969 did not violate state constitutional provisions for uniformity and against special privileges. Norden Laboratories, Inc. v. County Board of Equalization ---------- 437

14. Reasonable classification under federal constitutional guarantee of equal protection includes all persons in similar situations with respect to purpose of the law. Norden Laboratories, Inc. v. County Board of Equalization ---------- 437

15. Section 28-1011.15, R. S. Supp., 1972, held constitutional. State v. Skinner ---------- 457

16. Statute that (1) proscribes unreasonable interference or obstruction by conduct intertwined with expression and association and (2) vindicates important interests of society not void for "overbreadth." State v. Sullivan ---------- 465

17. Criminal sentence in which court considered prior

time spent by defendant in custody may be consistent with state and federal constitutional guarantees of due process and with federal constitutional guarantee of equal protection, although record at sentencing hearing silent on subject. State v. Nelson ---------- 580

18. Wherever an individual may harbor reasonable expectation of privacy he ought to be free from unconstitutional governmental intrusion. State v. Nichols ---------- 664

19. Section 28-921, R. S. Supp., 1972, not unconstitutionally vague nor is it unconstitutional for failure to prescribe procedure for its enforcement. State v. Little Art Corp. ---------- 681

20. Where single copy of film seized for sole purpose of preserving it for evidence in criminal action, such seizure does not violate First Amendment. State v. Little Art Corp. ---------- 681

21. Obscenity is not subject to protection of First Amendment. State v. Little Art Corp. ---------- 681

Contempt.

1. Principle well established that an appellate court may dismiss an appeal for contumacious violation of an order of court; one who flouts order of court not in position to seek judicial assistance. Kartman v. Cook ---------- 159

2. Contempt proceedings are in their nature criminal, and no intendments will be indulged in to support a conviction. Halverson v. Halverson ---------- 489

3. Before a person may be said to be in contempt of court for failure to pay amounts fixed in decree of divorce for support of children, evidence must disclose not only failure to comply with decree but also that failure was willful. Halverson v. Halverson ---------- 489

Continuances.

1. From and after 7 days after November 24, 1972, general finding of a trial court that "good cause" has existed under provisions of section 29-1207 (4) (f), R. S. Supp., 1971, for extending beyond 6 months from the filing of information the period for bringing defendant to trial will no longer suffice, and trial court will from that time on be required to make specific findings as to the cause or

causes of such extensions and the period of extension attributable to such causes; substantial preponderance of evidence must support such findings. State v. Alvarez ---------- 281
State v. Brown ---------- 297
2. Application for continuance addressed to sound discretion of trial court and its ruling thereon will not be disturbed unless it appears that rights of defendant were prejudiced thereby. State v. Kennedy ---------- 423
3. Motion for continuance addressed to sound discretion of court, and, in absence of abuse of discretion, its denial not error. State v. Craig ---------- 461
4. Request for continuance or recess addressed to sound discretion of trial judge. State v. McCown ---------- 495

Contracts.

1. County boards usually given authority to make all contracts necessary and incident to management of interests of county, and may stipulate as to manner in which such contracts to be performed and contract with ministerial officers of county, unless such contracts prohibited by statute. Thiles v. County Board of Sarpy County ---------- 1
2. County boards may not hire person to perform (1) unauthorized acts, (2) official discretionary duties of board, or (3) statutory official duties of board or another county or state official. County boards with such limitations have implied power to employ such agents and servants as required for county purposes and not otherwise provided for by statute or Constitution; wisdom and expediency of making particular contract of employment within exclusive discretion of board; and where only part of services contracted for in particular case within power of board to engage, contract nevertheless valid as to that part. Thiles v. County Board of Sarpy County ---------- 1
3. County budget act does not apply to contracts executed by county board of commissioners. Thiles v. County Board of Sarpy County ---------- 1
4. Contract, although in violation of statute, will not be declared void if was not intent of Legislature to make it illegal and void. Thiles v. County Board of Sarpy County ---------- 1
5. To invalidate contract for illegality, illegality must

be inherent and not merely collateral. Thiles v. County Board of Sarpy County ---------- 1

6. No insurance policy or certificate of any kind shall be issued or delivered in Nebraska unless and until copy of form thereof has been filed with Department of Insurance and approved by it. Workman v. Great Plains Ins. Co., Inc. ---------- 22

7. Cited statute does not prohibit insurance company from printing in or attaching to insurance policy additional or altered terms or conditions not found in standard approved form, provided they are not inconsistent with or waiver of any of provisions of such authorized approved form; provisions not in conflict with provisions of such approved form may be added when necessary to express terms of contract of insurance which is authorized. Workman v. Great Plains Ins. Co., Inc. ---------- 22

8. Under Uniform Commercial Code, where goods delivered to buyer under contract for sale and physically received by him, they are in his possession. North Platte State Bank v. Production Credit Assn. 44

9. Language in construction contract, prepared by owner, that quality of embankment materials in certain designated sites "will be acceptable in general," accompanied by language which provides "the contractor shall determine for himself the amount of selective excavation, blending. screening, mixing, and other work required to provide a finished product meeting the specifications," and which authorized the owner's engineer to "reject portions of the deposit as unacceptable," does not constitute representation by owner to contractor that quality such that material can be excavated and processed without undue difficulty; neither does such language prevent owner from waiving specifications on quality. Knight Bros., Inc. v. State ---------- 64

10. Specifications in construction contract containing test borings of site for embankment materials and which contain the following language: "No guarantee is made regarding the nature of the material at points other than locations sampled," expressly negatives warranty of quality except as shown by test borings. Knight Bros., Inc. v. State ---------- 64

11. Risk of unexpected cost and difficulty in performance of construction contracts usually carried by building contractor. Employing owner may make repre-

sentations or warranties; parties may by agreement allocate such risks as they see fit. Every case stands on its own legs; and is no rule of law with an answer mechanically determined. Knight Bros., Inc. v. State 64

12. If contract fairly entered into by experienced builder, fact that portion of work proves to be more expensive than estimated does not entitle builder, in absence of fraud or mistake, to any allowance beyond contract price. Knight Bros., Inc. v. State ---- 64

13. Provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. Knight Bros., Inc. v. State ---------- 64

14. When a contract is ambiguous, court must determine parties' intent and ambiguity must be resolved so as to give effect to that intent. Knight Bros., Inc. v. State ---------- 64

15. Interpretation given a contract by parties themselves while engaged in their performance of it is one of best indications of their true intent and should be given great, if not controlling, influence, and court should ordinarily enforce such construction. Knight Bros., Inc. v. State ---------- 64

16. Where evidence relating to ambiguities and contradictory provisions in a written contract is conflicting, interpretation to be given contract is for jury. Knight Bros., Inc. v. State ---------- 64

17. If a condition of obligor's duty is that he be satisfied with obligee's performance, an interpretation is preferred under which condition occurs, provided a reasonable man in position of obligor would be satisfied and such a test is practicable. Nebraska Panhandle Community Action Agency, Inc. v. Strange ---------- 83

18. Present a condition in employment contract that obligor be satisfied with obligee's performance, if agreement leaves no doubt that honest satisfaction and nor more is meant, condition does not occur if the obligor is honestly, even though unreasonably, dissatisfied. Nebraska Panhandle Community Action Agency, Inc. v. Strange ---------- 83

19. Where a condition of obligor's duty is that he be satisfied with obligee's performance, mere statement of obligor that he is not satisfied not conclusive. Nebraska Panhandle Community Action Agency, Inc. v. Strange ---------- 83

20. Interpretation given contract by parties themselves while engaged in performance of it one of the best indications of true intent of contract; ordinarily, such construction of contract should be enforced. Simon v. Omaha P. P. Dist. ---------- 183

21. Ordinarily, an agent only liable to his principal for mere breach of his contract with such principal; but if in course of his agency he undertakes as part of his contract to render service to his principal of type which he should recognize as necessary for protection of third persons, he must exercise reasonable care in performance of undertaking. Simon v. Omaha P. P. Dist. ---------- 183

22. Mere failure of surviving wife to tender back support or other payments received by her under terms of property settlement agreement entered into in connection with action for divorce does not by itself estop surviving spouse from denying finality of divorce decree and from claiming her statutory rights in estate of husband where he dies before divorce becomes final. Bassett v. First Nat. Bank & Trust Co. ---------- 206

23. Property settlement agreement entered into in connection with and to facilitate action for divorce, and conditioned upon divorce being granted and approval of court, has no viability independent of finality of decree of divorce, and where one of parties dies before divorce becomes final, rights of inheritance and statutory allowances not barred by property settlement agreement. Bassett v. First Nat. Bank & Trust Co. ---------- 206

24. Rule is that there can be no implied contract where there is express agreement between parties relative to same subject matter. Roth v. Lieske ---------- 216

25. Parol evidence generally admissible when offered for purpose of explaining and showing true nature of transaction between parties. Cedars Corp. v. H. Krasne & Son, Inc. ---------- 220

26. General rule that, in absence of anything to indicate contrary intention, instruments executed at same time by same parties for same purpose and in course of same transaction are, in eye of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance. Cedars Corp. v. H. Krasne & Son, Inc. 220

27. Consent decree transferring assets and liabilities

of sanitary and improvement district to City of Omaha upon annexation of land of district may be insufficient to constitute waiver or claim preclusion of beneficiary rights of Omaha under private covenants relating to rezoning. Pedersen v. Westroads, Inc. ---------- 236

28. In ambiguous contract, court may look at preliminary negotiations to determine intent of parties. Halbert v. Food Host U. S. A., Inc. ---------- 346

29. Simple promise to pay money not made impossible of performance by death or illness of either debtor or creditor. Hasemann v. Hasemann ---------- 431

30. Parties to contract can, by express terms, make their mutual duties terminate upon death of one of them, even though promised performances not personal. Hasemann v. Hasemann ---------- 431

31. Intention of parties to written contract expressed in unambiguous terms must be determined from its contents. Kingery Constr. Co. v. Board of Regents 453

32. Officers or shareholders upon selling their individual shares may make reasonable restrictive agreements not to compete with the corporation. Antrim v. Pittman ---------- 474

33. In sale of corporate shares a common law test of reasonableness of covenant not to compete is whether seller's opening a business of his own would substantially affect corporate good will. Antrim v. Pittman ---------- 474

34. At common law, invalidity of promise not to compete does not depend upon proof of actual harm. Antrim v. Pittman ---------- 474

35. Under Uniform Commercial Code, remedy of replevin not available to buyer of goods that have not been identified to contract. Putnam Ranches, Inc. v. Corkle ---------- 533

36. If value of property conveyed exceeds amount of encumbrances thereon, agreement by grantee to pay off encumbrances not valuable consideration as against grantor's creditors; ability of grantee to pay encumbrance also fact to be considered. First Nat. Bank v. First Cadco Corp. ---------- 553

37. Parol evidence inadmissible to vary written agreement complete on its face. First Nat. Bank v. Hull 581

38. Filling of blanks in written instrument not, strictly speaking, alteration of instrument; where blank filled in after execution and delivery of written in-

strument, it is question of authority to do so. First Nat. Bank v. Hull ---------- 581

39. Right to fill blanks in written instruments after execution and delivery based upon assumption of consent, in absence of specific instructions, and leaving of such blanks considered to imply authority to fill them, and creates an agency in receiver to do so in way contemplated by maker. First Nat. Bank v. Hull 581

40. To require discharge of a party to a written instrument on ground of alteration, must appear that alteration was both material and fraudulent. First Nat. Bank v. Hull ---------- 581

41. Where an instrument has been executed in duplicate, unauthorized alteration of one of copies does not ordinarily affect validity, operation, or effect of other copy. First Nat. Bank v. Hull ---------- 581

42. L.B. 1409, Laws 1969, c. 846, p. 3185, did not authorize metropolitan city to enter into agreement with Board of Regents of University of Nebraska for joint use of park property. Gallagher v. City of Omaha ---------- 598

43. In absence of statutory authority, a city has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority. Gallagher v. City of Omaha ---------- 598

44. Insurer under an aircraft insurance policy may lawfully exclude certain risks from coverage of its policy and where damage occurs during operation of insured aircraft under circumstances as to which policy excludes coverage, there is no coverage. Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co. ---------- 610

45. Under aircraft insurance policy that excludes coverage while aircraft operated in flight by other than a pilot or pilots holding valid and effective pilot and medical certificates, there is no coverage where a pilot's medical certificate lapsed 5 months before an accident occurred. Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co. ---------- 610

46. Objectively reasonable expectations of beneficiary-insured relating to terms of his insurance contract will ordinarily be honored. Bracy v. American Family Mut. Ins. Co. ---------- 631

47. Purpose of insurer against liability for medical payments in automobile policy may be not to make medical payments to insured who is injured in another

vehicle owned by insured but not insured under policy. Bracy v. American Family Mut. Ins. Co. ------ 631
48. Generally, agreement to return identical property makes contract one of bailment and not of sale, and title to property not changed. Simpkins v. Ritter -- 644
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50. Term "bailment" comprehensively defined as delivery of personalty for some particular purpose, or on mere deposit, upon contract, express or implied, that after purpose has been fulfilled it shall be redelivered to person who delivered it or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be. Simpkins v. Ritter 644
51. Parol agreement of compromise which has been executed is of equal effect with one in writing. Simmons v. Murray ---------- 695
52. When an act or agreement of beneficiary of spendthrift trust would disappoint or frustrate purposes of settlor by diverting property or income from purpose prescribed, such act or agreement void ab initio. First Nat. Bank of Omaha v. First Cadco Corp. 734

Controlled Substances.

1. In absence of legislative declaration to contrary, quantity with a potential for abuse not essential element of offense of unlawful possession of controlled substance. State v. McElroy ---------- 376
2. Depressant and Stimulant Drugs Act of 1967 did not violate Article III, section 14, Constitution of Nebraska. State v. Waechter ---------- 433
3. Party who claims that an exception contained in Depressant and Stimulant Drugs Act is applicable to him has burden of proof to establish that exception is applicable. State v. Waechter ---------- 433

Conversion.

1. Holder of security interest is real party in interest in action in trover or conversion to recover for property subject to security interest and wrongfully converted. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702
2. Purchaser of collateral which refuses to pay purchase price guilty of conversion. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702

Corporations.

1. Under Nebraska Nonprofit Corporation Act, the Economic Opportunity Act of 1964, as amended, and administrative regulations, unless particular facts require it, Supreme Court will not review validity of resolutions in which board of directors of corporate administrator of programs under Economic Opportunity Act of 1964, as amended, terminates its employees. Nebraska Panhandle Community Action Agency, Inc. v. Strange ---------- 83
2. Officers or shareholders upon selling their individual shares may make reasonable restrictive agreements not to compete with the corporation. Antrim v. Pittman ---------- 474
3. Conveyance in fraud of creditors may be effected by organization of corporation and transfer of property to it with intent to hinder, delay, or defraud creditors. First Nat. Bank v. First Cadco Corp. -- 553

Counties.

1. County commissioners clothed with powers expressly conferred upon them by statute and also such powers as are requisite to enable them to discharge official duties devolved upon them by law. Thiles v. County Board of Sarpy County ---------- 1
2. County boards usually given authority to make all contracts necessary and incident to management of interests of county, and may stipulate as to manner in which such contracts to be performed and contract with ministerial officers of county, unless such contracts prohibited by statute. Thiles v. County Board of Sarpy County ---------- 1
3. County boards may not hire person to perform (1) unauthorized acts, (2) official discretionary duties of board, or (3) statutory official duties of board or another county or state official. County boards with such limitations have implied power to employ such agents and servants as required for county purposes and not otherwise provided for by statute or Constitution; wisdom and expediency of making particular contract of employment within exclusive discretion of board; and where only part of services contracted for in particular case within power of board to engage, contract nevertheless valid as to that part. Thiles v. County Board of Sarpy County ---------- 1

4. County budget act does not apply to contracts executed by county board of commissioners. Thiles v. County Board of Sarpy County ---------- 1
5. In action against county commissioners pursuant to statute to recover money allegedly expended unlawfully after annual tax levy, must be shown not only that warrants in excess of 85 per cent of amount levied by tax for current year issued, but also that was no money in proper fund for their payment. Thiles v. County Board of Sarpy County 1
6. Contract, although in violation of statute, will not be declared void if was not intent of Legislature to make it illegal and void. Thiles v. County Board of Sarpy County ---------- 1
7. To invalidate contract for illegality, illegality must be inherent and not merely collateral. Thiles v. County Board of Sarpy County ---------- 1
8. Timely objection by litigant with standing may nullify rezoning resolution by county board that has not adopted comprehensive development plan conformable to statute. Bagley v. County of Sarpy -- 393
9. Under statutory provisions enacted in 1967, county engaged in zoning or rezoning ought to adopt comprehensive development plan within reasonable time. Bagley v. County of Sarpy ---------- 393
10. County board is only "authority" whose approval required for payment of tax refund claim under section 77-1734.01, R. R. S. 1943; failure to transmit copy of claim to other taxing entities does not deprive county board of jurisdiction and authority to determine and approve proper claim. School Dist. of Minatare v. County of Scotts Bluff ---------- 395
11. Section 77-1737, R. R. S. 1943, providing that county board does not have power to release, discharge, remit, or commute taxes for any reason, does not prevent proper authority from refunding taxes as authorized by any specific tax refund statute. School Dist. of Minatare v. County of Scotts Bluff ------ 395
12. Timely objection by litigant with standing may nullify zoning regulations purportedly adopted by county board that has not adopted comprehensive development plan conformable to statute. Deans v. West ---------- 518
13. Where location and boundaries of county zoning district can be determined only from an official zoning map or maps, maps must contain sufficient

information to permit person of ordinary intelligence to locate on map any specific legally described tract of land, and to determine with reasonable accuracy and precision boundaries of any zoning district. Deans v. West ---------- 518

County Officers and Employees.

In action against county commissioners pursuant to statute to recover money allegedly expended unlawfully after annual tax levy, must be shown not only that warrants in excess of 85 per cent of amount levied by tax for current year issued, but also that was no money in proper fund for their payment. Thiles v. County Board of Sarpy County - 1

Court of Industrial Relations.

1. Cited statute establishes right of any labor organization organized under provisions of the act to file petition with Court of Industrial Relations invoking its jurisdiction when any industrial dispute exists between parties as set forth in the act. Mid-Plains Education Assn. v. Mid-Plains Nebraska Tech. College ---------- 37
2. When school district refuses to recognize employees' association authorized to act for it, it has exhausted all remedies under Teachers' Professional Negotiations Act, and Court of Industrial Relations acquires jurisdiction. Sidney Education Assn. v. School Dist. of Sidney ---------- 540
3. Employees covered by Teachers' Professional Negotiations Act must await exhaustion of that act before invoking jurisdiction of Court of Industrial Relations, but this does not deny them right to invoke that jurisdiction. Sidney Education Assn. v. School Dist. of Sidney ---------- 540
4. All industrial disputes involving governmental service, service of a public utility, or other disputes as Legislature may provide shall be settled by invoking jurisdiction of Court of Industrial Relations. Nebraska Dept. of Roads Employees Assn. v. Department of Roads ---------- 754
5. A uniquely personal termination of employment does not constitute an industrial dispute. Nebraska Dept. of Roads Employees Assn. v. Department of Roads 754
6. Where court has no jurisdiction of subject matter of action, all proceedings in such action void. Ne-

braska Dept. of Roads Employees Assn. v. Department of Roads ---------- 754

Courts.

1. When a contract is ambiguous, court must determine parties' intent and ambiguity must be resolved so as to give effect to that intent. Knight Bros., Inc. v. State ---------- 64
2. Interpretation given a contract by parties themselves while engaged in their performance of it is one of best indications of their true intent and should be given great, if not controlling, influence, and court should ordinarily enforce such construction. Knight Bros., Inc. v. State ---------- 64
3. In construction of a statute, courts must consider preexisting law and any other laws relating to same subject. Seldin v. Northland Mortgage Co. -- 175
4. Courts should not give interpretation to a statute which would have effect of nullifying another statute when obviously that was not clear legislative intent. Seldin v. Northland Mortgage Co. ---------- 175
5. 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. Insurance Co. of North America v. Omaha Paper Stock, Inc. 232
6. All records in juvenile court pertaining to proceedings relating to a particular child may be filed together. State v. Miller ---------- 383
7. Juvenile court presumed to disregard all irrelevant matters in determining whether a child is a delinquent child. State v. Miller ---------- 383
8. In a disposition hearing, juvenile court may consider all previous matters in juvenile court pertaining to the child. State v. Miller ---------- 383
9. To extent that courts may have power to review action of professional examining board in its refusal to recommend reinstatement under provisions of section 71-155, R. R. S. 1943, of license which has earlier been revoked, Supreme Court has no right to compel discretionary power of that public board unless its action arbitrary or capricious. Coil v. Department of Health ---------- 606
10. Rules of practice in district court cannot enter into determination of question presented in Supreme Court unless incorporated in bill of exceptions, since Supreme Court will not take judicial notice of rules

of practice of district court. Simmons v. Murray -- 695

Creditors' Suits.

1. Question of fraudulent intent in all cases arising under provisions of section 36-401, R. R. S. 1943, is question of fact, and not of law. First Nat. Bank v. First Cadco Corp. ---------- 553
2. Creditor may usually follow and subject to his claim the fund or proceeds resulting from fraudulent conveyance and may pursue same into any property in which it may have been invested, so far as it can be found. First Nat. Bank v. First Cadco Corp. 553
3. Provisions of sections 36-401 to 36-409, R. R. S. 1943, do not impair title of purchaser for valuable consideration unless purchaser had previous notice of fraudulent intent of his immediate grantor, or of frauds rendering void title of grantor. First Nat. Bank v. First Cadco Corp. ---------- 553
4. Conveyance in consideration of an agreement for future support may, where it has effect of hindering, delaying, or defrauding creditors, be evidence of fraudulent intent. First Nat. Bank v. First Cadco Corp. ---------- 553
5. If value of property conveyed exceeds amount of encumbrances thereon, agreement by grantee to pay off encumbrances not valuable consideration as against grantor's creditors; ability of grantee to pay encumbrance also fact to be considered. First Nat. Bank v. First Cadco Corp. ---------- 553
6. Transfer by which grantor reserves to himself a benefit to detriment of his creditors may constitute evidence of fraud. First Nat. Bank v. First Cadco Corp. ---------- 553
7. Depending upon facts and circumstances, one who is beneficiary of fraudulent conveyance may be required to account for rents and profits thereof, including rents and profits from proceeds. First Nat. Bank v. First Cadco Corp. ---------- 553
8. Where is a conveyance between close relatives without adequate consideration, burden upon parties to transaction to establish that it was done in good faith. First Nat. Bank v. First Cadco Corp. ------ 553
9. Fact that plaintiff in creditor's bill action does have security does not deprive it of its standing as creditor under section 36-401, R. R. S. 1943. First Nat. Bank v. First Cadco Corp. ---------- 553

10. Whether creditor mortgagee will be required to first exhaust property which it has taken as security before subjecting fraudulently transferred property to satisfaction of its judgment lien is in equity matter for sound discretion of court. First Nat. Bank v. First Cadco Corp. ---------- 553

Criminal Law.

1. No constitutional right to separate trial; rather, right statutory in origin and depends upon showing that prejudice will result from joint trial. State v. Clark ---------- 109
2. Terms "maliciously" and "feloniously," as used in describing an offense, import a willful act. State v. Schumacher ---------- 138
3. Guilty plea which represents voluntary and intelligent choice of available alternatives, even though made for purpose of attempting to secure lighter sentence, acceptable. State v. Rubek ---------- 141
4. Accused may voluntarily, knowingly, and understandingly consent to imposition of prison sentence even though unwilling to admit participation in crime, or even if his guilty plea contains protestation of innocence, when he intelligently concludes that his interests require a guilty plea and record strongly evidences guilt. State v. Rubek ---------- 141
5. When legislative act, adopted after one has been convicted and sentenced for crime but while cause still pending on motion for new trial or on appeal, serves to mitigate sentence imposed, Supreme Court will either amend sentence to conform to legislative intent or will remand cause to district court for resentencing in conformity with statute. State v. Rubek ---------- 141
6. In determining admissibility of confession, all evidence on subject must be considered and mere fact that evidence conflicting not a bar to its admission. State v. Hutchison ---------- 158
7. When accused has been informed of his constitutional rights and thereafter freely and voluntarily confesses, confession ordinarily admissible in evidence. State v. Hutchison ---------- 158
8. In criminal action, Supreme Court will not interfere with verdict of guilty based upon conflicting evidence unless, as matter of law, evidence so lacking in probative force that it is insufficient to support

finding of guilt beyond reasonable doubt. State v. Corfield ---------- 163
9. Contributing to delinquency of minor consists of an act which encourages, causes, or contributes to delinquency of child under 18 years of age. State v. McCune ---------- 165
10. Delinquent child is any child under age of 18 years who has violated any state law or city or village ordinance. State v. McCune ---------- 165
11. Evidence that defendant furnished automobile used for drinking party upon the public highways in which 15-year-old girl allowed to participate will sustain conviction for contributing to delinquency of minor. State v. McCune ---------- 165
12. Motion to suppress can be urged only by one whose rights were violated, not by one aggrieved solely by introduction of damaging evidence. State v. McCune ---------- 165
13. Peace officer authorized to stop any person in public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and he may demand of him his name, address, and an explanation of his actions. State v. McCune ---------- 165
14. Officer from adjoining county may delay apprehending person he reasonably suspects has committed crime for reasonable time so that he can obtain assistance of local officer. State v. McCune ------ 165
15. Peace officer may arrest person without warrant if officer has reasonable cause to believe that person has committed misdemeanor and has reasonable cause to believe that person will not be apprehended unless immediately arrested, may cause injury to others unless immediately arrested, or may destroy or conceal evidence of commission of misdemeanor. State v. McCune ---------- 165
16. It is not a search for an officer to observe what is in plain view. State v. McCune ---------- 165
17. Cited statute gives legislative recognition to fact that in many cases sentence of probation more likely to be effective than sentence of imprisonment and that procedure of probation requires expenditure of substantially less public funds than does incarceration. State v. Dovel ---------- 173
18. Supreme Court will not overturn order of trial court which denies probation unless has been abuse of

discretion. State v. Dovel ---------- 173
19. It is only where there is total failure of competent proof in criminal case to support material allegation in information that trial court will be justified in directing verdict of not guilty. State v. Whipple - 259
20. Where punishment of an offense created by statute left to discretion of court, to be exercised within certain prescribed limits, sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion. State v. Whipple 259
State v. Van Ackeren ---------- 639
21. In addition to judicial review of records of Director of Motor Vehicles it is only completely void judgments, erroneous or fraudulent records, and abstracts of convictions which may be challenged at evidentiary hearing provided for in district court de novo review of order revoking driver's license. Bohlen v. Kissack ---------- 262
22. Where proof of a different crime tends to establish motive, criminal intent, or guilty knowledge, it is admissible. State v. Meints ---------- 264
23. Refusal of defendant to submit to legal chemical test for intoxication admissible in evidence. State v. Meints ---------- 264
24. Prosecuting attorney may comment to jury on refusal of defendant in prosecution for driving while under influence of intoxicating liquor to submit to chemical test which is required by law. State v. Meints ---------- 264
25. Warrantless search of motor vehicle may be conducted for probable cause which must be determined by a practical and not by any technical standard. State v. Connor ---------- 269
26. Supreme Court will not resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence unless it is so lacking in probative force as matter of law that it is insufficient to support finding of guilt beyond reasonable doubt. State v. Connor -- 269
27. Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were principal offender. State v. Alvarez ---- 276
28. Mere presence, acquiescence, or silence in absence of duty to act not enough to constitute one an accomplice, and knowledge that crime being or about to be committed does not constitute one an accomplice. State v. Alvarez ---------- 276

29. Aiding and abetting involves some participation in criminal act or involves some conscious sharing in criminal act, as in something that accused wishes to bring about, in furtherance of common design, either before or at time criminal act committed, and it is necessary that he seeks by his action to make it succeed. State v. Alvarez ---------- 276

30. Advice or encouragement which will render one an accessory before the fact may be by acts, or words, but it must, to create guilt, be used with intent to encourage and abet crime. State v. Alvarez ------ 276

31. When evidence in criminal prosecution insufficient to prove guilt beyond reasonable doubt, court should direct a verdict for accused. State v. Alvarez ---- 276

32. Primary burden upon State, that is, prosecutor and court, to bring accused person to trial within time provided by law. State v. Alvarez ---------- 281
State v. Brown ---------- 297

33. If a defendant not brought to trial within time provided for and as determined by valid statutory standards, he is, in absence of express waiver or waiver as provided by statute, entitled to his absolute discharge from offense alleged in the indictment or information as well as for any other offense coming within the term "required by law to be joined with that offense." State v. Alvarez -------- 281
State v. Brown ---------- 297

34. Failure by a defendant to demand a trial within time he is required to be brought to trial as provided by sections 29-1205 to 29-1209, R. S. Supp., 1971, or to object at time trial date set does not constitute a waiver of his rights under either the statutes or Constitution of Nebraska, but is a factor which, while not constituting good cause by itself, may be considered along with other circumstances in determining whether there was "good cause" for delay in trial under provisions of section 29-1207(4)(f), R. S. Supp., 1971. State v. Alvarez -- 281
State v. Brown ---------- 297

35. Where a defendant who has been charged in an indictment or information not brought to trial within 6 months from date of return of indictment or filing of information and before trial or entry of plea of guilty or nolo contendere moves for his absolute discharge, burden upon State to prove by substantial preponderance of evidence that one or

more of excluded periods provided for by section 29-1207(4)(a) through (f), R. S. Supp., 1971, is applicable. State v. Alvarez ---------- 281
State v. Brown ---------- 297

36. From and after 7 days after November 24, 1972, general finding of a trial court that "good cause" has existed under provisions of section 29-1207(4)(f), R. S. Supp., 1971, for extending beyond 6 months from the filing of information the period for bringing defendant to trial will no longer suffice, and trial court will from that time on be required to make specific findings as to the cause or causes of such extensions and the period of extension attributable to such causes; substantial preponderance of evidence must support such findings. State v. Alvarez ---------- 281
State v. Brown ---------- 297

37. Sentence to imprisonment ought not exceed minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of defendant. State v. Sturm ---------- 299

38. Protection of the public encompasses the principle of general deterrence. State v. Sturm ---------- 299

39. A technique for deterrence of crime is scaling of penal sanctions. State v. Sturm ---------- 299

40. Supreme Court may reduce sentence rendered by district court against accused when in its opinion sentence excessive, and it is its duty to render such sentence as in its opinion may be warranted by the evidence. State v. Sturm ---------- 299

41. Sentence imposed within statutory limits will not be disturbed for excessiveness in absence of abuse of discretion. State v. Haigh ---------- 316

42. Spontaneous declaration of homicide victim identifying attacker admissible where declaration and attack so clearly connected that declaration can in ordinary course of affairs be said to be spontaneous declaration of real cause. State v. Brown -------- 319

43. Standard for determining validity of guilty and nolo contendere pleas whether plea represents voluntary and intelligent choice among alternative courses of action open to defendant. State v. Hyslop 331

44. Where punishment of offense created by statute left to discretion of court within prescribed limits, sentence prescribed within such limits will not be disturbed unless there appears to be abuse of such

discretion. State v. Sanders ---------- 343
45. Imposition of sentence of 10 to 15 years which sentence to be consecutive to life sentence previously imposed for unrelated crime not a cruel and unusual punisment such as to be in conflict with Eighth Amendment to Constitution of United States. State v. Crooks ---------- 344
46. Doctrine of Miranda v. Arizona comes into play when individual first subjected to police interrogation while in custody. State v. Moore ---------- 354
47. If person in custody indicates that he wishes assistance of counsel before an interrogation, authorities cannot ignore that request and he must be offered counsel. State v. Moore ---------- 354
48. Once Miranda warnings have been given, procedure clear; if individual indicates prior to or during questioning that he wishes to remain silent, interrogation must cease. State v. Moore ---------- 354
49. If individual held for interrogation by police states that he wants an attorney, interrogation must cease until an attorney present and person must have opportunity to confer with attorney and to have him present during subsequent questioning. State v. Moore ---------- 354
50. Express declaration that individual held for interrogation by police willing to make statement and to do so without attorney being present, followed closely by statement, may constitute waiver of privilege against self-incrimination and right to counsel. State v. Moore ---------- 354
51. Fact that counsel may have been appointed or retained prior to any interrogation by police does not prevent police from administering Miranda warnings. State v. Moore ---------- 354
52. That police who knew that defendant was represented by attorney and failed to give attorney notice of intended interview of defendant did not under evidence in this case make inadmissible statements made by defendant because violative of right to counsel where defendant clearly, intelligently, knowingly, and voluntarily waived his right to have counsel present. State v. Moore ---------- 354
53. That waiver may seem or be unwise or not smart, where either prospectively or retrospectively considered, does not necessarily import that it was not intelligently made. State v. Moore ---------- 354

54. Sentence imposed within statutory limits will not ordinarily be disturbed in absence of abuse of judicial discretion. State v. Duitsman ---------- 375
55. In evaluation of reasonableness of search and seizure without warrant, imperative that facts be judged against an objective standard: Would facts available to officer at moment of search or seizure warrant man of reasonable caution in belief that action taken was appropriate? State v. McElroy -------- 376
56. When officer makes arrest, reasonable for him to search person arrested and seize any evidence on arrestee's person in order to prevent its concealment or destruction; that justification absent where search remote from arrest. State v. McElroy ------ 376
57. Wherever individual may harbor reasonable expectation of privacy he ought to be free from unreasonable governmental intrusion. State v. McElroy 376
58. Constitutional validity of warrantless search can only be decided in concrete factual context of individual case. State v. McElroy ---------- 376
59. In absence of legislative declaration to contrary, quantity with a potential for abuse not essential element of offense of unlawful possession of controlled substance. State v. McElroy ---------- 376
60. When materials in automobile indicative of criminal offense in plain sight of officer looking into automobile from outside, search justified and legal. State v. Moore ---------- 380
61. Claim of error on ground of ineffective assistance of counsel must be supported by record showing that counsel's assistance so grossly inept as to jeopardize rights of defendant and shock court by its inadequacy. State v. Kennedy ---------- 423
62. Application for continuance addressed to sound discretion of trial court and its ruling thereon will not be disturbed unless it appears that rights of defendant were prejudiced thereby. State v. Kennedy 423
63. Accused not free to manipulate his right to counsel for purpose of obstructing orderly procedure or other phases of judicial administration. State v. Kennedy 423
64. Test of sufficiency of circumstantial evidence in criminal prosecution whether facts and circumstances tending to connect accused with crime charged are of such conclusive nature as to exclude to moral certainty every rational hypothesis except that of guilt. State v. Kennedy ---------- 423

65. Instruction that jury to draw no inferences from fact defendant did not testify is cautionary instruction for benefit of defendant. State v. Kennedy ---------- 423
66. Invalidity of search warrant does not of itself automatically make evidence seized inadmissible. State v. Waechter ---------- 433
67. Motion to suppress can be urged only by one whose rights are violated, not by one aggrieved solely by introduction of damaging evidence. State v. Waechter ---------- 433
68. Party who claims that an exception contained in Depressant and Stimulant Drugs Act is applicable to him has burden of proof to establish that exception is applicable. State v. Waechter ---------- 433
69. Sentence within statutory limits will not be disturbed in absence of abuse of discretion. State v. Waechter ---------- 433
70. In absence of abuse of discretion, entirely within discretion of trial court to order, or refuse to permit, jury to inspect scene of alleged crime. State v. Craig ---------- 461
71. Only when there is total want of proof to support material allegation of information, or where testimony in criminal case so weak or doubtful character that conviction based thereon cannot be sustained, the court will be justified in directing verdict of not guilty. State v. Craig ---------- 461
72. Although statutory requirements for speedy trial in criminal prosecution refer only to indictments and informations, references may encompass complaints. State v. Stevens ---------- 487
73. Failure of magistrate to collect fee for issuing warrant does not affect validity of warrant. State v. McCown ---------- 495
74. Failure to comply strictly with post service statutory proceedings will not invalidate search conducted pursuant to otherwise valid warrant in absence of clear showing of prejudice. State v. McCown ---------- 495
75. Return and filing of search warrant a ministerial act and any failure therein does not void warrant. State v. McCown ---------- 495
76. Immunity has historically been governmental investigative tool for offenses which could not be investigated or proved otherwise; it is solely govern-

mental prerogative. State v. McCown ---------- 495
77. Request for continuance or recess addressed to sound discretion of trial judge. State v. McCown ------ 495
78. Trial court may in its discretion permit introduction of evidence in rebuttal that is not strictly rebuttal evidence. State v. Keith ---------- 536
79. Failure to endorse on information names of witnesses called by State not grounds for reversal of conviction in absence of prejudice. State v. Keith -- 536
80. Where sentence imposed within statutory limits, it will not be disturbed in absence of abuse of discretion. State v. Six ---------- 538
81. Suspension of sentence and granting of probation discretionary with trial court, and in absence of abuse of discretion trial court's determination will not be disturbed. State v. Jurgens ---------- 574
State v. Greco ---------- 817
82. Sentence within limits prescribed by statute will not be disturbed in absence of abuse of discretion. State v. Jurgens ---------- 574
83. Criminal sentence in which court considered prior time spent by defendant in custody may be consistent with state and federal constitutional guarantees of due process and with federal constitutional guarantee of equal protection, although record at sentencing hearing silent on subject. State v. Nelson -------- 580
84. Peace officer may arrest person without warrant if he has reasonable cause to believe that felony being committed or has been committed. State v. Brooks ---------- 592
85. Where peace officer has reasonable cause to believe that sale of narcotics taking place inside a residence, exigent circumstances may justify his entering residence for purpose of making arrest without prior disclosure of his authority and purpose. State v. Brooks ---------- 592
86. It is improper and generally prejudicial for prosecuting attorney in criminal case to declare to jury his personal belief in guilt of defendant unless belief is expressed as deduction from evidence. State v. Brooks ---------- 592
87. Prosecuting attorney in criminal case should make no reference or comment upon failure of defendant to testify. State v. Brooks ---------- 592
88. A comment or reference to defendant's failure to testify may not be prejudicial error where evidence

of guilt conclusive. State v. Brooks ---------- 592
89. Supreme Court may reduce sentence rendered by district court against accused, when in its opinion sentence excessive, and it shall be duty of Supreme Court to render such sentence against accused as in its opinion may be warranted by evidence. State v. Stroh ---------- 637
90. Where punishment of offense left to discretion of court within prescribed limits of statute, sentence prescribed within such limits will not be disturbed unless there appears to be abuse of such discretion. State v. Stroh ---------- 637
91. Section 28-921, R. S. Supp., 1972, not unconstitutionally vague nor is it unconstitutional for failure to prescribe procedure for its enforcement. State v. Little Art Corp. ---------- 681
92. Where single copy of film seized for sole purpose of preserving it for evidence in criminal action, such seizure does not violate First Amendment. State v. Little Art Corp. ---------- 681
93. Court may order defendant to deliver one copy of any alleged obscene material to prosecuting authority for use in connection with any pending criminal prosecution. State v. Little Art Corp. ---------- 681
94. Showing of scienter or knowledge of obscenity is required. State v. Little Art Corp. ---------- 681
95. Obscenity is not subject to protection of First Amendment. State v. Little Art Corp. ---------- 681
96. Three elements must coalesce to sustain finding of obscenity, namely, (a) dominant theme of material taken as whole appeals to prurient interest in sex; (b) material patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters; and (c) material utterly without redeeming social value. State v. Little Art Corp. ---------- 681
97. In present state of the law, failure by court to define term "community standards" as referring to standards on local, state, or national basis not erroneous so long as jurors are instructed to determine the case, not on their individual standards, but on contemporary community standards. State v. Little Art Corp. ---------- 681
98. Defendant has constitutional right to introduce evidence pertaining to community standard. State v. Little Art Corp. ---------- 681

99. Affirmative proof of community standards not necessary. State v. Little Art Corp. ---------- 681
100. Extraneous evidence that materials in question obscene not required. State v. Little Art Corp. -- 681
101. Public defender may apply to court to withdraw from representation of defendant on appeal when he deems such appeal to be wholly frivolous. State v. Kellogg 692
102. If counsel finds his case to be wholly frivolous, after conscientious examination of it, he should so advise court and request permission to withdraw; request must, however, be accompanied by brief referring to anything in record that might arguably support appeal; copy of counsel's brief should be furnished indigent and time allowed him to raise any points that he chooses; court - not counsel - then proceeds, after full examination of all proceedings, to decide whether case wholly frivolous; if it so finds, it may grant counsel's request to withdraw. State v. Kellogg ---------- 692
103. Sentences imposed within statutory limits furnish no basis for post conviction relief. State v. Kellogg 692
104. No prejudice to defendant when asked whether he had mentioned a material fact to police officers after his arrest if it appears objections to questions were sustained and questions not so phrased as to indicate that he stood mute. State v. Johnson ---------- 706
105. Ruling of trial court upon motion for consolidation or severance of criminal prosecutions that might have been properly joined in single indictment, information, or complaint will not be disturbed in absence of abuse of discretion. State v. Bazer --- 711
106. In determining sufficiency of evidence to sustain conviction in criminal prosecution, not province of court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Suggett ---------- 714
107. Duty of trial court to aid jury to determine guilt or innocence of accused by plain and clear instructions, and if jurors are in doubt as to meaning of instructions given, it is entirely proper for them to request, and for trial court to give, additional explanatory instructions. State v. Suggett -------- 714
108. Repetition of instruction not reversible error, unless its effect is to mislead jury. State v. Suggett - 714
109. It is only in most flagrant cases of improper conduct by prosecuting attorney, even in prosecution of

capital offenses, that defendant's counsel can apparently acquiesce in such conduct by remaining silent until trial finished, and then cause trial and verdict to be set aside by complaining of conduct to which he seemed at time to consent. State v. Suggett ---------- 714

110. It is error to exclude evidence which has tendency to impeach witness on material fact sworn to by him, proper foundation having been laid therefor. State v. Suggett ---------- 714

111. In cross-examination of defendant who voluntarily becomes witness in his own behalf, considerable judicial discretion committed to trial court to go beyond literal scope of direct examination in matters testing accuracy, memory, or credibility of witness. State v. Suggett ---------- 714

112. Reception of evidence collateral to any issue in case intended to affect credibility of witness usually within discretion of trial court, and ruling concerning it is not reason for reversal of judgment in case in absence of abuse of discretion. State v. Suggett -- 714

113. Section 83-170, R. R. S. 1943, not applicable to imposition of sentence by trial court. State v. Suggett 714

114. Section 83-1,105, R. S. Supp., 1972, not applicable in cases where maximum sentence fixed by law is life sentence. State v. Suggett ---------- 714

115. In criminal case, new trial may be granted for newly discovered evidence which is competent, material, and credible which might have changed result of trial and which exercise of due diligence could not have discovered and produced at trial. State v. Whipple ---------- 723

116. Motion for new trial on ground of newly discovered evidence addressed to sound discretion of trial court and unless abuse of discretion shown, its determination will not be disturbed. State v. Whipple ---- 723

117. Information charging offense in substantially words of statute generally sufficient. State v. Abraham 728

118. All defects that may be excepted to by motion to quash are taken to be waived by defendant pleading general issue. State v. Abraham ---------- 728

119. Indictment or information alone need not be full protection against double jeopardy because defendant may allege and prove facts outside record in support of plea of former adjudication. State v. Abraham ---------- 728

120. In prosecution for receiving stolen property, when facts known to defendant were such that man of age, intelligence, and experience of defendant would know the property to have been stolen, trier of fact may properly find defendant possessed guilty knowledge. State v. Abraham ---------- 728
121. Where evidence as to what occurred immediately prior to and at time of making of confession shows that it was freely and voluntarily made and excludes hypothesis of improper inducements or threats, confession is voluntary and may be received. State v. Medina ---------- 765
122. Finding that statement of accused voluntary will not ordinarily be set aside unless finding clearly erroneous. State v. Medina ---------- 765
123. Sentence imposed within statutory limits will not be disturbed unless abuse of discretion appears in record. State v. Medina ---------- 765
124. Test of mental competency to stand trial whether defendant has capacity to understand nature and object of proceedings against him; to comprehend his own condition in reference to such proceedings; and to make rational defense. State v. Crenshaw - 780
125. If facts brought to attention of court which raise doubt as to sanity of defendant, question of competency should be determined at that time. State v. Crenshaw ---------- 780
126. Question of competency to stand trial one of fact to be determined by court and means employed in resolving question are discretionary with court. State v. Crenshaw ---------- 780

Damages.

1. In action for damage to property, accounting records of owner of property damaged which relate to cost of repair are evidence of actual cost of repair, but such records not binding on triers of fact. Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc. ---------- 30
2. Claim for damage to property, established by reference to an accounting system involving allocation of costs of overhead, labor, vehicles, and material, which trier of fact may consider, but not bound to accept, not a liquidated account to allow plaintiff to recover prejudgment interest. Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins.

Soc. ---------- 30
3. Verdict and judgment will not be set aside as inadequate unless clearly wrong and so against weight and reasonableness of evidence as to indicate were result of passion, prejudice, or mistake. Parkhurst v. Barth ---------- 154
4. Proof that damage might or could have been caused by an accident not sufficient to sustain verdict for a claimant; such evidence not of quality required to satisfy burden of claimant to establish by preponderance of evidence an injury and extent thereof. Batterman v. Richardson ---------- 303
5. At common law, invalidity of promise not to compete does not depend upon proof of actual harm. Antrim v. Pittman ---------- 474
6. Injunction is extraordinary remedy and ordinarily will not be granted except in clear case where there is actual and substantial injury; right must be clear and damage irreparable. Larson v. Board of Regents 688
7. Writ of injunction not wholly writ of right and may be withheld, in discretion of court, when likely to inflict greater injury than grievance complained of. Larson v. Board of Regents ---------- 688

Dedication.

1. Where dedication made to public for defined purpose, neither Legislature, municipality, its successor, nor general public has any power to use property for any other purpose than one designated, whether use be public or private, or whether dedication is common-law or statutory dedication, notwithstanding that changed use may be advantageous to public. Gallagher v. City of Omaha ---------- 598
2. Where park property has been acquired by municipality especially for park use with funds from sale of bonds specifically authorized by electors for that purpose, city is a trustee of property for such purpose, but in this case may divert property from such use if it is clearly authorized to do so by Legislature, at least where property no longer needed for park purposes. Gallagher v. City of Omaha -- 598

Deeds.

1. In action of ejectment, when plaintiff's testimony shows defendant in possession of disputed lands under claim of ownership, plaintiff must then recover

on superiority of his title, and, if he relies on record or paper title, he must show regular chain of title from government, or from some grantor in possession, or from common source from which each of litigants claims. Kozak v. State ---------- 525
2. Effect of exception is to exclude from operation of conveyance interest specified and it remains in conveyor unaffected by conveyance. Kozak v. State - 525
3. Right or interest reserved in duly recorded conveyance effective as against all who deraign title through grantee, although reservation not expressed in subsequent deeds; similarly, fact that subsequent deeds contain no language showing exceptions made in former deed within chain of title does not abrogate or destroy such exceptions. Kozak v. State ------ 525
4. Where dedication made to public for defined purpose, neither Legislature, municipality, its successor, nor general public has any power to use property for any other purpose than one designated, whether use be public or private, or whether dedication is common-law or statutory dedication, notwithstanding that changed use may be advantageous to public. Gallagher v. City of Omaha ---- 598
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6. Extent of an easement created by conveyance fixed by conveyance. County of Sarpy v. Iske ---------- 621
7. In ascertaining extent of easement by conveyance, Supreme Court attaches importance to circumstances surrounding making of conveyance; criteria not exclusive. County of Sarpy v. Iske ---------- 621

Demurrer.

1. Demurrer reaches only defects which appear on face of petition. Johnsen v. Parks ---------- 712
2. Objection that there is another action pending between the parties for same cause may be raised by demurrer to petition only when pendency of former action is shown on its face. Johnsen v. Parks ---- 712

Depositions.

Extrajudicial admission appearing in deposition of party taken before trial ordinarily not final and conclusive upon him, but may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at trial, to be given such weight as trier of fact deems it entitled. Simon v. Omaha P. P. Dist. ---------- 183

Depositions and Discovery.

A statutory interpretation, effective March 1, 1973, is adopted as follows: A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement. Walls v. Horbach ---------- 479

Descent and Distribution.

1. Mere failure of surviving wife to tender back support or other payments received by her under terms of property settlement agreement entered into in connection with action for divorce does not by itself estop surviving spouse from denying finality of divorce decree and from claiming her statutory rights in estate of husband where he dies before divorce becomes final. Bassett v. First Nat. Bank & Trust Co. ---------- 206
2. Property settlement agreement entered into in connection with and to facilitate action for divorce, and conditioned upon divorce being granted and approval of court, has no viability independent of finality of decree of divorce, and where one of parties dies before divorce becomes final, rights of inheritance and statutory allowances not barred by property settlement agreement. Bassett v. First Nat. Bank & Trust Co. ---------- 206

Dismissal and Nonsuit.

Principle well established that an appellate court may dismiss an appeal for contumacious violation of an order of court; one who flouts order of court not in position to seek judicial assistance. Kartman v. Cook ---------- 159

Disturbance of Meetings.

Statute that (1) proscribes unreasonable interference or obstruction by conduct intertwined with expression and association and (2) vindicates important interests of society not void for "overbreadth." State v. Sullivan ---------- 465

Divorce.

1. Mere failure of surviving wife to tender back support or other payments received by her under terms of property settlement agreement entered into in connection with action for divorce does not by itself estop surviving spouse from denying finality of divorce decree and from claiming her statutory rights in estate of husband where he dies before divorce becomes final. Bassett v. First Nat. Bank & Trust Co. ---------- 206
2. Property settlement agreement entered into in connection with and to facilitate action for divorce, and conditioned upon divorce being granted and approval of court, has no viability independent of finality of decree of divorce, and where one of parties dies before divorce becomes final, rights of inheritance and statutory allowances not barred by property settlement agreement. Bassett v. First Nat. Bank & Trust Co. ---------- 206
3. Fixing of child support and alimony rests in sound discretion of court and, in absence of abuse of discretion, will not be disturbed. Person v. Person ---- 329
4. If sustained by pleadings and evidence, is within sound discretion of court as to whether divorce from bed and board or absolute divorce shall be granted. Allgood v. Allgood ---------- 429
5. Before a person may be said to be in contempt of court for failure to pay amounts fixed in decree of divorce for support of children, evidence must disclose not only failure to comply with decree but also that failure was willful. Halverson v. Halverson ---------- 489

6. In determining question of who should have care and custody of children upon divorce, paramount consideration is best interests and welfare of children. Lanz v. Lanz ---------- 578
7. 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. Lanz v. Lanz ---------- 578
8. In cases involving determinations of child custody, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless there is clear abuse of discretion. Lanz v. Lanz ---------- 578
9. Under provisions of Laws 1972, L.B. 820, no-fault divorce law, when appeal in action under prior divorce statutes filed in Supreme Court, it is invested with original de novo jurisdiction and required to disregard judgment of district court and make independent determinations of issues presented to district court, and therefore the provisions of L.B. 820 applicable to such determination by Supreme Court. Lienemann v. Lienemann ------ 626
10. Subsection (4) of section 33, Laws 1972, L.B. 820, requires that when new trial had on issues in divorce case, provisions of L.B. 820 shall govern the law determining such trial. Lienemann v. Lienemann 626
11. Taking of appeal to Supreme Court in divorce action vests it with jurisdiction and requires it to disregard judgment and action of district court and enter new, independent, and final judgment determining issues of case. Lienemann v. Lienemann ---- 626
12. Decree fixing custody of minor children will not be modified unless there has been change in circumstances indicating that person having custody unfit for that purpose or that best interests of children require such action. Bennett v. Bennett -------- 654
13. Discretion of trial court with respect to changing custody of minor children subject to review, but determination of the court will not ordinarily be disturbed unless there is clear abuse of discretion or it is clearly against weight of evidence. Bennett v. Bennett ---------- 654
14. In divorce action, where divorce has been granted and custody of children has been fixed, court in proper proceeding may, where circumstances of

parties have changed or it shall be to best interests of children, modify decree as it concerns care, custody, and maintenance of children, having due regard for rights of fit, proper, and suitable parents. Wichert v. Wichert ---------- 667

Domicile.

1. Act of registering to vote has been considered by Supreme Court to be persuasive of fact that a person considered such place his legal residence. State ex rel. Rittenhouse v. Newman ---------- 657
2. Motivation to change one's legal residence immaterial so long as a party has requisite intent to establish new residence and abandon his former home. State ex rel. Rittenhouse v. Newman ---------- 657

Easements.

1. Permissive use of land of another, that is a use or license exercised in subordination to other's claim and ownership, not adverse and cannot give an easement by prescription no matter how long it may be continued. Connot v. Bowden ---------- 97
2. Well settled that permissive use cannot ripen into prescriptive right until 10 years after notice of adverse claim brought home to landowner. Connot v. Bowden ---------- 97
3. To prove prescriptive right to an easement all elements to prescriptive use must be generally established by clear, convincing, and satisfactory evidence. Connot v. Bowden ---------- 97
4. Prescriptive right to property being used by permission cannot arise until 10 years after has been brought home to owner in some plain and unequivocal manner that person in possession is claiming adversely to him. Messersmith v. Klein ---------- 471
5. To establish prescriptive right to easement, must have been exercised under claim of right; use by express or implied permission or license cannot ripen into easement by prescription. Messersmith v. Klein 471
6. Extent of an easement created by conveyance fixed by conveyance. County of Sarpy v. Iske ---------- 621
7. In ascertaining extent of easement by conveyance, Supreme Court attaches importance to circumstances surrounding making of conveyance; criteria not exclusive. County of Sarpy v. Iske ---------- 621

Ejectment.

1. Plaintiff in ejectment must prevail, if at all, upon strength of his own title and not upon weakness of his adversary's title. Kozak v. State ---------- 525
2. In action of ejectment, when plaintiff's testimony shows defendant in possession of disputed lands under claim of ownership, plaintiff must then recover on superiority of his title, and, if he relies on record or paper title, he must show regular chain of title from government, or from some grantor in possession, or from common source from which each of litigants claims. Kozak v. State ---------- 525

Employer and Employee.

1. Under provisions of section 48-118, R. R. S. 1943, requiring giving of notice of claim or suit against third person, and opportunity to join and be represented by counsel, substantial compliance sufficient when other party had actual notice and opportunity; notice may be waived in writing or waiver may be implied from unequivocal conduct. Gillotte v. Omaha Public Power Dist. ---------- 444
2. Under section 48-118, R. R. S. 1943, where employer and employee join in suit against third person, district court has jurisdiction to determine all disputes between employer and employee, including setting and allocation of attorney's fees and expenses. Gillotte v. Omaha Public Power Dist. ---------- 444
3. A uniquely personal termination of employment does not constitute an industrial dispute. Nebraska Dept. of Roads Employees Assn. v. Department of Roads ---------- 754
4. No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization. Nebraska Dept. of Roads Employees Assn. v. Department of Roads ---------- 754
5. Under Workmen's Compensation Act if employee accepts any payment from his employer or from any insurance company carrying risk, on account of personal injury, such action ordinarily constitutes release to employer of all claims or demands at law, if any, arising from injury. Edelman v. Ralph Printing & Lithographing, Inc. ---------- 763
6. Section 25-313, R. R. S. 1943, authorizes unincorporated association to represent employees in col-

lective bargaining with employers as well as to sue and be sued in name of association; however, before it may bring an action in courts of this state, it must comply with provisions of section 25-314, R. R. S. 1943. Nebraska Council of Educational Leaders v. Nebraska Dept. of Education ---------- 811

Equity.

1. In equity, common law legal rule as to merger not always followed, and doctrine of merger not favored. Waite Lumber Co., Inc. v. Masid Bros., Inc. ------ 10
2. Equity will prevent or permit merger as will best subserve purposes of justice and actual and just intent of parties, whether express or implied. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10
3. In determining whether merger of titles to real estate has taken place, courts will consider circumstances of particular case in light of equity and good conscience. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10
4. Actions in equity triable de novo in Supreme Court. Cedars Corp. v. H. Krasne & Son, Inc. ---------- 220
5. Equity, once it assumes jurisdiction, has power to devise a remedy which will do complete justice and eliminate further litigation. Halbert v. Food Host U.S.A., Inc. ---------- 346
6. Actions in equity on appeal to Supreme Court subject 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 accepted one version of facts rather than other. Harre v. White - 404
7. Writ of assistance nothing more than process by which court of equity finally carries its judgment or decree into effect. State Fire Marshal v. Village of Dorchester ---------- 464
8. Doctrine that a party seeking equitable relief must come with clean hands not applicable in annulment proceeding where marriage void. Boersen v. Huffman ---------- 469
9. On appeal of action in equity, when credible evidence on material questions of fact in conflict, Supreme Court will consider fact that trial court observed witnesses and their manner of testifying and accepted one version of facts rather than other. Messersmith v. Klein ---------- 471

10. Whether creditor mortgagee will be required to first exhaust property which it has taken as security before subjecting fraudulently transferred property to satisfaction of its judgment lien is in equity matter for sound discretion of court. First Nat. Bank v. First Cadco Corp. ---------- 553

11. In equity, Supreme Court when reviewing findings of trial court will, where evidence in conflict, consider that trial court heard and observed witnesses and must have accepted one version of facts rather than another. This rule, however, has no application where, although belief of trial court apparent, its decision founded upon question of sufficiency of evidence and not its credibility. First Nat. Bank v. First Cadco Corp. ---------- 553

Estates.

1. Although mechanic's lien when filed attaches only to equitable estate, it may be enforced against fee after equitable and legal titles have merged. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10

2. General legal rule that, when a greater and a lesser estate meet in one person, without intervening estate, lesser estate is merged in greater. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10

3. In equity, common law legal rule as to merger not always followed, and doctrine of merger not favored. Waite Lumber Co., Inc. v. Masid Bros., Inc. ----- 10

4. Equity will prevent or permit merger as will best subserve purposes of justice and actual and just intent of parties, whether express or implied. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10

5. Merger does not always or necessarily result from such a coinciding of lesser and greater estates. Waite Lumber Co., Inc. v. Masid Bros., Inc. ------ 10

6. Whether lesser and greater estates will be held to have coalesced will depend upon facts and circumstances in particular case, the then intention of party acquiring two estates, and equities of parties to be affected. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10

7. In determining whether merger of titles to real estate has taken place, courts will consider circumstances of particular case in light of equity and good conscience. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10

8. Purpose of partition action to divide jointly owned interest in property so that each owner may enjoy and possess in severalty. Dixon v. Dixon 212
9. Sole life tenant, who owns no other interest in property, has no right to compel partition of property over objections of remaindermen. Dixon v. Dixon .. 212

Estoppel.

Statutory provisions may cut across issue and claim preclusion at common law. Pedersen v. Westroads, Inc. 236

Evidence.

1. In action against county commissioners pursuant to statute to recover money allegedly expended unlawfully after annual tax levy, must be shown not only that warrants in excess of 85 per cent of amount levied by tax for current year issued, but also that was no money in proper fund for their payment. Thiles v. County Board of Sarpy County .. 1
2. General denial available to defendant to challenge one or more of elements essential to recovery by plaintiff, and effect of denial is to put burden on plaintiff to establish by evidence matters denied. Waite Lumber Co., Inc. v. Masid Bros., Inc. 10
3. In action for damage to property, accounting records of owner of property damaged which relate to cost of repair are evidence of actual cost of repair, but such records not binding on triers of fact. Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc. 30
4. Claim for damage to property, established by reference to an accounting system involving allocation of costs of overhead, labor, vehicles, and material, which trier of fact may consider, but not bound to accept, not a liquidated account to allow plaintiff to recover prejudgment interest. Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc. .. 30
5. Motion to declare mistrial addressed to sound discretion of trial court, and its ruling will not be disturbed in absence of showing of abuse of discretion. Regier v. Nebraska P. P. Dist. 56
6. Judgment of trial court in action at law where jury waived has effect of verdict of jury, and will not be set aside unless clearly wrong. In determining sufficiency of evidence to sustain judgment in law

action, it must be considered most favorably to successful party, every controverted fact must be resolved in that party's favor, and he must have benefit of any inferences reasonably deducible from it. Knight Bros., Inc. v. State ---------- 64

7. Where evidence relating to ambiguities and contradictory provisions in a written contract is conflicting, interpretation to be given contract is for jury. Knight Bros., Inc. v. State ---------- 64

8. To prove prescriptive right to an easement all elements to prescriptive use must be generally established by clear, convincing, and satisfactory evidence. Connot v. Bowden ---------- 97

9. On appeal of workmen's compensation case to Supreme Court, if there is reasonable competent evidence to support findings of fact in trial court, judgment, order, or award will not be modified or set aside for insufficiency of evidence. Klein v. Trinity Industries, Inc. ---------- 117

10. General rule is that opinion evidence admissible where it is necessary and advisable as aid to jury; opinion evidence which may be of aid to jury may be admitted even though it bears directly on main issue; such evidence should be excluded whenever point reached at which trier of fact being told that which it is itself entirely equipped to determine. Dovey v. Sheridan ---------- 133

11. Admission of incompetent evidence may be cured by instruction which directs jury to consider as established fact transaction sought to be impeached by incompetent evidence. Dovey v. Sheridan ---- 133

12. Instructions must be confined to issues presented by pleadings and supported by evidence. Gier v. Gleason ---------- 156

13. Where an issue, even assuming it is properly pleaded, affords no basis for recovery under evidence adduced in case, trial court's submission of such an issue to jury constitutes error. Gier v. Gleason -------- 156

14. In determining admissibility of confession, all evidence on subject must be considered and mere fact that evidence conflicting not a bar to its admission. State v. Hutchison ---------- 158

15. When accused has been informed of his constitutional rights and thereafter freely and voluntarily confesses, confession ordinarily admissible in evidence. State v. Hutchison ---------- 158

16. In criminal action, Supreme Court will not interfere with verdict of guilty based upon conflicting evidence unless, as matter of law, evidence so lacking in probative force that it is insufficient to support finding of guilt beyond reasonable doubt. State v. Corfield ---------- 163
17. Evidence that defendant furnished automobile used for drinking party upon the public highways in which 15-year-old girl allowed to participate will sustain conviction for contributing to delinquency of minor. State v. McCune ---------- 165
18. Motion to suppress can be urged only by one whose rights were violated, not by one aggrieved solely by introduction of damaging evidence. State v. McCune ---------- 165
19. Violation of administrative rule, or of private safety regulation, is independent evidence of negligence, under all the circumstances, provided expert witness incorporates regulation in his opinion as to an issuable act of negligence and evidence would probably aid trier of fact. Simon v. Omaha P. P. Dist. 183
20. Extrajudicial admission appearing in deposition of party taken before trial ordinarily not final and conclusive upon him, but may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at trial, to be given such weight as trier of fact deems it entitled. Simon v. Omaha P. P. Dist. 183
21. Parol evidence generally admissible when offered for purpose of explaining and showing true nature of transaction between parties. Cedars Corp. v. H. Krasne & Son, Inc. ---------- 220
22. General rule that, in absence of anything to indicate contrary intention, instruments executed at same time by same parties for same purpose and in course of same transaction are, in eye of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance. Cedars Corp. v. H. Krasne & Son, Inc. ---------- 220
23. Where party without reasonable explanation testifies to facts materially different concerning vital issue, the change clearly being made to meet exigencies of pending litigation, such evidence discredited as matter of law and should be disregarded; however, contradictory statements of non-

party witnesses not governed by this rule and such contradictions may be submitted to jury as affecting weight of evidence and credibility of witnesses. Insurance Co. of North America v. Omaha Paper Stock, Inc. ---------- 232

24. Impeachment of witness by showing contradictory statements made by him admitted solely for purpose of discrediting reliability of witness; it is not substantive evidence of facts stated. Insurance Co. of North America v. Omaha Paper Stock, Inc. ---- 232

25. When defendant moves for directed verdict, he admits as true evidence of plaintiff who is then entitled to benefit of every reasonable inference deducible from evidence submitted. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. ---------- 247

26. It is only where there is total failure of competent proof in criminal case to support material allegation in information that trial court will be justified in directing verdict of not guilty. State v. Whipple 259

27. In addition to judicial review of records of Director of Motor Vehicles it is only completely void judgments, erroneous or fraudulent records, and abstracts if convictions which may be challenged at evidentiary hearing provided for in district court de novo review of order revoking driver's license. Bohlen v. Kissack ---------- 262

28. Where proof of a different crime tends to establish motive, criminal intent, or guilty knowledge, it is admissible. State v. Meints ---------- 264

29. Refusal of defendant to submit to legal chemical test for intoxication admissible in evidence. State v. Meints ---------- 264

30. Supreme Court will not resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence unless it is so lacking in probative force as matter of law that it is insufficient to support finding of guilt beyond reasonable doubt. State v. Connor ---------- 269

31. When evidence in criminal prosecution insufficient to prove guilt beyond reasonable doubt, court should direct a verdict for accused. State v. Alvarez ---- 276

32. Persuasiveness of evidence may be destroyed even though not contradicted by direct evidence. Batterman v. Richardson ---------- 303

33. Proof that damage might or could have been caused by an accident not sufficient to sustain verdict for

a claimant; such evidence not of quality required to satisfy burden of claimant to establish by preponderance of evidence an injury and extent thereof. Batterman v. Richardson ---------- 303

34. Spontanous declaration of homicide victim identifying attacker admissible where declaration and attack so clearly connected that declaration can in ordinary course of affairs be said to be spontaneous declaration of real cause. State v. Brown ---------- 319

35. In workmen's compensation case, burden of proof upon claimant to establish that his disability caused by an accident arising out of and in course of his employment. Hartwig v. Educational Service Unit No. 13 ---------- 339

36. Rule of liberal construction of Workmen's Compensation Act applies to law but not to the evidence offered in support of claim for benefits under the act. Hartwig v. Educational Service Unit No. 13 339

37. On appeal of workmen's compensation case to Supreme Court, where there is reasonable competent evidence to support findings of fact in trial court, judgment, order, or award will not be modified or set aside for insufficiency of evidence; cause will be considered de novo in Supreme Court only where findings of fact not supported by evidence as disclosed by record. Hartwig v. Educational Service Unit No. 13 ---------- 339

38. Where claimant in workmen's compensation case fails to show with reasonable certainty that disability of which he complains arose out of and in course of his employment, proceeding will be dismissed. Hartwig v. Educational Service Unit No. 13 ---------- 339

39. In ambiguous contract, court may look at preliminary negotiations to determine intent of parties. Halbert v. Food Host U. S. A., Inc. ---------- 346

40. Before evidence submitted to jury, is preliminary question for court, not whether is literally no evidence, but whether is any upon which jury can proceed to find verdict for party producing it, upon whom burden of proof imposed. Era v. Sapp Bros. GMC, Inc. ---------- 366

41. Where cases interwoven and interdependent, and controversy involved has already been considered and determined by Supreme Court in former proceedings, it may examine its own records and take

judicial notice of its own proceedings and its judgment in former action. Freeman v. Rose 370
42. In disposition hearing, juvenile court may consider all previous matters in juvenile court pertaining to the child. State v. Miller 383
43. In order that ordinance or statute be relevant on issue of standard of care, must have been in effect at time of claimed violation and by its terms be applicable to situation. Gubalke v. Estate of Anthes 385
44. Actions in equity on appeal to Supreme Court subject 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 accepted one version of facts rather than other. Harre v. White .. 404
45. Fifth Amendment privilege protects accused from being compelled to testify against himself only as to evidence of testimonial or communicative nature. State v. Manley 415
46. Withdrawal of blood, and use of analysis in evidence, does not involve compulsion within Fifth Amendment. State v. Manley 415
47. Test of sufficiency of circumstantial evidence in criminal prosecution whether facts and circumstances tending to connect accused with crime charged are of such conclusive nature as to exclude to moral certainty every rational hypothesis except that of guilt. State v. Kennedy 423
48. Invalidity of search warrant does not of itself automatically make evidence seized inadmissible. State v. Waechter 433
49. Motion to suppress can be urged only by one whose rights are violated, not by one aggrieved solely by introduction of damaging evidence. State v. Waechter 433
50. Party who claims that an exception contained in Depressant and Stimulant Drugs Act is applicable to him has burden of proof to establish that exception is applicable. State v. Waechter 433
51. Party who is under duty to bring before court some circumstance may, by his inexcusable failure to do so, imply that exposed circumstance would be unfavorable to him. City of Omaha v. American Theater Corp. 441
52. Failure of party under duty to produce matter specified in subpoena duces tecum may satisfy

burden of his opponent to produce evidence. City of Omaha v. American Theater Corp. ---------- 441

53. Subpoena duces tecum for trial imposes duty upon witness to bring with him sought-after matter under his control and that law requires him to produce as evidence. City of Omaha v. American Theater Corp. 441

54. Unless otherwise prejudicial, error in admission of evidence relating to a count upon which was an acquittal not ground for reversal. State v. Skinner 457

55. Not valid objection to evidence of expert that answer covers whole ground jury to decide, if case one to be wholly resolved by such evidence. Bayse v. Tri-County Feeds, Inc. ---------- 458

56. Only when there is total want of proof to support material allegation of information, or where testimony in criminal case so weak or doubtful character that conviction based thereon cannot be sustained, that court will be justified in directing verdict of not guilty. State v. Craig ---------- 461

57. On appeal of action in equity, when credible evidence on material questions of fact in conflict, Supreme Court will consider fact that trial court observed witnesses and their manner of testifying and accepted one version of facts rather than other. Messersmith v. Klein ---------- 471

58. In sale of corporate shares a common law test of reasonableness of covenant not to compete is whether seller's opening a business of his own would substantially affect corporate good will. Antrim v. Pittman ---------- 474

59. At common law, invalidity of promise not to compete does not depend upon proof of actual harm. Antrim v. Pittman ---------- 474

60. A statutory interpretation, effective March 1, 1973, is adopted as follows: A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement. Walls v. Horbach ------ 479

61. Before a person may be said to be in contempt of court for failure to pay amounts fixed in decree of divorce for support of children, evidence must disclose not only failure to comply with decree but also that failure was willful. Halverson v. Halverson ---------- 489
62. Finding that defendant has violated terms of his probation need not be established beyond reasonable doubt but must be established by clear and satisfactory evidence. State v. Case ---------- 493
63. Where an inference so usual, natural, or instinctive as to accord with general experience, its statement is received as substantially one of a fact—part of common stock of knowledge. State v. McCown ---------- 495
64. Negligence is question of fact which may be proved by circumstantial evidence, but facts and circumstances proved, together with reasonable inferences that may be drawn from them, must indicate with reasonable certainty negligent act complained of. Vietz v. Texaco, Inc. ---------- 514
65. Where several inferences may be drawn from facts proved, which inferences opposed to each other but equally consistent with facts proved, plaintiff may not sustain his position by reliance alone on inferences which would entitle him to recover. Vietz v. Texaco, Inc. ---------- 514
66. Plaintiff in ejectment must prevail, if at all, upon strength of his own title and not upon weakness of his adversary's title. Kozak v. State ---------- 525
67. In action of ejectment, when plaintiff's testimony shows defendant in possession of disputed lands under claim of ownership, plaintiff must then recover on superiority of his title, and, if he relies on record or paper title, he must show regular chain of title from government, or from some grantor in possession, or from common source from which each of litigants claims. Kozak v. State ---------- 525
68. Trial court may in its discretion permit introduction of evidence in rebuttal that is not strictly rebuttal evidence. State v. Keith ---------- 536
69. Inadequacy of consideration is a badge of fraud. First Nat. Bank v. First Cadco Corp. ---------- 553
70. Conveyance in consideration of an agreement for future support may, where it has effect of hindering, delaying, or defrauding creditors, be evidence

of fraudulent intent. First Nat. Bank v. First Cadco Corp. ---------- 553
71. In equity, Supreme Court when reviewing findings of trial court will, where evidence in conflict, consider that trial court heard and observed witnesses and must have accepted one version of facts rather than another. This rule, however, has no application where, although belief of trial court apparent, its decision founded upon question of sufficiency of evidence and not its credibility. First Nat. Bank v. First Cadco Corp. ---------- 553
72. In trial of civil action, after plaintiff has introduced evidence tending to prove its case, if defendant fails to testify to matters peculiarly within his knowledge necessary to his defense, presumption exists that his testimony, if produced, would militate against his interest, which presumption may be considered by court or jury trying case in determining facts proved. First Nat. Bank v. First Cadco Corp. ---------- 553
73. Parol evidence inadmissible to vary written agreement complete on its face. First Nat. Bank v. Hull _ 581
74. Newly discovered evidence does not require granting of new trial unless it is of such controlling nature that it probably would change result of former trial. Universal Terrazzo & Tile Co. v. Parsons Corp. ---------- 634
75. In error proceeding from inferior court or tribunal to district court, and on appeal therefrom to Supreme Court, error cannot be predicated on sufficiency or insufficiency of evidence as matter of law to affirm or reverse findings and judgment of inferior court or tribunal from which error was prosecuted, unless all material and relevant evidence properly presented in bill of exceptions. Lanc v. Douglas County Welfare Administration ------ 651
76. Where alleged errors of law dependent upon evidence are asserted, it will be conclusively presumed that evidence adduced in inferior court or tribunal supports judgment or final order therein made in absence of proper bill of exceptions. Lanc v. Douglas County Welfare Administration ---------- 651
77. Provision of statutes requiring plaintiff in error to file with his petition authenticated transcript of proceedings containing final order sought to be reversed, vacated, or modified jurisdictional and

mandatory. Lanc v. Douglas County Welfare Administration ---------- 651
78. Where a single copy of film seized for sole purpose of preserving it for evidence in criminal action, such seizure does not violate First Amendment. State v. Little Art Corp. ---------- 681
79. Court may order defendant to deliver one copy of any alleged obscene material to prosecuting authority for use in connection with any pending criminal prosecution. State v. Little Art Corp. ---------- 681
80. Defendant has constitutional right to introduce evidence pertaining to community standard. State v. Little Art Corp. ---------- 681
81. Affirmative proof of community standards not necessary. State v. Little Art Corp. ---------- 681
82. Extraneous evidence that materials in question obscene not required. State v. Little Art Corp. ------ 681
83. Rules of practice in district court cannot enter into determination of question presented in Supreme Court unless incorporated in bill of exceptions, since Supreme Court will not take judicial notice of rules of practice of district court. Simmons v. Murray - 695
84. In determining sufficiency of evidence to sustain conviction in criminal prosecution, not province of court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Suggett ---------- 714
85. It is error to exclude evidence which has tendency to impeach witness on material fact sworn to by him, proper foundation having been laid therefor. State v. Suggett ---------- 714
86. In cross-examination of defendant who voluntarily becomes witness in his own behalf, considerable judicial discretion committed to trial court to go beyond literal scope of direct examination in matters testing accuracy, memory, or credibility of witness. State v. Suggett ---------- 714
87. Reception of evidence collateral to any issue in case intended to affect credibility of witness usually within discretion of trial court, and ruling concerning it is not reason for reversal of judgment in case in absence of abuse of discretion. State v. Suggett -- 714
88. In criminal case, new trial may be granted for newly discovered evidence which is competent, material, and credible which might have changed result of trial and which exercise of due diligence would

not have discovered and produced at trial. State v. Whipple ---------- 723
89. Motion for new trial on ground of newly discovered evidence addressed to sound discretion of trial court and unless abuse of discretion shown, its determination will not be disturbed. State v. Whipple -- 723
90. In prosecution for receiving stolen property, when facts known to defendant were such that man of age, intelligence, and experience of defendant would know the property to have been stolen, trier of fact may properly find defendant possessed guilty knowledge. State v. Abraham ---------- 728
91. In garnishment proceeding, intervener or third party claimant normally has burden of proving his claim by preponderance of evidence, and this rule has application even where intervener or claimant has possession of property if judgment debtor and claimant closely related. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734
92. Evidence not directly contradicted not necessarily binding on triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734
93. Triers of fact have right to test credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that parol testimony false. First Nat. Bank of Omaha v. First Cadco Corp. -------- 734
94. Substantial conflict may arise even though all evidence produced by one party. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734
95. Credibility of witnesses and weight to be given their testimony are for triers of fact. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734
96. Where evidence as to what occurred immediately prior to and at time of making of confession shows that it was freely and voluntarily made and excludes hypothesis of improper inducements or threats, confession is voluntary and may be received. State v. Medina ---------- 765
97. Finding that statement of accused voluntary will not ordinarily be set aside unless finding clearly erroneous. State v. Medina ---------- 765

98. If there is any element of science or skill in matter being investigated before trial jury, not reversible error for court to admit expert testimony thereon, even though element of science slight. State v. Medina ---------- 765
99. Underlying principle of relevance is logical probative value. State v. Wright ---------- 783
100. Where evidence conflicting or where reasonable minds may draw different inferences or conclusions from evidence, within province of jury, or court when case tried without jury, to decide issues of fact and Supreme Court may not set aside or direct verdict in such situation. Libbey-Owens Ford Glass Co. v. L & M Paper Co. ---------- 792
101. Handwriting in question may be compared by trier of fact with writing of same person which is proved to be genuine. First Nat. Bank & Trust Co. v. Cutright ---------- 805
102. In law actions, conflicts in evidence or findings of fact will not be disturbed on appeal unless clearly wrong. First Nat. Bank & Trust Co. v. Cutright - 805

Fees.

1. Amount of attorney's fees allowed rests in sound discretion of district court, considering elements of amount involved, responsibility assumed, questions of law raised, time and labor necessarily required in performance of duties, professional diligence and skill required, and result of services performed. Insurance Co. of North America v. Omaha Paper Stock, Inc. ---------- 232
2. Where an insurer brings action for declaratory judgment to have coverage determined and insured prevails, latter entitled to attorney's fee under provisions of section 44-359, R. S. Supp., 1972. State Farm Mut. Auto. Ins. Co. v. Selders ---------- 334
3. Under section 48-118, R. R. S. 1943, where employer and employee join in suit against third person, district court has jurisdiction to determine all disputes between employer and employee, including setting and allocation of attorney's fees and expenses. Gillotte v. Omaha Public Power Dist. ---- 444
4. Under section 48-118, R. R. S. 1943, subrogated interest of employer, for computation and allocation of fees and expenses, not restricted to workmen's compensation benefits actually paid, but measured

by workmen's compensation liability relieved or discharged by recovery against third party. Gillotte v. Omaha Public Power Dist. ---------- 444
5. Failure of magistrate to collect fee for issuing warrant does not affect validity of warrant. State v. McCown ---------- 495

Foreclosure.

Person whose leasehold interest terminated, in premises upon which is mechanic's lien, not necessary party to petition for foreclosure. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10

Fraudulent Conveyances.

1. Every conveyance made with intent to hinder, delay, or defraud creditors or persons of their lawful debt or demands is void. First Nat. Bank v. First Cadco Corp. ---------- 553
2. Question of fraudulent intent in all cases arising under provisions of section 36-401, R. R. S. 1943, is question of fact, and not of law. First Nat. Bank v. First Cadco Corp. ---------- 553
3. Creditor may usually follow and subject to his claim the fund or proceeds resulting from fraudulent conveyance and may pursue same into any property in which it may have been invested, so far as it can be found. First Nat. Bank v. First Cadco Corp. - 553
4. Conveyance in fraud of creditors may be effected by organization of corporation and transfer of property to it with intent to hinder, delay, or defraud creditors. First Nat. Bank v. First Cadco Corp. -- 553
5. Provisions of sections 36-401 to 36-409, R. R. S. 1943, do not impair title of purchaser for valuable consideration unless purchaser had previous notice of fraudulent intent of his immediate grantor, or of frauds rendering void title of grantor. First Nat. Bank v. First Cadco Corp. ---------- 553
6. Inadequacy of consideration is a badge of fraud. First Nat. Bank v. First Cadco Corp. ---------- 553
7. Conveyance in consideration of an agreement for future support may, where it has effect of hindering, delaying, or defrauding creditors, be evidence of fraudulent intent. First Nat. Bank v. First Cadco Corp. ---------- 553
8. If value of property conveyed exceeds amount of encumbrances thereon, agreement by grantee to

pay off encumbrances not valuable consideration as against grantor's creditors; ability of grantee to pay encumbrance also fact to be considered. First Nat. Bank v. First Cadco Corp. ---------- 553

9. Transfer by which grantor reserves to himself a benefit to detriment of his creditors may constitute evidence of fraud. First Nat. Bank v. First Cadco Corp. ---------- 553

10. Depending upon facts and circumstances, one who is beneficiary of fraudulent conveyance may be required to account for rents and profits thereof, including rents and profits from proceeds. First Nat. Bank v. First Cadco Corp. ---------- 553

11. Where is a conveyance between close relatives without adequate consideration, burden upon parties to transaction to establish that it was done in good faith. First Nat. Bank v. First Cadco Corp. ----- 553

12. Fact that plaintiff in creditor's bill action does have security does not deprive it of its standing as creditor under section 36-401, R. R. S. 1943. First Nat. Bank v. First Cadco Corp. ---------- 553

13. Whether creditor mortgagee will be required to first exhaust property which it has taken as security before subjecting fraudulently transferred property to satisfaction of its judgment lien is in equity matter for sound discretion of court. First Nat. Bank v. First Cadco Corp. ---------- 553

14. In equity, Supreme Court when reviewing findings of trial court will, where evidence in conflict, consider that trial court heard and observed witnesses and must have accepted one version of facts rather than another. This rule, however, has no application where, although belief of trial court apparent, its decision founded upon question of sufficiency of evidence and not its credibility. First Nat. Bank v. First Cadco Corp. ---------- 553

Garnishment.

1. When period of spendthrift trust has expired and beneficiary has unrestricted right to demand trust res, property may be reached by garnishment even though trustee has delayed making actual distribution. First Nat. Bank of Omaha v. First Cadco Corp. 734

2. In garnishment proceeding, intervener or third party claimant normally has burden of proving his claim by preponderance of evidence, and this rule has

application even where intervener or claimant has possession of property if judgment debtor and claimant closely related. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734

Gas.

One engaged in installation of gas appliances must exercise high degree of care consistent with dangerous nature of commodity to be used in appliance. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. -- 247

Guilty Plea.

1. Guilty plea which represents voluntary and intelligent choice of available alternatives, even though made for purpose of attempting to secure lighter sentence, acceptable. State v. Rubek ---------- 141
2. Accused may voluntarily, knowingly, and understandingly consent to imposition of prison sentence even though unwilling to admit participation in crime, or even if his guilty plea contains protestation of innocence, when he intelligently concludes that his interests require a guilty plea and record strongly evidences guilt. State v. Rubek ---------- 141
3. Standard for determining validity of guilty and nolo contendere pleas whether plea represents voluntary and intelligent choice among alternative courses of action open to defendant. State v. Hyslop ------- 331

Highways.

1. Permissive use of land of another, that is a use or license exercised in subordination to other's claim and ownership, not adverse and cannot give an easement by prescription no matter how long it may be continued. Connot v. Bowden ---------- 97
2. Where object on highway in front of one driving thereon at night so nearly color of road that it may be difficult to distinguish until quite close, cannot be said, as matter of law, that such person was guilty of contributory negligence. McClellen v. Dobberstein ---------- 669
3. Motorist approaching highway protected by stop signs must stop before going upon highway, must look to his left and to his right, and must permit motor vehicle which is proceeding along highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for

motorist to proceed into intersection. White v. Kluge ---------- 742
4. Duty of motorist to look for vehicles approaching on highway protected by stop signs implies obligation to see what is in plain view. White v. Kluge .. 742
5. Motorist entering intersection of highways obligated to look for approaching automobiles and to see any vehicle within that radius which denotes limit of danger. White v. Kluge ---------- 742

Homicide.

Spontaneous declaration of homicide victim identifying attacker admissible where declaration and attack so clearly connected that declaration can in ordinary course of affairs be said to be spontaneous declaration of real cause. State v. Brown ---------- 319

Husband and Wife.

1. Mere failure of surviving wife to tender back support or other payments received by her under terms of property settlement agreement entered into in connection with action for divorce does not by itself estop surviving spouse from denying finality of divorce decree and from claiming her statutory rights in estate of husband where he dies before divorce becomes final. Bassett v. First Nat. Bank & Trust Co. ---------- 206
2. Property settlement agreement entered into in connection with and to facilitate action for divorce, and conditioned upon divorce being granted and approval of court, has no viability independent of finality of decree of divorce, and where one of parties dies before divorce becomes final, rights of inheritance and statutory allowances not barred by property settlement agreement. Bassett v. First Nat. Bank & Trust Co. ---------- 206

Implied Consent Law.

1. Fifth Amendment privilege against self-incrimination protects accused only from being compelled to testify against himself or otherwise provide State with evidence of testimonial or communicative nature, and withdrawal of body fluid and use of its analysis does not involve compulsion. State v. Williams 127
2. Nebraska Implied Consent Law constitutional. State v. Williams ---------- 127

3. Implied Consent Law, enacted in 1971, constitutional. State v. Manley ---------- 415

Indictments and Informations.

1. Technical formality and preciseness of charge unnecessary in proceeding for revocation of probation. State v. Case ---------- 493
2. Failure to endorse on information names of witnesses called by State not grounds for reversal of conviction in absence of prejudice. State v. Keith - 536
3. Ruling of trial court upon motion for consolidation or severance of criminal prosecutions that might have been properly joined in single indictment, information, or complaint will not be disturbed in absence of abuse of discretion. State v. Bazer ---- 711
4. Information charging offense in substantially words of statute generally sufficient. State v. Abraham -- 728
5. Indictment or information alone need not be full protection against double jeopardy because defendant may allege and prove facts outside record in support of plea of former adjudication. State v. Abraham ---------- 728

Infants.

1. Contributing to delinquency of minor consists of an act which encourages, causes, or contributes to delinquency of child under 18 years of age. State v. McCune ---------- 165
2. Delinquent child is any child under age of 18 years who has violated any state law or city or village ordinance. State v. McCune ---------- 165
3. Evidence that defendant furnished automobile used for drinking party upon the public highways in which 15-year-old girl allowed to participate will sustain conviction for contributing to delinquency of minor. State v. McCune ---------- 165
4. Juvenile court presumed to disregard all irrelevant matters in determining whether a child is a delinquent child. State v. Miller ---------- 383
5. In a disposition hearing, juvenile court may consider all previous matters in juvenile court pertaining to the child. State v. Miller ---------- 383
6. Conditions stated when possessor of land subject to liability for physical harm to children trespassing thereon caused by artificial condition upon the land. Gubalke v. Estate of Anthes ---------- 385

7. Decree fixing custody of minor children will not be modified unless there has been change in circumstances indicating that person having custody unfit for that purpose or that best interests of children require such action. Bennett v. Bennett ---------- 654
8. Discretion of trial court with respect to changing custody of minor children subject to review, but determination of the court will not ordinarily be disturbed unless there is clear abuse of discretion or it is clearly against weight of evidence. Bennett v. Bennett ---------- 654
9. In divorce action where divorce has been granted and custody of children has been fixed, court in proper proceeding may, where circumstances of parties have changed or it shall be to best interests of children, modify decree as it concerns care, custody, and maintenance of children, having due regard for rights of fit, proper, and suitable parents. Wichert v. Wichert 667

Initiative and Referendum.

Ordinance proposed by electors of city under initiative law must constitute such legislation as city council or legislative body of city has power to enact under delegated powers granted and defined by Legislature. State ex rel. Andersen v. Leahy ---------- 92

Injunctions.

1. Where an obstruction in natural watercourse constitutes continuing and permanent injury to adjoining landowners, injunctive relief may be granted upon proper showing. Wilson Concrete Co. v. County of Sarpy ---------- 312
2. Injunction is extraordinary remedy and ordinarily will not be granted except in clear case where there is actual and substantial injury; right must be clear and damage irreparable. Larson v. Board of Regents 688
3. Writ of injunction not wholly writ of right and may be withheld, in discretion of court, when likely to inflict greater injury than grievance complained of. Larson v. Board of Regents ---------- 688

Insane Persons.

1. Test of mental competency to stand trial whether defendant has capacity to understand nature and object of proceedings against him; to comprehend his own condition in reference to such proceedings;

and to make rational defense. State v. Crenshaw -- 780
2. If facts brought to attention of court which raise doubt as to sanity of defendant, question of competency should be determined at that time. State v. Crenshaw ---------- 780
3. Question of competency to stand trial one of fact to be determined by court and means employed in resolving question are discretionary with court. State v. Crenshaw ---------- 780

Instructions.

1. Admission of incompetent evidence may be cured by instruction which directs jury to consider as established fact transaction sought to be impeached by incompetent evidence. Dovey v. Sheridan -------- 133
2. Instructions must be confined to issues presented by pleadings and supported by evidence. Gier v. Gleason ---------- 156
3. Where an issue, even assuming it is properly pleaded, affords no basis for recovery under evidence adduced in case, trial court's submission of such an issue to jury constitutes error. Gier v. Gleason ------- 156
4. Instructions to jury must be considered as whole, and when thus considered, if law is correctly stated, and case fairly submitted, and jury could not have been misled, claim of prejudicial error in instructions not available. Simon v. Omaha P. P. Dist. -- 183
5. Where court has properly instructed generally on the law as to some issue presented by pleadings and evidence, it is generally duty of counsel to request instruction which seeks to supplement and define general instruction. Simon v. Omaha P. P. Dist. -- 183
6. Instruction that jury to draw no inferences from fact defendant did not testify is cautionary instruction for benefit of defendant. State v. Kennedy -- 423
7. When litigant has approved instructions in trial court, either by word or act, he cannot thereafter effectively complain of instructions given. Swearingen v. Sloggett ---------- 482
8. Instructions objected to must be specifically designated by number in motion for new trial in order for such alleged error to be considered on appeal; otherwise, such instructions will be taken as law of case. Swearingen v. Sloggett ---------- 482
9. Generally, any alleged errors in instructions occurring in course of trial irrelevant, if jury arrived at

verdict consistent with directed verdict that should have been granted. McClellen v. Dobberstein ----- 669
10. In present state of the law, failure by court to define term "community standards" as referring to standards on local, state, or national basis not erroneous so long as jurors are instructed to determine the case, not on their individual standards, but on contemporary community standards. State v. Little Art Corp. ---------- 681
11. Duty of trial court to aid jury to determine guilt or innocence of accused by plain and clear instructions, and if jurors are in doubt as to meaning of instructions given, it is entirely proper for them to request, and for trial court to give, additional explanatory instructions. State v. Suggett --------- 714
12. Repetition of instruction not reversible error, unless its effect is to mislead jury. State v. Suggett ---- 714
13. Failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Libbey-Owens Ford Glass Co. v. L & M Paper Co. ---------- 792
14. Where contributory negligence pleaded as defense, and no competent evidence to support it, it is prejudicial error to submit to jury issues involving contributory and comparative negligence. Spath v. Coon 822

Insurance.

1. No insurance policy or certificate of any kind shall be issued or delivered in Nebraska unless and until copy of form thereof has been filed with Department of Insurance and approved by it. Workman v. Great Plains Ins. Co., Inc. ---------- 22
2. Cited statute does not prohibit insurance company from printing in or attaching to insurance policy additional or altered terms or conditions not found in standard approved form, provided they are not inconsistent with or waiver of any of provisions of such authorized approved form; provisions not in conflict with provisions of such approved form may be added when necessary to express terms of contract of insurance which is authorized. Workman v. Great Plains Ins. Co., Inc. ---------- 22
3. Automobile that had been modified for use in stock car racing by removing seats, dashboard, headlights, taillights, and glass and by adding special equipment to facilitate its use in races, was "equipment

designed for use principally off public roads." Walcott v. Hawkeye-Security Ins. Co. ---------- 161

4. Where an insurer brings action for declaratory judgment to have coverage determined and insured prevails, latter entitled to attorney's fee under provisions of section 44-359, R. S. Supp., 1972. State Farm Mut. Auto. Ins. Co. v. Selders ---------- 334

5. A statutory interpretation, effective March 1, 1973, is adopted as follows: A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement. Walls v. Horbach ---------- 479

6. An aircraft insurance policy may exclude coverage when airplane flown by certain types of persons or pilots. Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co. ---------- 610

7. Insurer under an aircraft insurance policy may lawfully exclude certain risks from coverage of its policy and where damage occurs during operation of insured aircraft under circumstances as to which policy excludes coverage, there is no coverage. Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co. ---------- 610

8. Under aircraft insurance policy that excludes coverage while aircraft operated in flight by other than a pilot or pilots holding valid and effective pilot and medical certificates, there is no coverage where a pilot's medical certificate lapsed 5 months before an accident occurred. Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co. ---------- 610

9. Objectively reasonable expectations of beneficiary-insured relating to terms of his insurance contract will ordinarily be honored. Bracy v. American Family Mut. Ins. Co. ---------- 631

10. Purpose of insurer against liability for medical payments in automobile policy may be not to make medical payments to insured who is injured in another vehicle owned by insured but not insured under

policy. Bracy v. American Family Mut. Ins. Co. -- 631
11. Where two fire insurance policies issued by different insurers to common insured each contain prohibitions against other insurance and a prorating clause, but no express provision voiding policy for violation of prohibition nor suspending coverage during time of violation, both policies remain in force and prorating clauses apply to any covered loss. Kent v. Insurance Co. of North America ---------- 769

Intent.

1. Terms "maliciously" and "feloniously," as used in describing an offense, import a willful act. State v. Schumacher ---------- 138
2. Where proof of a different crime tends to establish motive, criminal intent, or guilty knowledge, it is admissible. State v. Meints ---------- 264
3. Question of fraudulent intent in all cases arising under provisions of section 36-401, R. R. S. 1943, is question of fact, and not of law. First Nat. Bank v. First Cadco Corp. ---------- 553
4. In determining legislative intent, all statutes relating to same subject should be construed and considered together. State v. Suggett ---------- 714
5. When intent of Legislature clear, it is duty of courts to construe it in accordance with such intent; sensible construction will be placed upon it to effectuate object of legislation rather than literal meaning that would have effect of defeating legislative intent. State v. Suggett ---------- 714
6. In prosecution for receiving stolen property, when facts known to defendant were such that man of age, intelligence, and experience of defendant would know the property to have been stolen, trier of fact may properly find defendant possessed guilty knowledge. State v. Abraham ---------- 728

Interest.

1. Claim for damage to property, established by reference to an accounting system involving allocation of costs of overhead, labor, vehicles, and material, which trier of fact may consider, but not bound to accept, not a liquidated account to allow plaintiff to recover prejudgment interest. Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc. -- 30
2. Real estate mortgage loans by nonlicensees whose

terms call for periodic interest payments and single payment of principal are not installment loans and not subject to inhibitory provisions of Installment Loan Act. Seldin v. Northland Mortgage Co. ----- 175
3. Interest allowable where conduct of party justifies its allowance, particularly where money or property belonging to another is wrongfully withheld to enrichment of debtor and to detriment of creditor. Halbert v. Food Host U.S.A., Inc. ---------- 346
4. Regardless of term used, if result is charge for loan of money or for forbearance of debt, result is interest. Midstates Acceptance v. Voss ---------- 411

Intoxicating Liquors.
1. Evidence that defendant furnished automobile used for drinking party upon the public highways in which 15-year-old girl allowed to participate will sustain conviction for contributing to delinquency of minor. State v. McCune ---------- 165
2. Refusal of defendant to submit to legal chemical test for intoxication admissible in evidence. State v. Meints ---------- 264
3. Prosecuting attorney may comment to jury on refusal of defendant in prosecution for driving while under influence of intoxicating liquor to submit to chemical test which is required by law. State v. Meints ---- 264
4. Implied Consent Law, enacted in 1971, constitutional. State v. Manley ---------- 415
5. Power to regulate all phases of control of distribution and sale of alcoholic liquors vested generally in Liquor Control Commission. T & N P Co., Inc. v. Nebraska Liquor Control Commission --------- 708
6. Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied; courts without authority to interfere with that discretion unless it has been abused. T & N P Co., Inc. v. Nebraska Liquor Control Commission ---------- 708

Invitee.
1. Duty of owner in control of premises where work performance under contract with owner to be executed to exercise reasonable care to keep premises in safe condition while contract in course of performance. Simon v. Omaha P. P. Dist. ---------- 183
2. Possessor of land retaining control subject to lia-

bility for personal injuries to business visitors caused by natural or artificial condition thereon if he knows, or by exercise of reasonable care could discover, condition which, if known to him, he should realize as involving unreasonable risk of harm to invitee. Simon v. Omaha P. P. Dist. ---------- 183

3. Owner's duty to invitee to provide safe place to work cannot be delegated or avoided by contract where owner retains possession and control of premises. Simon v. Omaha P. P. Dist. ---------- 183

Judgments.

1. 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. Workman v. Great Plains Ins. Co., Inc. ---------- 22
2. Judgment of trial court in action at law where jury waived has effect of verdict of jury, and will not be set aside unless clearly wrong. In determining sufficiency of evidence to sustain judgment in law action, it must be considered most favorably to successful party, every controverted fact must be resolved in that party's favor, and he must have benefit of any inferences reasonably deducible from it. Knight Bros., Inc. v. State ---------- 64
3. Judgment on merits ordinarily concludes parties and their privies, not only as to things determined, but also as to matters that might have been litigated. State Fire Marshal v. Village of Dorchester ------ 464
4. Not duty of reviewing court to search record for purpose of ascertaining if there is prejudicial error; every reasonable presumption will be indulged in favor of correctness of judgment that is entered; and any ruling alleged to be prejudicially erroneous must be specifically pointed out. McClellen v. Dobberstein ---------- 669
5. Where law action tried to court without jury, finding of court has effect of jury verdict and will not be disturbed unless clearly wrong. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734

Juries.

1. Party who fails to challenge jurors for disqualification and passes jurors for cause waives any objection to their selection. Regier v. Nebraska P. P. Dist. ---------- 56

2. Where evidence relating to ambiguities and contradictory provisions in a written contract is conflicting, interpretation to be given contract is for jury. Knight Bros., Inc. v. State ---------- 64
3. Ordinarily, challenge to array must be made before trial. State v. Nelson ---------- 144
4. Alleged exclusion of women from jury panel cannot be raised for first time in post conviction proceeding. State v. Nelson ---------- 144
5. Fundamental that a jury alone is sole judge of credibility of witnesses and of weight to be given to their testimony. Batterman v. Richardson ------- 303
6. A jury has right to test credibility of witnesses by their self-interest and to weigh disputed parol testimony against all other facts and circumstances in evidence from which a conclusion may properly be drawn that parol testimony either false or incredible of belief; substantial conflict may arise even though all the evidence produced by one party. Batterman v. Richardson ---------- 303
7. Before evidence submitted to jury, is preliminary question for court, not whether is literally no evidence, but whether is any upon which jury can proceed to find verdict for party producing it, upon whom burden of proof imposed. Era v. Sapp Bros. GMC, Inc. ---------- 366
8. Voir dire examination of jurors, opening statements, and final arguments to jury not customarily included in bill of exceptions, and will not be included unless request made to reporter that they be reported and included. State v. Kennedy ---------- 423

Jurisdiction.

1. County board is only "authority" whose approval required for payment of tax refund claim under section 77-1734.01, R. R. S. 1943; failure to transmit copy of claim to other taxing entities does not deprive county board of jurisdiction and authority to determine and approve proper claim. School Dist. of Minatare v. County of Scotts Bluff ---------- 395
2. Under section 48-118, R. R. S. 1943, where employer and employee join in suit against third person, district court has jurisdiction to determine all disputes between employer and employee, including setting and allocation of attorney's fees and expenses. Gillotte v. Omaha Public Power Dist. ---------- 444

3. Where court has no jurisdiction of subject matter of action, all proceedings in such action void. Nebraska Dept. of Roads Employees Assn. v. Department of Roads ---------- 754

Labor and Labor Relations.

1. Employer's action or nonaction which results in cessation of employee's employment unlawful if employer's motive in so doing to discourage union membership or activity, or in reprisal or retaliation for latter activities. Mid-Plains Education Assn. v. Mid-Plains Nebraska Tech. College ---------- 37
2. Cited statute establishes right of any labor organization organized under provisions of the act to file petition with Court of Industrial Relations invoking its jurisdiction when any industrial dispute exists between parties as set forth in the act. Mid-Plains Education Assn. v. Mid-Plains Nebraska Tech. College ---------- 37
3. All industrial disputes involving governmental service, service of a public utility, or other disputes as Legislature may provide shall be settled by invoking jurisdiction of Court of Industrial Relations. Nebraska Dept. of Roads Employees Assn. v. Department of Roads ---------- 754
4. No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization. Nebraska Dept. of Roads Employees Assn. v. Department of Roads 754
5. Section 25-313, R. R. S. 1943, authorizes unincorporated association to represent employees in collective bargaining with employers as well as to sue and be sued in name of association; however, before it may bring an action in courts of this state, it must comply with provisions of section 25-314, R. R. S. 1943. Nebraska Council of Educational Leaders v. Nebraska Department of Education ---------- 811

Landlord and Tenant.

1. Tenant cannot, without authority of landlord, charge land with lien for materials for constructing or improving building thereon. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10
2. Mechanic's lien law of Nebraska requires that contract for material, labor, etc., for improvement on real estate be made with owner thereof or his agent;

and tenant of real estate, because of his tenancy, not agent of landlord for that purpose. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10

3. An abandonment of leased premises by tenant constitutes offer to terminate lease, and abandonment or surrender of leased premises together with acceptance thereof by landlord as by resumption of possession may constitute surrender by operation of law. Waite Lumber Co., Inc. v. Masid Bros., Inc. -- 10
4. Whether has been acceptance by landlord of tenant's abandonment of premises largely matter of intention and such acceptance may be inferred from acts of landlord inconsistent with continuance of lease. Waite Lumber Co., Inc. v. Masid Bros., Inc. ----- 10
5. Person whose leasehold interest terminated, in premises upon which is mechanic's lien, not necessary party to petition for foreclosure. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10
6. Where possession of real estate entered upon under agreement with owner with reference to occupancy and not as owner, occupant cannot assert ownership by adverse possession unless he first surrenders his possession, or by some unequivocal act notifies landlord that he no longer holds under agreement made. Jackson v. Eichenberger ---------- 777
7. Mere nondemand and nonpayment of rent not sufficient to bar landlord's title. Jackson v. Eichenberger ---------- 777

Legislature.

1. In enacting a statute, Legislature must be presumed to have had in mind all previous legislation upon subject. Seldin v. Northland Mortgage Co. -------- 175
2. In Legislature, record of floor explanation or debate legislative history, and may be an extrinsic, secondary source in statutory interpretation. Norden Laboratories, Inc. v. County Board of Equalization 437
3. When Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it will be presumed that it does so with full knowledge of preexisting legislation and judicial decisions of Supreme Court construing and applying it. Sidney Education Assn. v. School Dist. of Sidney ---- 540

Licenses.

1. License to practice law in this jurisdiction granted

on implied understanding that party receiving it shall at all times demean himself in proper manner and abstain from such practices as cannot fail to bring discredit to himself, the profession, and the courts. State ex rel. Nebraska State Bar Assn. v. Strom ---------- 146

2. Violation of any ethical standards relating to practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach on the courts or the legal profession, constitute grounds for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Strom ---------- 146
3. Although Installment Loan Act applies primarily to those who have been licensed under the act, its inhibitory provisions apply to nonlicensees as well. Seldin v. Northland Mortgage Co. ---------- 175
4. Real estate mortgage loans by nonlicensees whose terms call for periodic interest payments and single payment of principal are not installment loans and not subject to inhibitory provisions of Installment Loan Act. Seldin v. Northland Mortgage Co. -- 175
5. To extent that courts may have power to review action of professional examining board in its refusal to recommend reinstatement under provisions of section 71-155, R. R. S. 1943, of license which has earlier been revoked, Supreme Court has no right to compel discretionary power of that public board unless its action arbitrary or capricious. Coil v. Department of Health ---------- 606
6. Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied; courts without authority to interfere with that discretion unless it has been abused. T & N P Co., Inc. v. Nebraska Liquor Control Commission ---------- 708

Limitations of Actions.

After running of statute, adverse possessor has indefeasible title which can only be divested by his conveyance of land to another, or by subsequent disseisin for statutory limitation period. Abood v. Johnson ---------- 87

Mandamus.

1. An act is nonetheless ministerial because person performing it or officer who is obligated to perform

it may have to satisfy himself that state of facts exist under which it is his right and duty to perform the act. State ex rel. Rittenhouse v. Newman 657

2. Fact that necessity may exist for ascertainment, from personal knowledge, or from information derived from other sources, of those facts and conditions, such as residence, upon existence of fulfillment of which performance of act becomes clear and specific duty, does not operate to convert act into one judicial in its nature. State ex rel. Rittenhouse v. Newman ---------- 657

Marriage.

Marriage contract between man and woman, one of whom is married, contrary to public policy, illegal, and void. Boersen v. Huffman ---------- 469

Marshalling Assets.

Whether creditor mortgagee will be required to first exhaust property which it has taken as security before subjecting fraudulently transferred property to satisfaction of its judgment lien is in equity matter for sound discretion of court. First Nat. Bank v. First Cadco Corp. ---------- 553

Master and Servant.

1. Employer's action or nonaction which results in cessation of employee's employment unlawful if employer's motive in so doing to discourage union membership or activity, or in reprisal or retaliation for latter activities. Mid-Plains Education Assn. v. Mid-Plains Nebraska Tech. College ---------- 37
2. If a condition of obligor's duty is that he be satisfied with obligee's performance, an interpretation is preferred under which condition occurs, provided a reasonable man in position of obligor would be satisfied and such a test is practicable. Nebraska Panhandle Community Action Agency, Inc. v. Strange 83
3. Present a condition in employment contract that obligor be satisfied with obligee's performance, if agreement leaves no doubt that honest satisfaction and no more is meant, condition does not occur if the obligor is honestly, even though unreasonably, dissatisfied. Nebraska Panhandle Community Action Agency, Inc. v. Strange ---------- 83
4. Where a condition of obligor's duty is that he be sat-

isfied with obligee's performance, mere statement of obligor that he is not satisfied not conclusive. Nebraska Panhandle Community Action Agency, Inc. v. Strange ---------- 83

5. Under Nebraska Nonprofit Corporation Act, the Economic Opportunity Act of 1964, as amended, and administrative regulations, unless particular facts require it, Supreme Court will not review validity of resolutions in which board of directors of corporate administrator of programs under Economic Opportunity Act of 1964, as amended, terminates its employees. Nebraska Panhandle Community Action Agency, Inc. v. Strange ---------- 83

6. Duty imposed upon owner not that of an insurer; he must use only that degree of care in furnishing safe place to work which a reasonable and prudent man would exercise under like circumstances. Simon v. Omaha P. P. Dist. ---------- 183

7. Ordinarily, safe place to work requires that owner in possession and control of premises should recognize that construction work likely to create during its progress peculiar risk of physical harm to others unless special precautions taken. Simon v. Omaha P. P. Dist. ---------- 183

Mechanic's Liens.

1. Tenant cannot, without authority of landlord, charge land with lien for materials for constructing or improving building thereon. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10

2. Mechanic's lien law of Nebraska requires that contract for material, labor, etc., for improvement on real estate be made with owner thereof or his agent; and tenant of real estate, because of his tenancy, not agent of landlord for that purpose. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10

3. Although mechanic's lien when filed attaches only to equitable estate, it may be enforced against fee after equitable and legal titles have merged. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10

4. Person whose leasehold interest terminated, in premises upon which is mechanic's lien, not necessary party to petition for foreclosure. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10

Mortgages.

Real estate mortgage loans by nonlicensees whose terms call for periodic interest payments and single payment of principal are not installment loans and not subject to inhibitory provisions of Installment Loan Act. Seldin v. Northland Mortgage Co. ---- 175

Motions, Rules, and Orders.

1. Motion to declare mistrial addressed to sound discretion of trial court, and its ruling will not be disturbed in absence of showing of abuse of discretion. Regier v. Nebraska P. P. Dist. ---------- 56
2. Motion to suppress can be urged only by one whose rights were violated, not by one aggrieved solely by introduction of damaging evidence. State v. McCune ---------- 165
   State v. Waechter ---------- 433
3. When defendant moves for directed verdict, he admits as true evidence of plaintiff who is then entitled to benefit of every reasonable inference deducible from evidence submitted. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. ---------- 247
4. Motion for continuance addressed to sound discretion of court, and, in absence of abuse of discretion, its denial not error. State v. Craig ---------- 461
5. Order overruling motion for judgment in accordance with motion for directed verdict may be reviewed on appeal, although no verdict returned by jury. Bailey v. Williams ---------- 484
6. Motion to transfer under section 25-409, R. S. Supp., 1972, properly overruled where record does not show that action was commenced in wrong county. Johnsen v. Parks ---------- 712
7. Where record does not show abuse of discretion, ruling on motion to transfer under section 25-410, R. S. Supp., 1972, will not be disturbed. Johnsen v. Parks ---------- 712
8. All defects that may be excepted to by motion to quash are taken to be waived by defendant pleading general issue. State v. Abraham ---------- 728
9. Indictment or information alone need not be full protection against double jeopardy because defendant may allege and prove facts outside record in support of plea of former adjudication. State v. Abraham ---------- 728
10. District court has power and is required to consider

and determine motions for new trial by exercise of its judicial discretion. Roush v. Nebraska P. P. Dist. ---------- 785

11. Whether decision was to grant new trial or deny one, questions in Supreme Court are, do alleged error or errors appear in record, were they called to attention of trial court by motion, and do they constitute prejudicial error to party complaining. Roush v. Nebraska P. P. Dist. ---------- 785

Motor Vehicles.

1. Nebraska Implied Consent Law constitutional. State v. Williams ---------- 127
2. Automobile that had been modified for use in stock car racing by removing seats, dashboard, headlights, taillights, and glass and by adding special equipment to facilitate its use in races, was "equipment designed for use principally off public roads." Walcott v. Hawkeye-Security Ins. Co. ---------- 161
3. Refusal of defendant to submit to legal chemical test for intoxication admissible in evidence. State v. Meints ---------- 264
4. Prosecuting attorney may comment to jury on refusal of defendant in prosecution for driving while under influence of intoxicating liquor to submit to chemical test which is required by law. State v. Meints ---------- 264
5. Warrantless search of motor vehicle may be conducted for probable cause which must be determined by a practical and not by any technical standard. State v. Connor ---------- 269
6. When materials in automobile indicative of criminal offense in plain sight of officer looking into automobile from outside, search justified and legal. State v. Moore ---------- 380
7. Driver of automobile legally obligated to keep such a lookout that he can see what is plainly visible before him and he cannot relieve himself of that duty. McClellen v. Dobberstein ---------- 669
8. Existence and presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or destroy visibility not to be deemed intervening causes, but rather as conditions which impose upon drivers of automobiles duty to assure safety of public by exercise of care commensurate with such surrounding conditions. Mc-

Clellen v. Dobberstein ---------- 669
9. Where object on highway in front of one driving thereon at night so nearly color of road that it may be difficult to distinguish until quite close, cannot be said, as matter of law, that such person was guilty of contributory negligence. McClellen v. Dobberstein 669
10. Motorist approaching highway protected by stop signs must stop before going upon highway, must look to his left and to his right, and must permit motor vehicle which is proceeding along highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for motorist to proceed into intersection. White v. Kluge ---------- 742
11. Duty of motorist to look for vehicles approaching on highway protected by stop signs implies obligation to see what is in plain view. White v. Kluge -- 742
12. Motorist entering intersection of highways obligated to look for approaching automobiles and to see any vehicle within that radius which denotes limit of danger. White v. Kluge ---------- 742
13. If motorist entering intersection looks for approaching vehicles but fails to see one which is favored over him under rules of the road, he is guilty of negligence as matter of law. White v. Kluge ---- 742

Municipal Corporations.

1. Municipal corporation may not, without sanction of state by constitutional provision or legislative enactment, annex territory to its corporate area or change its boundaries. State ex rel. Andersen v. Leahy ---------- 92
2. Ordinance proposed by electors of city under initiative law must constitute such legislation as city council or legislative body of city has power to enact under delegated powers granted and defined by Legislature. State ex rel. Andersen v. Leahy -------- 92
3. Public utility may classify its users for rate purposes if classification reasonable and not unjustly discriminatory. Reimer v. City of O'Neill -------- 151
4. Hotels and motels may be classified separately from trailer courts and apartment houses for purpose of fixing rates for water and sewer service. Reimer v. City of O'Neill ---------- 151
5. Municipality furnishing water and sewer service to its residents must treat all customers in same class

equally. Reimer v. City of O'Neill ---------- 151
6. An Omahan as such has no derivative right greater than right City of Omaha possesses. Pedersen v. Westroads, Inc. ---------- 236
7. Resident taxpayer's derivative claim on behalf of City of Omaha may come within spirit of statutory provision for derivative defenses, although it is not technically referable to threatened expenditure of public funds. Pedersen v. Westroads, Inc. ------- 236
8. Consent decree transferring assets and liabilities of sanitary and improvement district to City of Omaha upon annexation of land of district may be insufficient to constitute waiver or claim preclusion of beneficiary rights of Omaha under private covenants relating to rezoning. Pedersen v. Westroads, Inc. 236
9. Where dedication made to public for defined purpose, neither Legislature, municipality, its successor, nor general public has any power to use property for any other purpose than one designated, whether use be public or private, or whether dedication is common-law or statutory dedication, notwithstanding that changed use may be advantageous to public. Gallagher v. City of Omaha ---------- 598
10. Where park property has been acquired by municipality especially for park use with funds from sale of bonds specifically authorized by electors for that purpose, city is a trustee of property for such purpose, but in this case may divert property from such use if it is clearly authorized to do so by Legislature, at least where property no longer needed for park purposes. Gallagher v. City of Omaha ---------- 598
11. L.B. 1409, Laws 1969, c. 846, p. 3185, did not authorize metropolitan city to enter into agreement with Board of Regents of University of Nebraska for joint use of park property. Gallagher v. City of Omaha ---------- 598
12. In absence of statutory authority, a city has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority. Gallagher v. City of Omaha ---------- 598

Negligence.

1. Duty of owner in control of premises where work performance under contract with owner to be executed to exercise reasonable care to keep premises in safe condition while contract in course of perform-

ance. Simon v. Omaha P. P. Dist. ---------- 183
2. Possessor of land retaining control subject to liability for personal injuries to business visitors caused by natural or artificial condition thereon if he knows, or by exercise of reasonable care could discover, condition which, if known to him, he should realize as involving unreasonable risk of harm to invitee. Simon v. Omaha P. P. Dist. ---------- 183
3. Duty imposed upon owner not that of an insurer; he must use only that degree of care in furnishing safe place to work which a reasonable and prudent man would exercise under like circumstances. Simon v. Omaha P. P. Dist. ---------- 183
4. Ordinarily, safe place to work requires that owner in possession and control of premises should recognize that construction work likely to create during its progress peculiar risk of physical harm to others unless special precautions taken. Simon v. Omaha P. P. Dist. ---------- 183
5. Owner's duty to invitee to provide safe place to work cannot be delegated or avoided by contract where owner retains possession and control of premises. Simon v. Omaha P. P. Dist. ---------- 183
6. Violation of administrative rule, or of private safety regulation, is independent evidence of negligence, under all the circumstances, provided expert witness incorporates regulation in his opinion as to an issuable act of negligence and evidence would probably aid trier of fact. Simon v. Omaha P. P. Dist. 183
7. Ordinarily, an agent only liable to his principal for mere breach of his contract with such principal; but if in course of his agency he undertakes as part of his contract to render service to his principal of type which he should recognize as necessary for protection of third persons, he must exercise reasonable care in performance of undertaking. Simon v. Omaha P. P. Dist. ---------- 183
8. One engaged in installation of gas appliances must exercise high degree of care consistent with dangerous nature of commodity to be used in appliance. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. -- 247
9. Conditions stated when possessor of land subject to liability for physical harm to children trespassing thereon caused by artificial condition upon the land. Gubalke v. Estate of Anthes ---------- 385
10. Contributory negligence affirmative defense which

must be pleaded. Bayse v. Tri-County Feeds, Inc. 458
11. Ordinarily, question of existence of negligence or contributory negligence one for jury. Bayse v. Tri-County Feeds, Inc. ---------- 458
12. Physician required to exercise care, skill, and diligence that physicians and surgeons in same neighborhood and similar communities, engaged in same or similar lines of work, would ordinarily exercise and devote to benefit of their patients. Bailey v. Williams ---------- 484
13. Physician required to use reasonable skill and care in diagnosing condition of patient. Bailey v. Williams ---------- 484
14. Malpractice may consist of lack of skill or care in making diagnosis as well as in treatment of ailment. Bailey v, Williams ---------- 484
15. Prejudicial error within meaning of comparative negligence statute to submit to jury issues that are irrelevant and for which there is no proof. Graham v. Simplex Motor Rebuilders, Inc. ---------- 507
16. Not negligence to maintain, under appropriate circumstances, different levels and approaches to places of business. Graham v. Simplex Motor Rebuilders, Inc. ---------- 507
17. Generally, error to submit general allegation of negligence to jury. Graham v. Simplex Motor Rebuilders, Inc. ---------- 507
18. Enumeration of specific acts of negligence should state ultimate acts of negligence and not conclusion of pleader. Graham v. Simplex Motor Rebuilders, Inc. ---------- 507
19. Negligence is question of fact which may be proved by circumstantial evidence, but facts and circumstances proved, together with reasonable inferences that may be drawn from them, must indicate with reasonable certainty negligent act complained of. Vietz v. Texaco, Inc. ---------- 514
20. Where several inferences may be drawn from facts proved, which inferences opposed to each other but equally consistent with facts proved, plaintiff may not sustain his position by reliance alone on inferences which would entitle him to recover. Vietz v. Texaco, Inc. ---------- 514
21. Driver of automobile legally obligated to keep such a lookout that he can see what is plainly visible before him and he cannot relieve himself of that duty.

McClellen v. Dobberstein ---------- 669
22. Existence and presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or destroy visibility not to be deemed intervening causes, but rather as conditions which impose upon drivers of automobiles duty to assure safety of public by exercise of care commensurate with surrounding conditions. McClellen v. Dobberstein ---------- 669
23. Where object on highway in front of one driving thereon at night so nearly color of road that it may be difficult to distinguish until quite close, cannot be said, as matter of law, that such person was guilty of contributory negligence. McClellen v. Dobberstein ---------- 669
24. If motorist entering intersection looks for approaching vehicles but fails to see one which is favored over him under rules of the road, he is guilty of negligence as matter of law. White v. Kluge ---- 742
25. It is not every intervening act or occurrence which will break necessary causal connection and insulate manufacturer from liability from his original negligent act or omission. Libbey-Owens Ford Glass Co. v. L & M Paper Co. ---------- 792
26. Generally, effect of intervening negligent act tested by determining whether it was such as might reasonably have been foreseen as consequence of claimed negligence of original actor. Libbey-Owens Ford Glass Co. v. L & M Paper Co. ---------- 792
27. Law does not require precision in foreseeing exact hazard or consequence which happens; sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen. Libbey-Owens Ford Glass Co. v. L & M Paper Co. ---------- 792
28. Question whether negligence is, in view of intervening negligence of third person, such a continuing and substantial factor in producing an accident as to be proximate cause of injury, is question of fact, rather than question of law. Libbey-Owens Ford Glass Co. v. L & M Paper Co. ---------- 792
29. If original negligence is of character which, according to usual experience of mankind, is liable to invite or induce intervention of some subsequent cause, intervening cause will not excuse it, and subsequent mischief will be held to be result of original negligence. Libbey-Owens Ford Glass Co. v. L &

M Paper Co. ---------- 792
30. In action based on negligence, question of whether or not there was intervening cause which removed negligence of defendant as proximate cause usually one for jury. Libbey-Owens Ford Glass Co. v. L & M Paper Co. ---------- 792
31. When separate and independent acts of negligence by different persons combine to produce single injury, each participant liable for damage although one of them alone would not have caused it. Libbey-Owens Ford Glass Co. v. L & M Paper Co. -- 792
32. Under section 4-406 (3), U. C. C., lack of ordinary care on part of drawee bank in paying items may be established by proof that bank's employees failed to exercise care in processing the items. First Nat. Bank & Trust Co. v. Cutright ---------- 805
33. Where contributory negligence pleaded as defense, and no competent evidence to support it, it is prejudicial error to submit to jury issues involving contributory and comparative negligence. Spath v. Coon ---------- 822

New Trial.

1. Separate juvenile court possesses jurisdiction to hear and determine motion for new trial on ground of newly discovered evidence during pendency of appeal to Supreme Court. Grant v. Doeschot -------- 121
2. Instructions objected to must be specifically designated by number in motion for new trial in order for such alleged error to be considered on appeal; otherwise, such instructions will be taken as law of case. Swearingen v. Sloggett ---------- 482
3. A holding of Supreme Court on a first appeal becomes law of the case on retrial of same issues unless on second trial facts materially and substantially different. State v. Jurgens ---------- 574
4. Subsection (4) of section 33, Laws 1972, L.B. 820, requires that when new trial had on issues in divorce case, provisions of L.B. 820 shall govern the law determining such trial. Lienemann v. Lienemann 626
5. Newly discovered evidence does not require granting of new trial unless it is of such controlling nature that it probably would change result of former trial. Universal Terrazzo & Tile Co. v. Parsons Corp. ---------- 634
6. In criminal case, new trial may be granted for newly

discovered evidence which is competent, material, and credible which might have changed result of trial and which exercise of due diligence could not have discovered and produced at trial. State v. Whipple 723

7. Motion for new trial on ground of newly discovered evidence addressed to sound discretion of trial court and unless abuse of discretion shown, its determination will not be disturbed. State v. Whipple ------ 723
8. Errors sufficient to cause granting of new trial must be errors prejudicial to rights of unsuccessful party. Roush v. Nebraska P. P. Dist. ---------- 785
9. District court has power and is required to consider and determine motions for new trial by exercise of its judicial discretion. Roush v. Nebraska P. P. Dist. ---------- 785
10. Ruling of trial court on motion for new trial subject to review in Supreme Court. Roush v. Nebraska P. P. Dist. ---------- 785
11. Whether decision was to grant new trial or deny one, questions in Supreme Court are, do alleged error or errors appear in record, were they called to attention of trial court by motion, and do they constitute prejudicial error to party complaining. Roush v. Nebraska P. P. Dist. ---------- 785
12. Rules of law will be applied to those assignments of error in Supreme Court with same requirements whether decision granted or denied new trial. Roush v. Nebraska P. P. Dist. ---------- 785
13. An order granting new trial will be scrutinized in Supreme Court with same care as one denying new trial. Roush v. Nebraska P. P. Dist. ---------- 785

Notice.

1. Basic rule of notice filing under Article 9 of Uniform Commercial Code is that where two security interests perfected by filing, one covered by financing statement which filed first has priority. North Platte State Bank v. Production Credit Assn. ---------- 44
2. Well settled that permissive use cannot ripen into prescriptive right until 10 years after notice of adverse claim brought home to landowner. Connot v. Bowden ---------- 97
3. Under provisions of section 48-118, R. R. S. 1943, requiring giving of notice of claim or suit against third person, and opportunity to join and be represented by counsel, substantial compliance sufficient

when other party had actual notice and opportunity; notice may be waived in writing or waiver may be implied from unequivocal conduct. Gillotte v. Omaha Public Power Dist. ---------- 444

4. Prescriptive right to property being used by permission cannot arise until 10 years after has been brought home to owner in some plain and unequivocal manner that person in possession is claiming adversely to him. Messersmith v. Klein ---------- 471

5. Official zoning map or zoning plan adopted by county board as part of county zoning regulations which incorporate map by reference, must be published in book or pamphlet form or in legal newspaper as required by section 23-114.03, R. R. S. 1943. Deans v. West ---------- 518

6. Failure to comply with statutory requirements for publication of official county zoning map prevents zoning regulations, of which map a part, from becoming valid, effective, or enforceable, at least where boundaries of zoning districts can only be determined from map. Deans v. West ---------- 518

Nuisances.

Conditions stated when possessor of land subject to liability for physical harm to children trespassing thereon caused by artificial condition upon the land. Gubalke v. Estate of Anthes ---------- 385

Obscenity.

1. Court may order defendant to deliver one copy of any alleged obscene material to prosecuting authority for use in connection with any pending criminal prosecution. State v. Little Art Corp. ---------- 681

2. Showing of scienter or knowledge of obscenity is required. State v. Little Art Corp. ---------- 681

3. Obscenity is not subject to protection of First Amendment. State v. Little Art Corp. ---------- 681

4. Three elements must coalesce to sustain finding of obscenity, namely, (a) dominant theme of material taken as whole appeals to prurient interest in sex; (b) material patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters; and (c) material utterly without redeeming social value. State v. Little Art Corp. ---------- 681

5. In present state of the law, failure by court to de-

fine term "community standards" as referring to standards on local, state, or national basis not erroneous so long as jurors are instructed to determine the case, not on their individual standards, but on contemporary community standards. State v. Little Art Corp. ---------- 681
6. Defendant has constitutional right to introduce evidence pertaining to community standard. State v. Little Art Corp. ---------- 681
7. Affirmative proof of community standards not necessary. State v. Little Art Corp. ---------- 681
8. Extraneous evidence that materials in question obscene not required. State v. Little Art Corp. ---- 681

Officers.

1. An act is nonetheless ministerial because person performing it or officer who is obligated to perform it may have to satisfy himself that state of facts exist under which it is his right and duty to perform the act. State ex rel. Rittenhouse v. Newman ---- 657
2. Fact that necessity may exist for ascertainment, from personal knowledge, or from information derived from other sources, of those facts and conditions, such as residence, upon existence of fulfillment of which performance of act becomes clear and specific duty, does not operate to convert act into one judicial in its nature. State ex rel. Rittenhouse v. Newman ---------- 657

Ordinances.

1. Ordinance proposed by electors of city under initiative law must constitute such legislation as city council or legislative body of city has power to enact under delegated powers granted and defined by Legislature. State ex rel. Andersen v. Leahy -------- 92
2. In order that ordinance or statute be relevant on issue of standard of care, must have been in effect at time of claimed violation and by its terms be applicable to situation. Gubalke v. Estate of Anthes 385

Parent and Child.

1. Fixing of child support and alimony rests in sound discretion of court and, in absence of abuse of discretion, will not be disturbed. Person v. Person -- 329
2. In determining question of who should have care and custody of children upon divorce, paramount

consideration is best interests and welfare of children. Lanz v. Lanz ---------- 578
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. Lanz v. Lanz ---------- 578
4. In cases involving determinations of child custody, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless there is clear abuse of discretion. Lanz v. Lanz ---------- 578
5. Decree fixing custody of minor children will not be modified unless there has been change in circumstances indicating that person having custody unfit for that purpose or that best interests of children require such action. Bennett v. Bennett ---- 654
6. Discretion of trial court with respect to changing custody of minor children subject to review, but determination of the court will not ordinarily be disturbed unless there is clear abuse of discretion or it is clearly against weight of evidence. Bennett v. Bennett ---------- 654
7. In divorce action, where divorce has been granted and custody of children has been fixed, court in proper proceeding may, where circumstances of parties have changed or it shall be to best interests of children, modify decree as it concerns care, custody, and maintenance of children, having due regard for rights of fit, proper, and suitable parents. Wichert v. Wichert ---------- 667

Parks and Public Grounds.

1. Where dedication made to public for defined purpose, neither Legislature, municipality, its successor, nor general public has any power to use property for any other purpose than one designated, whether use be public or private, or whether dedication is common-law or statutory dedication, notwithstanding that changed use may be advantageous to public. Gallagher v. City of Omaha ---------- 598
2. Where park property has been acquired by municipality especially for park use with funds from sale of bonds specifically authorized by electors for that purpose, city is a trustee of property for such purpose, but in this case may divert property from

such use if it is clearly authorized to do so by Legislature, at least where property no longer needed for park purposes. Gallagher v. City of Omaha -- 598

3. L.B. 1409, Laws 1969, c. 846, p. 3185, did not authorize metropolitan city to enter into agreement with Board of Regents of University of Nebraska for joint use of park property. Gallagher v. City of Omaha ---------- 598

Parliamentary Law.

In absence of contrary statutory provision, majority of quorum which constitutes simple majority of collective body may act for that body. Houser v. School Dist. of South Sioux City ---------- 323

Parties.

1. Person whose leasehold interest terminated, in premises upon which is mechanic's lien, not necessary party to petition for foreclosure. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10
2. Granting of leave to file third party complaint is matter entirely within discretion of trial court. Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc. ---------- 80
3. Interpretation given a contract by parties themselves while engaged in their performance of it is one of best indications of their true intent and should be given great, if not controlling, influence, and court should ordinarily enforce such construction. Knight Bros., Inc. v. State ---------- 64
4. Motion to suppress can be urged only by one whose rights were violated, not by one aggrieved solely by introduction of damaging evidence. State v. McCune ---------- 165
5. Extrajudicial admission appearing in deposition of party taken before trial ordinarily not final and conclusive upon him, but may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at trial, to be given such weight as trier of fact deems it entitled. Simon v. Omaha P. P. Dist. 183
6. Under section 48-118, R. R. S. 1943, where employer and employee join in suit against third person, district court has jurisdiction to determine all disputes between employer and employee, including setting and allocation of attorney's fees and expenses.

Gillotte v. Omaha Public Power Dist. ---------- 444
7. Holder of security interest is real party in interest in action in trover or conversion to recover for property subject to security interest and wrongfully converted. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702

Partition.
1. Purpose of partition action to divide jointly owned interest in property so that each owner may enjoy and possess in severalty. Dixon v. Dixon -------- 212
2. Sole life tenant, who owns no other interest in property, has no right to compel partition of property over objections of remaindermen. Dixon v. Dixon ---------- 212

Physicians and Surgeons.
1. Physician required to exercise care, skill, and diligence that physicians and surgeons in same neighborhood and similar communities, engaged in same or similar lines of work, would ordinarily exercise and devote to benefit of their patients. Bailey v. Williams ---------- 484
2. Physician required to use reasonable skill and care in diagnosing condition of patient. Bailey v. Williams ---------- 484
3. Malpractice may consist of lack of skill or care in making diagnosis as well as in treatment of ailment. Bailey v. Williams ---------- 484

Pleadings.
1. General denial available to defendant to challenge one or more of elements essential to recovery by plaintiff, and effect of denial is to put burden on plaintiff to establish by evidence matters denied. Waite Lumber Co., Inc. v. Masid Bros., Inc. ------ 10
2. Granting of leave to file third party complaint is matter entirely within discretion of trial court. Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc. ---------- 30
3. Instructions must be confined to issues presented by pleadings and supported by evidence. Gier v. Gleason ---------- 156
4. Where an issue, even assuming it is properly pleaded, affords no basis for recovery under evidence adduced in case, trial court's submission of such an

issue to jury constitutes error. Gier v. Gleason -- 156
5. Contributory negligence affirmative defense which must be pleaded. Bayse v. Tri-County Feeds, Inc. 458
6. Enumeration of specific acts of negligence should state ultimate acts of negligence and not conclusion of pleader. Graham v. Simplex Motor Rebuilders, Inc. ---------- 507
7. Right to amend is as liberally accorded in replevin actions as in other causes. First Nat. Bank v. Hull 581
8. Demurrer reaches only defects which appear on face of petition. Johnsen v. Parks ---------- 712
9. Objection that there is another action pending between the parties for same cause may be raised by demurrer to petition only when pendency of former action is shown on its face. Johnsen v. Parks ---- 712
10. All defects that may be excepted to by motion to quash are taken to be waived by defendant pleading general issue. State v. Abraham ---------- 728
11. In post conviction proceeding, defendant must allege facts which, if proved, would constitute an infringement of his constitutional rights. State v. Johnson ---------- 824
12. Conclusions, not substantiated by allegations of fact with some probability of verity, not sufficient to warrant a hearing. State v. Johnson ---------- 824

Police Officers and Sheriffs.

1. Peace officer authorized to stop any person in public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and he may demand of him his name, address, and an explanation of his actions. State v. McCune 165
2. Officer from adjoining county may delay apprehending person he reasonably suspects has committed crime for reasonable time so that he can obtain assistance of local officer. State v. McCune ----- 165
3. Peace officer may arrest person without warrant if officer has reasonable cause to believe that person has committed misdemeanor and has reasonable cause to believe that person will not be apprehended unless immediately arrested, may cause injury to others unless immediately arrested, or may destroy or conceal evidence of commission of misdemeanor. State v. McCune ---------- 165
4. It is not a search for an officer to observe what is in plain view. State v. McCune ---------- 165

Post Conviction.

1. Post Conviction Act not substitute for appeal. State v. Williams ---------- 127
2. It is only violation or infringement of constitutional rights which is cognizable under Post Conviction Act. State v. Williams ---------- 127
3. Alleged exclusion of women from jury panel cannot be raised for first time in post conviction proceeding. State v. Nelson ---------- 144
4. Motion for post conviction relief premature if no judgment or final order which might be vacated or set aside. State v. Werts ---------- 468
5. Sentences imposed within statutory limits furnish no basis for post conviction relief. State v. Kellogg 692
6. In post conviction proceeding, defendant must allege facts which, if proved, would constitute an infringement of his constitutional rights. State v. Johnson ---------- 824
7. Conclusions, not substantiated by allegations of fact with some probability of verity, not sufficient to warrant a hearing. State v. Johnson ---------- 824
8. Where files and records in post conviction proceeding show that prisoner entitled to no relief, evidentiary hearing not required. State v. Menard -- 825

Powers.

1. Peace officer authorized to stop any person in public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and he may demand of him his name, address, and an explanation of his actions. State v. McCune ---------- 165
2. Officer from adjoining county may delay apprehending person he reasonably suspects has committed crime for reasonable time so that he can obtain assistance of local officer. State v. McCune ------ 165
3. Peace officer may arrest person without warrant if officer has reasonable cause to believe that person has committed misdemeanor and has reasonable cause to believe that person will not be apprehended unless immediately arrested, may cause injury to others unless immediately arrested, or may destroy or conceal evidence of commission of misdemeanor. State v. McCune ---------- 165

Principal and Agent.

1. Ordinarily, an agent only liable to his principal for mere breach of his contract with such principal; but if in course of his agency he undertakes as part of his contract to render service to his principal of type which he should recognize as necessary for protection of third persons, he must exercise reasonable care in performance of undertaking. Simon v. Omaha P. P. Dist. ---------- 183
2. Under section 4-406 (3), U. C. C., lack of ordinary care on part of drawee bank in paying items may be established by proof that bank's employees failed to exercise care in processing the items. First Nat. Bank & Trust Co. v. Cutright ---------- 805

Probation and Parole.

1. Cited statute gives legislative recognition to fact that in many cases sentence of probation more likely to be effective than sentence of imprisonment and that procedure of probation requires expenditure of substantially less public funds than does incarceration. State v. Dovel ---------- 173
2. Supreme Court will not overturn order of trial court which denies probation unless has been abuse of discretion. State v. Dovel ---------- 173
3. Technical formality and preciseness of charge unnecessary in proceeding for revocation of probation. State v. Case ---------- 493
4. Finding that defendant has violated terms of his probation need not be established beyond reasonable doubt but must be established by clear and satisfactory evidence. State v. Case ---------- 493
5. Suspension of sentence and granting of probation discretionary with trial court, and in absence of abuse of discretion trial court's determination will not be disturbed. State v. Jurgens ---------- 574
   State v. Greco ---------- 817

Property.

1. Duty of owner in control of premises where work performed under contract with owner to be executed to exercise reasonable care to keep premises in safe condition while contract in course of performance. Simon v. Omaha P. P. Dist. ---------- 183
2. Possessor of land retaining control subject to liability for personal injuries to business visitors caused

by natural or artificial condition thereon if he knows, or by exercise of reasonable care could discover, condition which, if known to him, he should realize as involving unreasonable risk of harm to invitee. Simon v. Omaha P. P. Dist. ---------- 183

3. Owner's duty to invitee to provide safe place to work cannot be delegated or avoided by contract where owner retains possession and control of premises. Simon v. Omaha P. P. Dist. ---------- 183

4. Conditions stated when possessor of land subject to liability for physical harm to children trespassing thereon caused by artificial condition upon the land. Gubalke v. Estate of Anthes ---------- 385

5. Creditor may usually follow and subject to his claim the fund or proceeds resulting from fraudulent conveyance and may pursue same into any property in which it may have been invested, so far as it can be found. First Nat. Bank v. First Cadco Corp. -- 553

Prosecuting Attorneys.

It is only in most flagrant cases of improper conduct by prosecuting attorney, even in prosecution of capital offenses, that defendant's counsel can apparently acquiesce in such conduct by remaining silent until trial finished, and then cause trial and verdict to be set aside by complaining of conduct to which he seemed at time to consent. State v. Suggett -- 714

Proximate Cause.

1. It is not every intervening act or occurrence which will break necessary causal connection and insulate manufacturer from liability from his original negligent act or omission. Libbey-Owens Ford Glass Co. v. L & M Paper Co. ---------- 792

2. Question whether negligence is, in view of intervening negligence of third person, such a continuing and substantial factor in producing an accident as to be proximate cause of injury, is question of fact, rather than question of law. Libbey-Owens Ford Glass Co. v. L & M Paper Co. ---------- 792

3. If original negligence is of character which, according to usual experience of mankind, is liable to invite or induce intervention of some subsequent cause, intervening cause will not excuse it, and subsequent mischief will be held to be result of original negligence. Libbey-Owens Ford Glass Co. v. L & M

Paper Co. ---------- 792
4. In action based on negligence, question of whether or not there was intervening cause which removed negligence of defendant as proximate cause usually one for jury. Libbey-Owens Ford Glass Co. v. L & M Paper Co. ---------- 792

Public Officers and Employees.

1. County commissioners clothed with powers expressly conferred upon them by statute and also such powers as are requisite to enable them to discharge official duties devolved upon them by law. Thiles v. County Board of Sarpy County ---------- 1
2. County boards usually given authority to make all contracts necessary and incident to management of interests of county, and may stipulate as to manner in which such contracts to be performed and contract with ministerial officers of county, unless such contracts prohibited by statute. Thiles v. County Board of Sarpy County ---------- 1
3. County boards may not hire person to perform (1) unauthorized acts, (2) official discretionary duties of board, or (3) statutory official duties of board or another county or state official. County boards with such limitations have implied power to employ such agents and servants as required for county purposes and not otherwise provided for by statute or Constitution; wisdom and expediency of making particular contract of employment within exclusive discretion of board; and where only part of services contracted for in particular case within power of board to engage, contract nevertheless valid as to that part. Thiles v. County Board of Sarpy County 1
4. County budget act does not apply to contracts executed by county board of commissioners. Thiles v. County Board of Sarpy County ---------- 1
5. Section 81-117, R. R. S. 1943, has no application to state officers, employees, and others whose basic work week has not been established to be 40 hours under provisions of Chapter 84, article 10, R. R. S. 1943. Roth v. Lieske ---------- 216
6. When law commits to any officer duty of looking into facts and acting upon them, not in way which it specifically directs but after discretion in its nature judicial, function quasi-judicial; where officer or official body has no judicial power or discretion

as to interpretation of the law, and course to be pursued fixed by law, their acts ministerial only. School Dist. of Minatare v. County of Scotts Bluff - 395

7. Allowance of tax refund claim, where county board acts quasi-judicially and within scope of its jurisdiction and authority, not open to collateral attack in absence of fraud. School Dist. of Minatare v. County of Scotts Bluff ---------- 395

8. It is settled principle that governmental employment, in absence of legislation, can be revoked at will of appointing officer. Nebraska Dept. of Roads Employees Assn. v. Department of Roads -------- 754

Public Service Commissions.

In statutory provisions for person to obtain telephone service furnished in exchange service area adjacent to his residence or place of operation, such phrases as "reasonably adequate service," "duplication of facilities," "public interest," and "community of interest in the general territory" acquire new meaning limited to context; definition must evolve, case by case. Schoen v. American Communication Co., Inc. 78

Public Utilities.

1. Public utility may classify its users for rate purposes if classification reasonable and not unjustly discriminatory. Reimer v. City of O'Neill -------- 151

2. Hotels and motels may be classified separately from trailer courts and apartment houses for purpose of fixing rates for water and sewer service. Reimer v. City of O'Neill ---------- 151

3. Municipality furnishing water and sewer service to its residents must treat all customers in same class equally. Reimer v. City of O'Neill ---------- 151

Receiving Stolen Goods.

In prosecution for receiving stolen property, when facts known to defendant were such that man of age, intelligence, and experience of defendant would know the property to have been stolen, trier of fact may properly find defendant possessed guilty knowledge. State v. Abraham ---------- 728

Records

1. All records in juvenile court pertaining to proceedings relating to a particular child may be filed

together. State v. Miller ---------- 383
2. In disposition hearing, juvenile court may consider all previous matters in juvenile court pertaining to the child. State v. Miller ---------- 383
3. Claim of error on ground of ineffective assistance of counsel must be supported by record showing that counsel's assistance so grossly inept as to jeopardize rights of defendant and shock court by its inadequacy. State v. Kennedy ---------- 423
4. In error proceeding from inferior court or tribunal to district court, and on appeal therefrom to Supreme Court, error cannot be predicated on sufficiency or insufficiency of evidence as matter of law to affirm or reverse findings and judgment of inferior court or tribunal from which error was prosecuted, unless all material and relevant evidence properly presented in bill of exceptions. Lanc v. Douglas County Welfare Administration -- 651
5. Where alleged errors of law dependent upon evidence are asserted, it will be conclusively presumed that evidence adduced in inferior court or tribunal supports judgment or final order therein made in absence of proper bill of exceptions. Lanc v. Douglas County Welfare Administration ---------- 651
6. Provision of statutes requiring plaintiff in error to file with his petition authenticated transcript of proceedings containing final order sought to be reversed, vacated, or modified jurisdictional and mandatory. Lanc v. Douglas County Welfare Administration ---------- 651
7. Where files and records in post conviction proceeding show that prisoner entitled to no relief, evidentiary hearing not required. State v. Menard -- 825

Replevin.

1. Under Uniform Commercial Code, remedy of replevin not available to buyer of goods that have not been identified to contract. Putnam Ranches, Inc. v. Corkle ---------- 533
2. Right to amend is as liberally accorded in replevin actions as in other causes. First Nat. Bank v. Hull 581

Res Judicata.

Statutory provisions may cut across issue and claim preclusion at common law. Pedersen v. Westroads, Inc. ---------- 236

Right of Privacy.

Wherever individual may harbor reasonable expectation of privacy he ought to be free from unreasonable governmental intrusion. State v. McElroy ---- 376

Right to Counsel.

1. Doctrine of Miranda v. Arizona comes into play when individual first subjected to police interrogation while in custody. State v. Moore ---- 354
2. If person in custody indicates that he wishes assistance of counsel before an interrogation, authorities cannot ignore that request and he must be offered counsel. State v. Moore ---- 354
3. Once Miranda warnings have been given, procedure clear; if individual indicates prior to or during questioning that he wishes to remain silent, interrogation must cease. State v. Moore ---- 354
4. If individual held for interrogation by police states that he wants an attorney, interrogation must cease until an attorney present and person must have opportunity to confer with attorney and to have him present during subsequent questioning. State v. Moore ---- 354
5. Express declaration that individual held for interrogation by police willing to make statement and to do so without attorney being present, followed closely by statement, may constitute waiver of privilege against self-incrimination and right to counsel. State v. Moore ---- 354
6. Fact that counsel may have been appointed or retained prior to any interrogation by police does not prevent police from administering Miranda warnings. State v. Moore ---- 354
7. That police who knew that defendant was represented by attorney and failed to give attorney notice of intended interview of defendant did not under evidence in this case make inadmissible statements made by defendant because violative of right to counsel where defendant clearly, intelligently, knowingly, and voluntarily waived his right to have counsel present. State v. Moore ---- 354
8. Claim of error on ground of ineffective assistance of counsel must be supported by record showing that counsel's assistance so grossly inept as to jeopardize rights of defendant and shock court by its inadequacy. State v. Kennedy ---- 423

9. Accused not free to manipulate his right to counsel for purpose of obstructing orderly procedure or other phases of judicial administration. State v. Kennedy ---------- 423

Rules of Court.

1. Rule 20. State v. Stennis ---------- 113
   State v. McGovern ---------- 117
   State v. Lampkin ---------- 219
   State v. Meals ---------- 338
   State v. Romell ---------- 705
   State v. Kimes ---------- 791
   State v. Cox ---------- 821
2. Rules of practice in district court cannot enter into determination of question presented in Supreme Court unless incorporated in bill of exceptions, since Supreme Court will not take judicial notice of rules of practice of district court. Simmons v. Murray -- 695

Salary or Compensation.

Section 81-117, R. R. S. 1943, has no application to state officers, employees, and others whose basic work week has not been established to be 40 hours under provisions of Chapter 84, article 10, R. R. S. 1943. Roth v. Lieske ---------- 216

Sales.

1. Under Uniform Commercial Code, where goods delivered to buyer under contract for sale and physically received by him, they are in his possession. North Platte State Bank v. Production Credit Assn. 44
2. Under Uniform Commercial Code, title passes to buyer at time and place at which seller completes his performance with reference to physical delivery of goods, unless otherwise explicitly agreed. North Platte State Bank v. Production Credit Assn. ---- 44
3. Sale of reusable bottles, cartons, and shells to bottlers by manufacturers or suppliers is sale at retail subject to sales tax imposed by Nebraska Revenue Act of 1967. Pepsi Cola Bottling Co. v. Peters -------- 271
4. An essential of valid time sale price is price agreed upon between parties where buyer actually informed of and has at time sale made opportunity to choose between cash and time sale price. Midstates Acceptance v. Voss ---------- 411
5. Whether or not transaction bona fide time sale or

financing of balance of cash purchase price is question of fact. Midstates Acceptance v. Voss ------ 411
6. In considering whether or not transaction is time sale made in good faith or loan of money or forbearance of debt, court will look through form and examine its substance. Midstates Acceptance v. Voss ---------- 411
7. "Proceeds" includes whatever is received when collateral sold or disposed of including an account for purchase price. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702
8. Secured party which consents to liquidation by debtor or by means of auction sale does not waive its security interest or its right to proceeds of sale. South Omaha Production Credit Assn. v. Tyson's Inc. --- 702
9. Purchaser of collateral which refuses to pay purchase price guilty of conversion. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702
10. Purchaser of farm machinery and equipment at farm auction sale not buyer in ordinary course of business. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702

Schools and School Districts.

1. Words "a majority of the members of the board," as used in section 79-1254, R. R. S. 1943, means a majority of all members of the board. Houser v. School Dist. of South Sioux City ---------- 323
2. When school district refuses to recognize employees' association authorized to act for it, it has exhausted all remedies under Teachers' Professional Negotiations Act, and Court of Industrial Relations acquires jurisdiction. Sidney Education Assn. v. School Dist. of Sidney ---------- 540
3. Employees covered by Teachers' Professional Negotiations Act must await exhaustion of that act before invoking jurisdiction of Court of Industrial Relations, but this does not deny them right to invoke that jurisdiction. Sidney Education Assn. v. School Dist. of Sidney ---------- 540
4. An act is nonetheless ministerial because person performing it or officer who is obligated to perform it may have to satisfy himself that state of facts exist under which it is his right and duty to perform the act. State ex rel. Rittenhouse v. Newman 657
5. Fact that necessity may exist for ascertainment,

from personal knowledge, or from information derived from other sources, of those facts and conditions, such as residence, upon existence of fulfillment of which performance of act becomes clear and specific duty, does not operate to convert act into one judicial in its nature. State ex rel. Rittenhouse v. Newman ---------- 657

6. Fundamental that mandamus is law action and that conflicts in evidence or findings of fact based thereon will not be disturbed on appeal unless clearly wrong. State ex rel. Rittenhouse v. Newman ---- 657

7. Act of registering to vote has been considered by Supreme Court to be persuasive of fact that a person considered such place his legal residence. State ex rel. Rittenhouse v. Newman ---------- 657

8. Motivation to change one's legal residence immaterial so long as a party has requisite intent to establish new residence and abandon his former home. State ex rel. Rittenhouse v. Newman ---- 657

Searches and Seizures.

1. It is not a search for an officer to observe what is in plain view. State v. McCune ---------- 165

2. Warrantless search of motor vehicle may be conducted for probable cause which must be determined by a practical and not by any technical standard. State v. Connor ---------- 269

3. In evaluation of reasonableness of search and seizure without warrant, imperative that facts be judged against an objective standard: Would facts available to officer at moment of search or seizure warrant man of reasonable caution in belief that action taken was appropriate? State v. McElroy ---------- 376

4. When officer makes arrest, reasonable for him to search person arrested and seize any evidence on arrestee's person in order to prevent its concealment or destruction; that justification absent where search remote from arrest. State v. McElroy ---------- 376

5. Constitutional validity of warrantless search can only be decided in concrete factual context of individual case. State v. McElroy ---------- 376

6. When materials in automobile indicative of criminal offense in plain sight of officer looking into automobile from outside, search justified and legal. State v. Moore ---------- 380

7. Invalidity of search warrant does not of itself auto-

matically make evidence seized inadmissible. State v. Waechter ---------- 433
8. Failure of magistrate to collect fee for issuing warrant does not affect validity of warrant. State v. McCown ---------- 495
9. Failure to comply strictly with post service statutory proceedings will not invalidate search conducted pursuant to otherwise valid warrant in absence of clear showing of prejudice. State v. McCown 495
10. Return and filing of search warrant a ministerial act and any failure therein does not void warrant. State v. McCown ---------- 495
11. Where peace officer has reasonable cause to believe that sale of narcotics taking place inside a residence, exigent circumstances may justify his entering residence for purpose of making arrest without prior disclosure of his authority and purpose. State v. Brooks ---------- 592
12. In evaluation of reasonableness of search or seizure without warrant, imperative that facts be judged against an objective standard; to wit, facts available to officer at moment of search or seizure should warrant a man of reasonable caution to believe action taken appropriate. State v. Nichols ---------- 664
13. Wherever an individual may harbor reasonable expectation of privacy he ought to be free from unconstitutional governmental intrusion. State v. Nichols 664

Security Interests.

1. Basic rule of notice filing under Article 9 of Uniform Commercial Code is that where two security interests perfected by filing, one covered by financing statement which filed first has priority. North Platte State Bank v. Production Credit Assn. ---- 44
2. Purchase money security interest of person who is not a seller can arise only if value which is given is used to enable debtor to acquire rights in or use of collateral. North Platte State Bank v. Production Credit Assn. ---------- 44
3. Purchase money priority provided for in Article 9 of Uniform Commercial Code is exception to first to file rule, and should be applied only in strict accordance with limitations in code. North Platte State Bank v. Production Credit Assn. ---------- 44
4. Holder of security interest is real party in interest in action in trover or conversion to recover for prop-

erty subject to security interest and wrongfully converted. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702
5. "Proceeds" includes whatever is received when collateral sold or disposed of including an account for purchase price. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702
6. Secured party which consents to liquidation by debtor by means of auction sale does not waive its security interest or its right to proceeds of sale. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702
7. Purchaser of collateral which refuses to pay purchase price guilty of conversion. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702
8. Purchaser of farm machinery and equipment at farm auction sale not buyer in ordinary course of business. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702

Sentences.

1. When legislative act, adopted after one has been convicted and sentenced for crime but while cause still pending on motion for new trial or on appeal, serves to mitigate sentence imposed, Supreme Court will either amend sentence to conform to legislative intent or will remand cause to district court for resentencing in conformity with statute. State v. Rubek ---------- 141
2. Cited statute gives legislative recognition to fact that in many cases sentence of probation more likely to be effective than sentence of imprisonment and that procedure of probation requires expenditure of substantially less public funds than does incarceration. State v. Dovel ---------- 173
3. Where punishment of an offense created by statute left to discretion of court, to be exercised within certain prescribed limits, sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion. State v. Whipple ---------- 259
State v. Van Ackeren ---------- 639
4. Sentence to imprisonment ought not exceed minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of defendant. State v. Sturm ---------- 299

5. Protection of the public encompasses the principle of general deterrence. State v. Sturm ---------- 299
6. A technique for deterrence of crime is scaling of penal sanctions. State v. Sturm ---------- 299
7. Supreme Court may reduce sentence rendered by district court against accused when in its opinion sentence excessive, and it is its duty to render such sentence as in its opinion may be warranted by the evidence. State v. Sturm ---------- 299
8. Sentence imposed within statutory limits will not be disturbed for excessiveness in absence of abuse of discretion. State v. Haigh ---------- 316
9. Where punishment of offense created by statute left to discretion of court within prescribed limits, sentence prescribed within such limits will not be disturbed unless there appears to be abuse of such discretion. State v. Sanders ---------- 343
10. Imposition of sentence of 10 to 15 years which sentence to be consecutive to life sentence previously imposed for unrelated crime not a cruel and unusual punishment such as to be in conflict with Eighth Amendment to Constitution of United States. State v. Crooks ---------- 344
11. Sentence imposed within statutory limits will not ordinarily be disturbed in absence of abuse of judicial discretion. State v. Duitsman ---------- 375
12. Sentence within statutory limits will not be disturbed in absence of abuse of discretion. State v. Waechter 433
13. Unless abuse of discretion appears, sentence within statutory limits will not be disturbed on appeal. State v. Weidenfeller ---------- 505
14. Where sentence imposed within statutory limits, it will not be disturbed in absence of abuse of discretion. State v. Six ---------- 528
15. Sentence within limits prescribed by statute will not be disturbed in absence of abuse of discretion. State v. Jurgens ---------- 574
16. Criminal sentence in which court considered prior time spent by defendant in custody may be consistent with state and federal constitutional guarantees of due process and with federal constitutional guarantee of equal protection, although record at sentencing hearing silent on subject. State v. Nelson ---------- 580
17. Supreme Court may reduce sentence rendered by district court against accused, when in its opinion sentence excessive, and it shall be duty of Supreme

Court to render such sentence against accused as in its opinion may be warranted by evidence. State v. Stroh ---------- 637

18. Where punishment of offense left to discretion of court within prescribed limits of statute, sentence prescribed within such limits will not be disturbed unless there appears to be abuse of such discretion. State v. Stroh ---------- 637

19. Sentences imposed within statutory limits furnish no basis for post conviction relief. State v. Kellogg 692

20. Section 83-170, R. R. S. 1943, not applicable to imposition of sentence by trial court. State v. Suggett 714

21. Section 83-1,105, R. S. Supp., 1972, not applicable in cases where maximum sentence fixed by law is life sentence. State v. Suggett ---------- 714

22. Sentence imposed within statutory limits will not be disturbed unless abuse of discretion appears in record. State v. Medina ---------- 765

Statutes.

1. County budget act does not apply to contracts executed by county board of commissioners. Thiles v. County Board of Sarpy County ---------- 1

2. In action against county commissioners pursuant to statute to recover money allegedly expended unlawfully after annual tax levy, must be shown not only that warrants in excess of 85 per cent of amount levied by tax for current year issued, but also that was no money in proper fund for their payment. Thiles v. County Board of Sarpy County 1

3. When legislative act, adopted after one has been convicted and sentenced for crime but while cause still pending on motion for new trial or on appeal, serves to mitigate sentence imposed, Supreme Court will either amend sentence to conform to legislative intent or will remand cause to district court for resentencing in conformity with statute. State v. Rubek ---------- 141

4. In enacting a statute, Legislature must be presumed to have had in mind all previous legislation upon subject. Seldin v. Northland Mortgage Co. -- 175

5. In construction of a statute, courts must consider preexisting law and any other laws relating to same subject. Seldin v. Northland Mortgage Co. -------- 175

6. Courts should not give interpretation to a statute which would have effect of nullifying another stat-

ute when obviously that was not clear legislative intent. Seldin v. Northland Mortgage Co. ---------- 175
7. It is a cardinal principle that statutes pertaining to same subject matter should be construed together, as if they were one law, and effect given to every provision. Seldin v. Northland Mortgage Co. ------ 175
8. Real estate mortgage loans by nonlicensees whose terms call for periodic interest payments and single payment of principal are not installment loans and not subject to inhibitory provisions of Installment Loan Act. Seldin v. Northland Mortgage Co. ------ 175
9. Statutory provisions may cut across issue and claim preclusion at common law. Pedersen v. Westroads, Inc. ---------- 236
10. Resident taxpayer's derivative claim on behalf of City of Omaha may come within spirit of statutory provision for derivative defenses, although it is not technically referable to threatened expenditure of public funds. Pedersen v. Westroads, Inc. -------- 236
11. In absence of contrary statutory provision, majority of quorum which constitutes simple majority of collective body may act for that body. Houser v. School Dist. of South Sioux City ---------- 323
12. Special provisions of statute in regard to particular subject will prevail over general provisions in same or other statutes so far as there is a conflict. Houser v. School Dist. of South Sioux City ---------- 323
13. Words "a majority of the members of the board," as used in section 79-1254, R. R. S. 1943, means a majority of all members of the board. Houser v. School Dist. of South Sioux City ---------- 323
14. In order that ordinance or statute be relevant on issue of standard of care, must have been in effect at time of claimed violation and by its terms be applicable to situation. Gubalke v. Estate of Anthes - 385
15. Under provisions of section 77-1734.01, R. R. S. 1943, term "clerical error" not restricted to clerical error made by taxpayer on face of personal property tax return. School Dist. of Minatare v. County of Scotts Bluff ---------- 395
16. County board is only "authority" whose approval required for payment of tax refund claim under section 77-1734.01, R. R. S. 1943; failure to transmit copy of claim to other taxing entities does not deprive county board of jurisdiction and authority to determine and approve proper claim. School

Dist. of Minatare v. County of Scotts Bluff 395
17. Section 77-1737, R. R. S. 1943, providing that county board does not have power to release, discharge, remit, or commute taxes for any reason, does not prevent proper authority from refunding taxes as authorized by any specific tax refund statute. School Dist. of Minatare v. County of Scotts Bluff 395
18. If an act complete and independent in itself, it may incidentally amend, modify, or have impact upon provisions of existing statutes without controverting provisions of Constitution relating to amendments set out in Article III, section 14. Bodenstedt v. Rickers 407
19. If statute subject to more than one reasonable construction, court will adopt one which will make act constitutional. Bodenstedt v. Rickers 407
20. Duty of Supreme Court to give a statute an interpretation which meets constitutional requirements if it can. State v. Manley 415
21. Depressant and Stimulant Drugs Act of 1967 did not violate Article III, section 14, Constitution of Nebraska. State v. Waechter 433
22. In Legislature, record of floor explanation or debate legislative history, and may be an extrinsic, secondary source in statutory interpretation. Norden Laboratories, Inc. v. County Board of Equalization .. 437
23. Legislative history cannot ordinarily serve to import an intent into legislation devoid of language fit to express it. Norden Laboratories, Inc. v. County Board of Equalization 437
24. Section 28-1011.15, R. S. Supp., 1972, held constitutional. State v. Skinner 457
25. Statute that clearly and precisely delineates its reach in words of common understanding not void for vagueness. State v. Sullivan 465
26. Statute that (1) proscribes unreasonable interference or obstruction by conduct intertwined with expression and association and (2) vindicates important interests of society not void for "overbreadth." State v. Sullivan 465
27. A statutory interpretation, effective March 1, 1973, is adopted as follows: A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action

or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement. Walls v. Horbach ---------- 479

28. Official zoning map or zoning plan adopted by county board as part of county zoning regulations which incorporate map by reference, must be published in book or pamphlet form or in legal newspaper as required by section 23-114.03, R. R. S. 1943. Deans v. West ---------- 518

29. Failure to comply with statutory requirements for publication of official county zoning map prevents zoning regulations, of which map a part, from becoming valid, effective, or enforceable, at least where boundaries of zoning districts can only be determined from map. Deans v. West ---------- 518

30. Courts are to construe and apply Uniform Commercial Code liberally to promote its underlying purposes and policies. Putnam Ranches, Inc. v. Corkle ---------- 533

31. Under Uniform Commercial Code, remedy of replevin not available to buyer of goods that have not been identified to contract. Putnam Ranches, Inc. v. Corkle ---------- 533

32. When Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it will be presumed that it does so with full knowledge of preexisting legislation and judicial decisions of Supreme Court construing and applying it. Sidney Education Assn. v. School Dist. of Sidney 540

33. Question of fraudulent intent in all cases arising under provisions of section 36-401, R. R. S. 1943, is question of fact, and not of law. First Nat. Bank v. First Cadco Corp. ---------- 553

34. L.B. 1409, Laws 1969, c. 846, p. 3185, did not authorize metropolitan city to enter into agreement with Board of Regents of University of Nebraska for joint use of park property. Gallagher v. City of Omaha ---------- 598

35. In absence of statutory authority, a city has no power to enter into contracts which curtail or prohibit its exercise of legislative or administrative authority. Gallagher v. City of Omaha ---------- 598

36. Under provisions of Laws 1972, L.B. 820, no-fault divorce law, when appeal in action under prior divorce statutes filed in Supreme Court, it is invested with original de novo jurisdiction and required to disregard judgment of district court and make independent determinations of issues presented to district court, and therefore the provisions of L.B. 820 applicable to such determination by Supreme Court. Lienemann v. Lienemann ---------- 626
37. Subsection (4) of section 33, Laws 1972, L.B. 820, requires that when new trial had on issues in divorce case, provisions of L.B. 820 shall govern the law determining such trial. Lienemann v. Lienemann -- 626
38. Section 28-921, R. S. Supp., 1972, not unconstitutionally vague nor is it unconstitutional for failure to prescribe procedure for its enforcement. State v. Little Art Corp. ---------- 681
39. Power to regulate all phases of control of distribution and sale of alcoholic liquors vested generally in Liquor Control Commission. T & N P Co., Inc. v. Nebraska Liquor Control Commission ---------- 708
40. Motion to transfer under section 25-409, R. S. Supp., 1972, properly overruled where record does not show that action was commenced in wrong county. Johnsen v. Parks ---------- 712
41. Where record does not show abuse of discretion, ruling on motion to transfer under section 25-410, R. S. Supp., 1972, will not be disturbed. Johnsen v. Parks ---------- 712
42. In determining legislative intent, all statutes relating to same subject should be construed and considered together. State v. Suggett ---------- 714
43. When intent of Legislature clear, it is duty of courts to construe it in accordance with such intent; sensible construction will be placed upon it to effectuate object of legislation rather than literal meaning that would have effect of defeating legislative intent. State v. Suggett ---------- 714
44. Section 83-170, R. R. S. 1943, not applicable to imposition of sentence by trial court. State v. Suggett 714
45. Section 83-1,105, R. S. Supp., 1972, not applicable in cases where maximum sentence fixed by law is life sentence. State v. Suggett ---------- 714
46. In statutory construction, Supreme Court considers ordinary meaning of words in context and the mischief to which it attributes the remedy. State v.

Coleman ---------- 725

Summary Judgments.

1. Moving party not entitled to summary judgment except where there exists no genuine issue as to any material fact in case and where under the facts he is entitled to judgment as matter of law. Green v. Village of Terrytown ---------- 615
2. Burden upon party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so, motion must be overruled. Green v. Village of Terrytown ---------- 615
3. Upon motion for summary judgment, court examines evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. Green v. Village of Terrytown ---------- 615
4. In considering motion for summary judgment, court views evidence in light most favorable to party against whom it is directed, giving to that party benefit of all favorable inferences that may reasonably be drawn therefrom. Green v. Village of Terrytown ---------- 615
5. Motion for summary judgment not substitute for demurrer or motion for directed verdict. Green v. Village of Terrytown ---------- 615
6. Summary judgment proper where is no genuine issue as to any material fact and moving party entitled to judgment as matter of law. Larson v. Board of Regents ---------- 688

Taxation.

1. Sale of reusable bottles, cartons, and shells to bottlers by manufacturers or suppliers is sale at retail subject to sales tax imposed by Nebraska Revenue Act of 1967. Pepsi Cola Bottling Co. v. Peters -- 271
2. Legislature may classify for purposes of legislation if classification rests upon substantial difference of situation or circumstance. Pepsi Cola Bottling Co. v. Peters ---------- 271
3. Under provisions of section 77-1734.01, R. R. S. 1943, term "clerical error" not restricted to clerical error made by taxpayer on face of personal property tax return. School Dist. of Minatare v. County of Scotts Bluff ---------- 395
4. County board is only "authority" whose approval required for payment of tax refund claim under sec-

tion 77-1734.01, R. R. S. 1943; failure to transmit copy of claim to other taxing entities does not deprive county board of jurisdiction and authority to determine and approve proper claim. School Dist. of Minatare v. County of Scotts Bluff ---------- 395

5. Section 77-1737, R. R. S. 1943, providing that county board does not have power to release, discharge, remit, or commute taxes for any reason, does not prevent proper authority from refunding taxes as authorized by any specific tax refund statute. School Dist. of Minatare v. County of Scotts Bluff ------ 395

6. Allowance of tax refund claim, where county board acts quasi-judicially and within scope of its jurisdiction and authority, not open to collateral attack in absence of fraud. School Dist. of Minatare v. County of Scotts Bluff ---------- 395

7. Exemption under free port law in 1969 was not open to warehouseman that failed to make available and use warehouse facilities for public storage for compensation. Norden Laboratories, Inc. v. County Board of Equalization ---------- 437

8. Free port law in force in 1969 did not violate state constitutional provisions for uniformity and against special privileges. Norden Laboratories, Inc. v. County Board of Equalization ---------- 437

9. Reasonable classification under federal constitutional guarantee of equal protection includes all persons in similar situations with respect to purpose of the law. Norden Laboratories, Inc. v. County Board of Equalization ---------- 437

Telecommunications.

In statutory provisions for person to obtain telephone service furnished in exchange service area adjacent to his residence or place of operation, such phrases as "reasonably adequate service," "duplication of facilities," "public interest," and "community of interest in the general territory" acquire new meaning limited to context; definition must evolve, case by case. Schoen v. American Communication Co., Inc. 78

Time.

1. Basic rule of notice filing under Article 9 of Uniform Commercial Code is that where two security interests perfected by filing, one covered by financing statement which filed first has priority. North

Platte State Bank v. Production Credit Assn. ---- 44

2. Purchase money priority provided for in Article 9 of Uniform Commercial Code is exception to first to file rule, and should be applied only in strict accordance with limitations in code. North Platte State Bank v. Production Credit Assn. ---------- 44

3. Under Uniform Commercial Code, title passes to buyer at time and place at which seller completes his performance with reference to physical delivery of goods, unless otherwise explicitly agreed. North Platte State Bank v. Production Credit Assn. ------ 44

4. Separate juvenile court possesses jurisdiction to hear and determine motion for new trial on ground of newly discovered evidence during pendency of appeal to Supreme Court. Grant v. Doeschot ---------- 121

5. When legislative act, adopted after one has been convicted and sentenced for crime but while cause still pending on motion for new trial or on appeal, serves to mitigate sentence imposed, Supreme Court will either amend sentence to conform to legislative intent or will remand cause to district court for resentencing in conformity with statute. State v. Rubek ---------- 141

6. Ordinarily, challenge to array must be made before trial. State v. Nelson ---------- 144

7. Alleged exclusion of women from jury panel cannot be raised for first time in post conviction proceeding. State v. Nelson ---------- 144

8. Officer from adjoining county may delay apprehending person he reasonably suspects has committed crime for reasonable time so that he can obtain assistance of local officer. State v. McCune ---------- 165

9. Peace officer may arrest person without warrant if officer has reasonable cause to believe that person has committed misdemeanor and has reasonable cause to believe that person will not be apprehended unless immediately arrested, may cause injury to others unless immediately arrested, or may destroy or conceal evidence of commission of misdemeanor. State v. McCune ---------- 165

10. Primary burden upon State, that is, prosecutor and court, to bring accused person to trial within time provided by law. State v. Alvarez ---------- 281
State v. Brown ---------- 297

11. If a defendant not brought to trial within time provided for and as determined by valid statutory stand-

ards, he is, in absence of express waiver or waiver as provided by statute, entitled to his absolute discharge from offense alleged in the indictment or information as well as for any other offense coming within the term "required by law to be joined with that offense." State v. Alvarez ---------- 281
State v. Brown ---------- 297

12. Failure by a defendant to demand a trial within time he is required to be brought to trial as provided by sections 29-1205 to 29-1209, R. S. Supp., 1971, or to object at time trial date set does not constitute a waiver of his rights under either the statutes or Constitution of Nebraska, but is a factor which, while not constituting good cause by itself, may be considered along with other circumstances in determining whether there was "good cause" for delay in trial under provisions of section 29-1207(4) (f), R. S. Supp., 1971. State v. Alvarez ---------- 281
State v. Brown ---------- 297

13. Where a defendant who has been charged in an indictment or information not brought to trial within 6 months from date of return of indictment or filing of information and before trial or entry or plea of guilty or nolo contendere moves for his absolute discharge, burden upon State to prove by substantial preponderance of evidence that one or more of excluded periods provided for by section 29-1207(4) (a) through (f), R. S. Supp., 1971, is applicable. State v. Alvarez ---------- 281
State v. Brown ---------- 297

14. From and after 7 days after November 24, 1972, general finding of a trial court that "good cause" has existed under provisions of section 29-1207(4) (f), R. S. Supp., 1971, for extending beyond 6 months from the filing of information the period for bringing defendant to trial will no longer suffice, and trial court will from that time on be required to make specific findings as to the cause or causes of such extensions and the period of extension attributable to such causes; substantial preponderance of evidence must support such findings. State v. Alvarez ---------- 281
State v. Brown ---------- 297

15. In evaluation of reasonableness of search and seizure without warrant, imperative that facts be judged against an objective standard: Would facts avail-

able to officer at moment of search or seizure warrant man of reasonable caution in belief that action taken was appropriate? State v. McElroy ------- 376
16. In order that ordinance or statute be relevant on issue of standard of care, must have been in effect at time of claimed violation and by its terms be applicable to situation. Gubalke v. Estate of Anthes 385
17. Timely objection by litigant with standing may nullify rezoning resolution by county board that has not adopted comprehensive development plan conformable to statute. Bagley v. County of Sarpy -- 393
18. Under statutory provisions enacted in 1967, county engaged in zoning or rezoning ought to adopt comprehensive development plan within reasonable time. Bagley v. County of Sarpy ---------- 393
19. Motion for post conviction relief premature if no judgment or final order which might be vacated or set aside. State v. Werts ---------- 468
20. Although statutory requirements for speedy trial in criminal prosecution refer only to indictments and informations, references may encompass complaints. State v. Stevens ---------- 487
21. Timely objection by litigant with standing may nullify zoning regulations purportedly adopted by county board that has not adopted comprehensive development plan conformable to statute. Deans v. West ---------- 518
22. Criminal sentence in which court considered prior time spent by defendant in custody may be consistent with state and federal constitutional guarantees of due process and with federal constitutional guarantee of equal protection, although record at sentencing hearing silent on subject. State v. Nelson ---------- 580
23. Under aircraft insurance policy that excludes coverage while aircraft operated in flight by other than a pilot or pilots holding valid and effective pilot and medical certificates, there is no coverage where a pilot's medical certificate lapsed 5 months before an accident occurred. Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co. ---------- 610

Trespass.

Conditions stated when possessor of land subject to liability for physical harm to children trespassing thereon caused by artificial condition upon the land.

Gubalke v. Estate of Anthes ---------- 385

Trial.

1. In action against county commissioners pursuant to statute to recover money allegedly expended unlawfully after annual tax levy, must be shown not only that warrants in excess of 85 per cent of amount levied by tax for current year issued, but also that was no money in proper fund for their payment. Thiles v. County Board of Sarpy County 1
2. In determining whether merger of titles to real estate has taken place, courts will consider circumstances of particular case in light of equity and good conscience. Waite Lumber Co., Inc. v. Masid Bros., Inc. ---------- 10
3. General denial available to defendant to challenge one or more of elements essential to recovery by plaintiff, and effect of denial is to put burden on plaintiff to establish by evidence matters denied. Waite Lumber Co., Inc. v. Masid Bros., Inc. ------ 10
4. 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. Workman v. Great Plains Ins. Co., Inc. ---------- 22
Insurance Co. of North America v. Omaha Paper Stock, Inc. ---------- 232
5. In action for damage to property, accounting records of owner of property damaged which relate to cost of repair are evidence of actual cost of repair, but such records not binding on triers of fact. Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc. ---------- 30
6. Claim for damage to property, established by reference to an accounting system involving allocation of costs of overhead, labor, vehicles, and material, which trier of fact may consider, but not bound to accept, not a liquidated account to allow plaintiff to recover prejudgment interest. Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc. -- 30
7. Party cannot be heard to complain of error which he was instrumental in bringing about. Regier v. Nebraska P. P. Dist. ---------- 56
8. Error without prejudice not ground for reversal. Regier v. Nebraska P. P. Dist. ---------- 56
9. Party who fails to challenge jurors for disqualification and passes jurors for cause waives any objec-

tion to their selection. Regier v. Nebraska P. P. Dist. ---------- 56
10. Motion to declare mistrial addressed to sound discretion of trial court, and its ruling will not be disturbed in absence of showing of abuse of discretion. Regier v. Nebraska P. P. Dist. ---------- 56
11. Judgment of trial court in action at law where jury waived has effect of verdict of jury, and will not be set aside unless clearly wrong. In determining sufficiency of evidence to sustain judgment in law action, it must be considered most favorably to successful party, every controverted fact must be resolved in that party's favor, and he must have benefit of any inferences reasonably deducible from it. Knight Bros., Inc. v. State ---------- 64
12. No constitutional right to separate trial; rather, right statutory in origin and depends upon showing that prejudice will result from joint trial. State v. Clark ---------- 109
13. Admissibility of expert testimony ordinarily within discretion of trial court, and its ruling will be upheld unless abuse of discretion shown. Dovey v. Sheridan ---------- 133
14. General rule is that opinion evidence admissible where it is necessary and advisable as aid to jury; opinion evidence which may be of aid to jury may be admitted even though it bears directly on main issue; such evidence should be excluded whenever point reached at which trier of fact being told that which it is itself entirely equipped to determine. Dovey v. Sheridan ---------- 133
15. Admission of incompetent evidence may be cured by instruction which directs jury to consider as established fact transaction sought to be impeached by incompetent evidence. Dovey v. Sheridan ---- 133
16. Ordinarily, challenge to array must be made before trial. State v. Nelson ---------- 144
17. Ordinarily, party cannot complain of submission of issue to jury where finding on that issue favorable to him. Parkhurst v. Barth ---------- 154
18. Verdict and judgment will not be set aside as inadequate unless clearly wrong and so against weight and reasonableness of evidence as to indicate were result of passion, prejudice, or mistake. Parkhurst v. Barth ---------- 154
19. Instructions must be confined to issues presented

by pleadings and supported by evidence. Gier v. Gleason ---------- 156
20. Where an issue, even assuming it is properly pleaded, affords no basis for recovery under evidence adduced in case, trial court's submission of such an issue to jury constitutes error. Gier v. Gleason -- 156
21. In determining admissibility of confession, all evidence on subject must be considered and mere fact that evidence conflicting not a bar to its admission. State v. Hutchison ---------- 158
22. When accused has been informed of his constitutional rights and thereafter freely and voluntarily confesses, confession ordinarily admissible in evidence. State v. Hutchison ---------- 158
23. Real question of whether transaction installment loan is question for trier of fact under the circumstances. Seldin v. Northland Mortgage Co. ------ 175
24. Instructions to jury must be considered as whole, and when thus considered, if law is correctly stated, and case fairly submitted, and jury could not have been misled, claim of prejudicial error in instructions not available. Simon v. Omaha P. P. Dist. -- 183
25. Violation of administrative rule, or of private safety regulation, is independent evidence of negligence, under all the circumstances, provided expert witness incorporates regulation in his opinion as to an issuable act of negligence and evidence would probably aid trier of fact. Simon v. Omaha P. P. Dist. ---------- 183
26. Where court has properly instructed generally on the law as to some issue presented by pleadings and evidence, it is generally duty of counsel to request instruction which seeks to supplement and define general instruction. Simon v. Omaha P. P. Dist. -- 183
27. Interpretation given contract by parties themselves while engaged in performance of it one of the best indications of true intent of contract; ordinarily, such construction of contract should be enforced. Simon v. Omaha P. P. Dist. ---------- 183
28. Extrajudicial admission appearing in deposition of party taken before trial ordinarily not final and conclusive upon him, but may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at trial, to be given such weight as trier of fact deems it entitled. Simon v. Omaha P. P. Dist. 183

29. Parol evidence generally admissible when offered for purpose of explaining and showing true nature of transaction between parties. Cedars Corp. v. H. Krasne & Son, Inc. ---------- 220

30. General rule that, in absence of anything to indicate contrary intention, instruments executed at same time by same parties for same purpose and in course of same transaction are, in eye of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance. Cedars Corp. v. H. Krasne & Son, Inc. ---------- 220

31. Where party without reasonable explanation testifies to facts materially different concerning vital issue, the change clearly being made to meet exigencies of pending litigation, such evidence discredited as matter of law and should be disregarded; however, contradictory statements of nonparty witnesses not governed by this rule and such contradictions may be submitted to jury as affecting weight of evidence and credibility of witnesses. Insurance Co. of North America v. Omaha Paper Stock, Inc. ---------- 232

32. Impeachment of witness by showing contradictory statements made by him admitted solely for purpose of discrediting reliability of witness; it is not substantive evidence of facts stated. Insurance Co. of North America v. Omaha Paper Stock, Inc. ---- 232

33. Trial court given large discretion in determining whether or not witness' qualification to state his opinion has been established and this discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. ---------- 247

34. Whether an expert opinion is necessary or permissible to establish cause of fire would depend upon nature of case. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. ---------- 247

35. Who may be competent to testify as an expert in determining cause or origin of a fire may depend upon type of particular fire in question. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. ---------- 247

36. When defendant moves for directed verdict, he admits as true evidence of plaintiff who is then entitled to benefit of every reasonable inference deducible from evidence submitted. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. ---------- 247

37. It is only where there is total failure of competent proof in criminal case to support material allegation in information that trial court will be justified in directing verdict of not guilty. State v. Whipple 259

38. In addition to judicial review of records of Director of Motor Vehicles it is only completely void judgments, erroneous or fraudulent records, and abstracts of convictions which may be challenged at evidentiary hearing provided for in district court de novo review of order revoking driver's license. Bohlen v. Kissack ---------- 262

39. Where proof of a different crime tends to establish motive, criminal intent, or guilty knowledge, it is admissible. State v. Meints ---------- 264

40. Refusal of defendant to submit to legal chemical test for intoxication admissible in evidence. State v. Meints ---------- 264

41. Prosecuting attorney may comment to jury on refusal of defendant in prosecution for driving while under influence of intoxicating liquor to submit to chemical test which is required by law. State v. Meints ---------- 264

42. When evidence in criminal prosecution insufficient to prove guilt beyond reasonable doubt, court should direct a verdict for accused. State v. Alvarez --- 276

43. Primary burden upon State, that is, prosecutor and court, to bring accused person to trial within time provided by law. State v. Alvarez ---------- 281
State v. Brown ---------- 297

44. If a defendant not brought to trial within time provided for and as determined by valid statutory standards, he is, in absence of express waiver or waiver as provided by statute, entitled to his absolute discharge from offense alleged in the indictment or information as well as for any other offense coming within the term "required by law to be joined with that offense." State v. Alvarez -- 281
State v. Brown ---------- 297

45. Failure by a defendant to demand a trial within time he is required to be brought to trial as provided by sections 29-1205 to 29-1209, R. S. Supp., 1971, or to object at time trial date set does not constitute a waiver of his rights under either the statutes or Constitution of Nebraska, but is a factor which, while not constituting good cause by itself, may be considered along with other circumstances

in determining whether there was "good cause" for delay in trial under provisions of section 29-1207 (4) (f), R. S. Supp., 1971. State v. Alvarez ---------- 281
State v. Brown ---------- 297

46. Where a defendant who has been charged in an indictment or information not brought to trial within 6 months from date of return of indictment or filing of information and before trial or entry of plea of guilty or nolo contendere moves for his absolute discharge, burden upon State to prove by substantial preponderance of evidence that one or more of excluded periods provided for by section 29-1207 (4) (a) through (f), R. S. Supp., 1971, is applicable. State v. Alvarez ---------- 281
State v. Brown ---------- 297

47. From and after 7 days after November 24, 1972, general finding of a trial court that "good cause" has existed under provisions of section 29-1207 (4) (f), R. S. Supp., 1971, for extending beyond 6 months from the filing of information the period for bringing defendant to trial will no longer suffice, and trial court will from that time on be required to make specific findings as to the cause or causes of such extensions and the period of extension attributable to such causes; substantial preponderance of evidence must support such findings. State v. Alvarez ---------- 281
State v. Brown ---------- 297

48. Fundamental that a jury alone is sole judge of credibility of witnesses and of weight to be given to their testimony. Batterman v. Richardson ---------- 303

49. A jury has right to test credibility of witnesses by their self-interest and to weigh disputed parol testimony against all other facts and circumstances in evidence from which a conclusion may properly be drawn that parol testimony either false or incredible of belief; substantial conflict may arise even though all the evidence produced by one party. Batterman v. Richardson ---------- 303

50. Proof that damage might or could have been caused by an accident not sufficient to sustain verdict for a claimant; such evidence not of quality required to satisfy burden of claimant to establish by preponderance of evidence an injury and extent thereof. Batterman v. Richardson ---------- 303

51. Spontaneous declaration of homicide victim ident-

ifying attacker admissible where declaration and attack so clearly connected that declaration can in ordinary course of affairs be said to be spontaneous declaration of real cause. State v. Brown ------- 319
52. In workmen's compensation case, burden of proof upon claimant to establish that his disability caused by an accident arising out of and in course of his employment. Hartwig v. Educational Service Unit No. 13 ---------- 339
53. Rule of liberal construction of Workmen's Compensation Act applies to law but not to the evidence offered in support of claim for benefits under the act. Hartwig v. Educational Service Unit No. 13 339
54. Where claimant in workmen's compensation case fails to show with reasonable certainty that disability of which he complains arose out of and in course of his employment, proceeding will be dismissed. Hartwig v. Educational Service Unit No. 13 339
55. In ambiguous contract, court may look at preliminary negotiations to determine intent of parties. Halbert v. Food Host U.S.A., Inc. ---------- 346
56. Before evidence submitted to jury, is preliminary question for court, not whether is literally no evidence, but whether is any upon which jury can proceed to find verdict for party producing it, upon whom burden of proof imposed. Era v. Sapp Bros. GMC, Inc. ---------- 366
57. Juvenile court presumed to disregard all irrelevant matters in determining whether a child is a delinquent child. State v. Miller ---------- 383
58. In disposition hearing, juvenile court may consider all previous matters in juvenile court pertaining to the child. State v. Miller ---------- 383
59. Voir dire examination of jurors, opening statements, and final arguments to jury not customarily included in bill of exceptions, and will not be included unless request made to reporter that they be reported and included. State v. Kennedy ---------- 423
60. Instruction that jury to draw no inferences from fact defendant did not testify is cautionary instruction for benefit of defendant. State v. Kennedy 423
61. Invalidity of search warrant does not of itself automatically make evidence seized inadmissible. State v. Waechter ---------- 433
62. Motion to suppress can be urged only by one whose rights are violated, not by one aggrieved solely by

introduction of damaging evidence. State v. Waechter ---------- 433
63. Party who claims that an exception contained in Depressant and Stimulant Drugs Act is applicable to him has burden of proof to establish that exception is applicable. State v. Waechter ---------- 433
64. Party who is under duty to bring before court some circumstance may, by his inexcusable failure to do so, imply that exposed circumstance would be unfavorable to him. City of Omaha v. American Theater Corp. ---------- 441
65. Failure of party under duty to produce matter specified in subpoena duces tecum may satisfy burden of his opponent to produce evidence. City of Omaha v. American Theater Corp. ---------- 441
66. Subpoena duces tecum for trial imposes duty upon witness to bring with him sought-after matter under his control and that law requires him to produce as evidence. City of Omaha v. American Theater Corp. ---------- 441
67. Unless otherwise prejudicial, error in admission of evidence relating to a count upon which was an acquittal not ground for reversal. State v. Skinner 457
68. Ordinarily, question of existence of negligence or contributory negligence one for jury. Bayse v. Tri-County Feeds, Inc. ---------- 458
69. In absence of abuse of discretion, entirely within discretion of trial court to order, or refuse to permit, jury to inspect scene of alleged crime. State v. Craig ---------- 461
70. A statutory interpretation, effective March 1, 1973, is adopted as follows: A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement. Walls v. Horbach ---------- 479
71. When litigant has approved instructions in trial court, either by word or act, he cannot thereafter effectively complain of instructions given. Swear-

ingen v. Sloggett ---------- 482
72. Although statutory requirements for speedy trial in criminal prosecution refer only to indictments and informations, references may encompass complaints. State v. Stevens ---------- 487
73. Immunity has historically been governmental investigative tool for offenses which could not be investigated or proved otherwise; it is solely governmental prerogative. State v. McCown ---------- 495
74. Where an inference so usual, natural, or instinctive as to accord with general experience, its statement is received as substantially one of a fact—part of common stock of knowledge. State v. McCown ---- 495
75. Prejudicial error within meaning of comparative negligence statute to submit to jury issues that are irrelevant and for which there is no proof. Graham v. Simplex Motor Rebuilders, Inc. ---------- 507
76. Generally, error to submit general allegation of negligence to jury. Graham v. Simplex Motor Rebuilders, Inc. ---------- 507
77. Trial court may in its discretion permit introduction of evidence in rebuttal that is not strictly rebuttal evidence. State v. Keith ---------- 536
78. Where is a conveyance between close relatives without adequate consideration, burden upon parties to transaction to establish that it was done in good faith. First Nat. Bank v. First Cadco Corp. ------ 553
79. In trial of civil action, after plaintiff has introduced evidence tending to prove its case, if defendant fails to testify to matters peculiarly within his knowledge necessary to his defense, presumption exists that his testimony, if produced, would militate against his interest, which presumption may be considered by court or jury trying case in determining facts proved. First Nat. Bank v. First Cadco Corp. ---------- 553
80. Parol evidence inadmissible to vary written agreement complete on its face. First Nat. Bank v. Hull 581
81. It is improper and generally prejudicial for prosecuting attorney in criminal case to declare to jury his personal belief in guilt of defendant unless belief is expressed as deduction from evidence. State v. Brooks ---------- 592
82. Prosecuting attorney in criminal case should make no reference or comment upon failure of defendant to testify. State v. Brooks ---------- 592

83. A comment or reference to defendant's failure to testify may not be prejudicial error where evidence of guilt conclusive. State v. Brooks ---------- 592
84. Generally, any alleged errors in instructions occurring in course of trial irrelevant, if jury arrived at verdict consistent with directed verdict that should have been granted. McClellan v. Dobberstein ---- 669
85. Showing of scienter or knowledge of obscenity is required. State v. Little Art Corp. ---------- 681
86. In present state of the law, failure by court to define term "community standards" as referring to standards on local, state, or national basis not erroneous so long as jurors are instructed to determine the case, not on their individual standards, but on contemporary community standards. State v. Little Art Corp. ---------- 681
87. Defendant has constitutional right to introduce evidence pertaining to community standard. State v. Little Art Corp. ---------- 681
88. Affirmative proof of community standards not necessary. State v. Little Art Corp. ---------- 681
89. Extraneous evidence that materials in question obscene not required. State v. Little Art Corp. ---- 681
90. No prejudice to defendant when asked whether he had mentioned a material fact to police officers after his arrest if it appears objections to questions were sustained and questions not so phrased as to indicate that he stood mute. State v. Johnson --- 706
91. Ruling of trial court upon motion for consolidation or severance of criminal prosecutions that might have been properly joined in single indictment, information, or complaint will not be disturbed in absence of abuse of discretion. State v. Bazer ---- 711
92. In determining sufficiency of evidence to sustain conviction in criminal prosecution, not province of court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Suggett ---------- 714
93. Duty of trial court to aid jury to determine guilt or innocence of accused by plain and clear instructions, and if jurors are in doubt as to meaning of instructions given, it is entirely proper for them to request, and for trial court to give, additional explanatory instructions. State v. Suggett -------- 714
94. Repetition of instruction not reversible error, unless its effect is to mislead jury. State v. Suggett ---- 714

95. It is only in most flagrant cases of improper conduct by prosecuting attorney, even in prosecution of capital offenses, that defendant's counsel can apparently acquiesce in such conduct by remaining silent until trial finished, and then cause trial and verdict to be set aside by complaining of conduct to which he seemed at time to consent. State v. Suggett ---------- 714

96. It is error to exclude evidence which has tendency to impeach witness on material fact sworn to by him, proper foundation having been laid therefor. State v. Suggett ---------- 714

97. In cross-examination of defendant who voluntarily becomes witness in his own behalf, considerable judicial discretion committed to trial court to go beyond literal scope of direct examination in matters testing accuracy, memory, or credibility of witness. State v. Suggett ---------- 714

98. Reception of evidence collateral to any issue in case intended to affect credibility of witness usually within discretion of trial court, and ruling concerning it is not reason for reversal of judgment in case in absence of abuse of discretion. State v. Suggett 714

99. In garnishment proceeding, intervener or third party claimant normally has burden of proving his claim by preponderance of evidence, and this rule has application even where intervener or claimant has possession of property if judgment debtor and claimant closely related. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734

100. Where law action tried to court without jury, finding of court has effect of jury verdict and will not be disturbed unless clearly wrong. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734

101. Evidence not directly contradicted not necessarily binding on triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734

102. Triers of fact have right to test credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that parol testimony false. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734

103. Substantial conflict may arise even though all evidence produced by one party. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734
104. Credibility of witnesses and weight to be given their testimony are for triers of fact. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734
105. If there is any element of science or skill in matter being investigated before trial jury, not reversible error for court to admit expert testimony thereon, even though element of science slight. State v. Medina ---------- 765
106. Test of mental competency to stand trial whether defendant has capacity to understand nature and object of proceedings against him; to comprehend his own condition in reference to such proceedings; and to make rational defense. State v. Crenshaw -- 780
107. If facts brought to attention of court which raise doubt as to sanity of defendant, question of competency should be determined at that time. State v. Crenshaw ---------- 780
108. Question of competency to stand trial one of fact to be determined by court and means employed in resolving question are discretionary with court. State v. Crenshaw ---------- 780
109. 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 is prejudicial error in proceedings by which it was secured. Roush v. Nebraska P. P. Dist. ---------- 785
110. Where evidence conflicting or where reasonable minds may draw different inferences or conclusions from evidence, within province of jury, or court when case tried without jury, to decide issues of fact and Supreme Court may not set aside or direct verdict in such situation. Libbey-Owens Ford Glass Co. v. L & M Paper Co. ---------- 792
111. Failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Libbey-Owens Ford Glass Co. v. L & M Paper Co. ---------- 792
112. Under section 4-406 (3), U. C. C., lack of ordinary care on part of drawee bank in paying items may be established by proof that bank's employees failed to exercise care in processing the items. First Nat. Bank & Trust Co. v. Cutright ---------- 805

113. Handwriting in question may be compared by trier of fact with writing of same person which is proved to be genuine. First Nat. Bank & Trust Co. v. Cutright ---------- 805
114. Where contributory negligence pleaded as defense, and no competent evidence to support it, it is prejudicial error to submit to jury issues involving contributory and comparative negligence. Spath v. Coon ---------- 822

Trusts.

1. When an act or agreement of beneficiary of spendthrift trust would disappoint or frustrate purposes of settlor by diverting property or income from purpose prescribed, such act or agreement void ab initio. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734
2. When period of spendthrift trust has expired and beneficiary has unrestricted right to demand trust res, property may be reached by garnishment even though trustee has delayed making actual distribution. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734

Uniform Commercial Code.

1. Under Uniform Commercial Code, where goods delivered to buyer under contract for sale and physically received by him, they are in his possession. North Platte State Bank v. Production Credit Assn. 44
2. Basic rule of notice filing under Article 9 of Uniform Commercial Code is that where two security interests perfected by filing, one covered by financing statement which filed first has priority. North Platte State Bank v. Production Credit Assn. ---- 44
3. Purchase money security interest of person who is not a seller can arise only if value which is given is used to enable debtor to acquire rights in or use of collateral. North Platte State Bank v. Production Credit Assn. ---------- 44
4. Purchase money priority provided for in Article 9 of Uniform Commercial Code is exception to first to file rule, and should be applied only in strict accordance with limitations in code. North Platte State Bank v. Production Credit Assn. ---------- 44
5. Under Uniform Commercial Code, title passes to buyer at time and place at which seller completes

his performance with reference to physical delivery of goods, unless otherwise explicitly agreed. North Platte State Bank v. Production Credit Assn. ------ 44

Usury.

1. Well established in Nebraska that usury is defense rather than cause of action, and that after usurious interest paid, action will not lie to recover it. Seldin v. Northland Mortgage Co. ---------- 175
2. Although Installment Loan Act applies primarily to those who have been licensed under the act, its inhibitory provisions apply to nonlicensees as well. Seldin v. Northland Mortgage Co. ---------- 175
3. Real question of whether transaction installment loan is question for trier of fact under the circumstances. Seldin v. Northland Mortgage Co. ------ 175
4. Regardless of term used, if result is charge for loan of money or for forbearance of debt, result is interest. Midstates Acceptance v. Voss -------- 411
5. Whether or not transaction bona fide time sale or financing of balance of cash purchase price is question of fact. Midstates Acceptance v. Voss ------ 411
6. In considering whether or not transaction is time sale made in good faith or loan of money or forbearance of debt, court will look through form and examine its substance. Midstates Acceptance v. Voss ---------- 411
7. Defense of usury ordinarily available to a surety or guarantor. Midstates Acceptance v. Voss ---- 411

Vendor and Purchaser.

1. Effect of exception is to exclude from operation of conveyance interest specified and it remains in conveyor unaffected by conveyance. Kozak v. State -- 525
2. Right or interest reserved in duly recorded conveyance effective as against all who deraign title through grantee, although reservation not expressed in subsequent deeds; similarly, fact that subsequent deeds contain no language showing exceptions made in former deed within chain of title does not abrogate or destroy such exceptions. Kozak v. State ----- 525
3. Provisions of sections 36-401 to 36-409, R. R. S. 1943, do not impair title of purchaser for valuable consideration unless purchaser had previous notice of fraudulent intent of his immediate grantor, or of frauds rendering void title of grantor. First Nat.

Bank v. First Cadco Corp. ---------- 553
4. If value of property conveyed exceeds amount of encumbrances thereon, agreement by grantee to pay off encumbrances not valuable consideration as against grantor's creditors; ability of grantee to pay encumbrance also fact to be considered. First Nat. Bank v. First Cadco Corp. ---------- 553
5. Depending upon facts and circumstances, one who is beneficiary of fraudulent conveyance may be required to account for rents and profits thereof, including rents and profits from proceeds. First Nat. Bank v. First Cadco Corp. ---------- 553

Vendors and Vendees.
1. Officers or shareholders upon selling their individual shares may make reasonable restrictive agreements not to compete with the corporation. Antrim v. Pittman ---------- 474
2. In sale of corporate shares a common law test of reasonableness of covenant not to compete is whether seller's opening a business of his own would substantially affect corporate good will. Antrim v. Pittman ---------- 474

Venue.
1. Motion to transfer under section 25-409, R. S. Supp., 1972, properly overruled where record does not show that action was commenced in wrong county. Johnsen v. Parks ---------- 712
2. Where record does not show abuse of discretion, ruling on motion to transfer under section 25-410, R. S. Supp., 1972, will not be disturbed. Johnsen v. Parks ---------- 712

Verdicts.
1. Verdict and judgment will not be set aside as inadequate unless clearly wrong and so against weight and reasonableness of evidence as to indicate were result of passion, prejudice, or mistake. Parkhurst v. Barth ---------- 154
2. 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. Insurance Co. of North America v. Omaha Paper Stock, Inc. - 232
3. Generally, any alleged errors in instructions occurring in course of trial irrelevant, if jury arrived

at verdict consistent with directed verdict that should have been granted. McClellen v. Dobberstein ---- 669

4. 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 is prejudicial error in proceedings by which it was secured. Roush v. Nebraska P. P. Dist. ---------- 785

View of Premises.

In absence of abuse of discretion, entirely within discretion of trial court to order, or refuse to permit, jury to inspect scene of alleged crime. State v. Craig 461

Waiver.

1. Failure by a defendant to demand a trial within time he is required to be brought to trial as provided by sections 29-1205 to 29-1209, R. S. Supp., 1971, or to object at time trial date set does not constitute a waiver of his rights under either the statutes or Constitution of Nebraska, but is a factor which, while not constituting good cause by itself, may be considered along with other circumstances in determining whether there was "good cause" for delay in trial under provisions of section 29-1207 (4) (f), R. S. Supp., 1971. State v. Alvarez ---------- 281
State v. Brown ---------- 297
2. Express declaration that individual held for interrogation by police willing to make statement and to do so without attorney being present, followed closely by statement, may constitute waiver of privilege against self-incrimination and right to counsel. State v. Moore ---------- 354
3. That police who knew that defendant was represented by attorney and failed to give attorney notice of intended interview of defendant did not under evidence in this case make inadmissible statements made by defendant because violative of right to counsel where defendant clearly, intelligently, knowingly, and voluntarily waived his right to have counsel present. State v. Moore ---------- 354
4. That waiver may seem or be unwise or not smart, where either prospectively or retrospectively considered, does not necessarily import that it was not intelligently made. State v. Moore ---------- 354
5. Under provisions of section 48-118, R. R. S. 1943,

requiring giving of notice of claim or suit against third person, and opportunity to join and be represented by counsel, substantial compliance sufficient when other party had actual notice and opportunity; notice may be waived in writing or waiver may be implied from unequivocal conduct. Gillotte v. Omaha Public Power Dist. ---------- 444

6. Secured party which consents to liquidation by debtor or by means of auction sale does not waive its security interest or its right to proceeds of sale. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702

7. It is only in most flagrant cases of improper conduct by prosecuting attorney, even in prosecution of capital offenses, that defendant's counsel can apparently acquiesce in such conduct by remaining silent until trial finished, and then cause trial and verdict to be set aside by complaining of conduct to which he seemed at time to consent. State v. Suggett ---------- 714

Warehouses.

1. Exemption under free port law in 1969 was not open to warehouseman that failed to make available and use warehouse facilities for public storage for compensation. Norden Laboratories, Inc. v. County Board of Equalization ---------- 437

2. Free port law in force in 1969 did not violate state constitutional provisions for uniformity and against special privileges. Norden Laboratories, Inc. v. County Board of Equalization ---------- 437

Warranty.

1. Specifications in construction contract containing test borings of site for embankment materials and which contain the following language: "No guarantee is made regarding the nature of the material at points other than locations sampled," expressly negatives warranty of quality except as shown by test borings. Knight Bros., Inc. v. State 64

2. Risk of unexpected cost and difficulty in performance of construction contracts usually carried by building contractor. Employing owner may make representations or warranties; parties may by agreement allocate such risks as they see fit. Every case stands on its own legs; and is no rule of law

with an answer mechanically determined. Knight Bros., Inc. v. State ---------- 64

Waters.

1. It is duty of those who build structures in natural watercourse to provide for passage through such obstruction of all waters which may reasonably be anticipated to flow or be carried therein and this is a continuing duty; what private proprietors may not do neither may public authorities, except in exercise of eminent domain. Wilson Concrete Co. v. County of Sarpy ---------- 312
2. Where an obstruction in natural watercourse constitutes continuing and permanent injury to adjoining landowners, injunctive relief may be granted upon proper showing. Wilson Concrete Co. v. County of Sarpy ---------- 312

Wills.

1. In construing a will, court must ascertain intent and purpose of testator as disclosed by language of will; object is to carry out intention of testator as shown by will in light of attendant circumstances. Travis v. Travis ---------- 242
2. Burden of proving intention to change testamentary plan of disposition is on party claiming change of intention. Travis v. Travis ---------- 242

Witnesses.

1. Admissibility of expert testimony ordinarily within discretion of trial court, and its ruling will be upheld unless abuse of discretion shown. Dovey v. Sheridan ---------- 133
2. General rule is that opinion evidence admissible where it is necessary and advisable as aid to jury; opinion evidence which may be of aid to jury may be admitted even though it bears directly on main issue; such evidence should be excluded whenever point reached at which trier of fact being told that which it is itself entirely equipped to determine. Dovey v. Sheridan ---------- 133
3. Violation of administrative rule, or of private safety regulation, is independent evidence of negligence, under all the circumstances, provided expert witness incorporates regulation in his opinion as to an issuable act of negligence and evidence would prob-

ably aid trier of fact. Simon v. Omaha P. P. Dist. 183
4. Where party without reasonable explanation testifies to facts materially different concerning vital issue, the change clearly being made to meet exigencies of pending litigation, such evidence discredited as matter of law and should be disregarded; however, contradictory statements of nonparty witnesses not governed by this rule and such contradictions may be submitted to jury as affecting weight of evidence and credibility of witnesses. Insurance Co. of North America v. Omaha Paper Stock, Inc. 232
5. Impeachment of witness by showing contradictory statements made by him admitted solely for purpose of discrediting reliability of witness; it is not substantive evidence of facts stated. Insurance Co. of North America v. Omaha Paper Stock, Inc. ---- 232
6. There is no exact standard for fixing qualifications of an expert or skilled witness. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. ---------- 247
7. An expert or skilled witness will be deemed qualified if, and only if, he possesses special skill or knowledge respecting subject matter involved so superior to that of men in general as to make his formation of a judgment a fact of probative value. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. -- 247
8 An expert may be qualified by his formal education or practical experience. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. ---------- 247
9. Trial court given large discretion in determining whether or not witness' qualification to state his opinion has been established and this discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. ---------- 247
10. An expert may base his opinion upon facts observed by him personally. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. ---------- 247
11. Whether an expert opinion is necessary or permissible to establish cause of a fire would depend upon nature of case. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. ---------- 247
12. Who may be competent to testify as an expert in determining cause or origin of a fire may depend upon type of particular fire in question. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc. ---------- 247
13. Fundamental that a jury alone is sole judge of

credibility of witnesses and of weight to be given to their testimony. Batterman v. Richardson ----- 303
14. A jury has right to test credibility of witnesses by their self-interest and to weigh disputed parol testimony against all other facts and circumstances in evidence from which a conclusion may properly be drawn that parol testimony either false or incredible of belief; substantial conflict may arise even though all the evidence produced by one party. Batterman v. Richardson ---------- 303
15. Actions in equity on appeal to Supreme Court subject 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 accepted one version of facts rather than other. Harre v. White -- 404
16. Fifth Amendment privilege protects accused from being compelled to testify against himself only as to evidence of testimonial or communicative nature. State v. Manley ---------- 415
17. Withdrawal of blood, and use of analysis in evidence, does not involve compulsion within Fifth Amendment. State v. Manley ---------- 415
18. Subpoena duces tecum for trial imposes duty upon witness to bring with him sought-after matter under his control and that law requires him to produce as evidence. City of Omaha v. American Theater Corp. 441
19. Not valid objection to evidence of expert that answer covers whole ground jury to decide, if case one to be wholly resolved by such evidence. Bayse v. Tri-County Feeds, Inc. ---------- 458
20. On appeal of action in equity, when credible evidence on material questions of fact in conflict, Supreme Court will consider fact that trial court observed witnesses and their manner of testifying and accepted one version of facts rather than other. Messersmith v. Klein ---------- 471
21. Immunity has historically been governmental investigative tool for offenses which could not be investigated or proved otherwise; it is solely governmental prerogative. State v. McGown ---------- 495
22. Failure to endorse on information names of witnesses called by State not grounds for reversal of conviction in absence of prejudice. State v. Keith 536
23. It is error to exclude evidence which has tendency to impeach witness on material fact sworn to by

him, proper foundation having been laid therefor. State v. Suggett ---------- 714

24. In cross-examination of defendant who voluntarily becomes witness in his own behalf, considerable judicial discretion committed to trial court to go beyond literal scope of direct examination in matters testing accuracy, memory, or credibility of witness. State v. Suggett ---------- 714

25. Reception of evidence collateral to any issue in case intended to affect credibility of witness usually within discretion of trial court, and ruling concerning it is not reason for reversal of judgment in case in absence of abuse of discretion. State v. Suggett ---- 714

26. Triers of fact have right to test credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that parol testimony false. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734

27. Credibility of witnesses and weight to be given their testimony are for triers of fact. First Nat. Bank of Omaha v. First Cadco Corp. ---------- 734

Words and Phrases.

1. Language in construction contract, prepared by owner, that quality of embankment materials in certain designated sites "will be acceptable in general," accompanied by language which provides "the contractor shall determine for himself the amount of selective excavation, blending, screening, mixing, and other work required to provide a finished product meeting the specifications," and which authorized the owner's engineer to "reject portions of the deposit as unacceptable," does not constitute representation by owner to contractor that quality such that material can be excavated and processed without undue difficulty; neither does such language prevent owner from waiving specifications on quality. Knight Bros., Inc. v. State ---------- 64

2. Specifications in construction contract containing test borings of site for embankment materials and which contain the following language: "No guarantee is made regarding the nature of the material at points other than locations sampled," expressly negatives warranty of quality except as shown by test borings. Knight Bros., Inc. v. State ---------- 64

3. In statutory provisions for person to obtain telephone service furnished in exchange service area adjacent to his residence or place of operation, such phrases as "reasonably adequate service," "duplication of facilities," "public interest," and "community of interest in the general territory" acquire new meaning limited to context; definition must evolve, case by case. Schoen v. American Communication Co., Inc. ---------- 78
4. Terms "maliciously" and "feloniously," as used in describing an offense, import a willful act. State v. Schumacher ---------- 138
5. Automobile that had been modified for use in stock car racing by removing seats, dashboard, headlights, taillights, and glass and by adding special equipment to facilitate its use in races, was "equipment designed for use principally off public roads." Walcott v. Hawkeye-Security Ins. Co. ---------- 161
6. Contributing to delinquency of minor consists of an act which encourages, causes, or contributes to delinquency of child under 18 years of age. State v. McCune ---------- 165
7. Delinquent child is any child under age of 18 years who has violated any state law or city or village ordinance. State v. McCune ---------- 165
8. Words "a majority of the members of the board," as used in section 79-1254, R. R. S. 1943, means a majority of all members of the board. Houser v. School Dist. of South Sioux City ---------- 323
9. Under provisions of section 77-1734.01, R. R. S. 1943, term "clerical error" not restricted to clerical error made by taxpayer on face of personal property tax return. School Dist. of Minatare v. County of Scotts Bluff ---------- 395
10. County board is only "authority" whose approval required for payment of tax refund claim under section 77-1734.01, R. R. S. 1943; failure to transmit copy of claim to other taxing entities does not deprive county board of jurisdiction and authority to determine and approve proper claim. School Dist. of Minatare v. County of Scotts Bluff ---------- 395
11. "Unreasonably interferes with or obstructs" words of common understanding. State v. Sullivan ----- 465
12. Term "bailment" comprehensively defined as delivery of personality for some particular purpose, or on mere deposit, upon contract, express or implied,

that after purpose has been fulfilled it shall be redelivered to person who delivered it or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be. Simpkins v. Ritter ---------- 644

13. Three elements must coalesce to sustain finding of obscenity, namely, (a) dominant theme of material taken as whole appeals to prurient interest in sex; (b) material patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters; and (c) material utterly without redeeming social value. State v. Little Art Corp. ---------- 681

14. "Proceeds" includes whatever is received when collateral sold or disposed of including an account for purchase price. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702

15. Purchaser of farm machinery and equipment at farm auction sale not buyer in ordinary course of business. South Omaha Production Credit Assn. v. Tyson's Inc. ---------- 702

16. In statutory construction, Supreme Court considers ordinary meaning of words in context and the mischief to which it attributes the remedy. State v. Coleman ---------- 725

17. Underlying principle of relevance is logical probative value. State v. Wright ---------- 783

Work and Labor.

Section 81-117, R. R. S. 1943, has no application to state officers, employees, and others whose basic work week has not been established to be 40 hours under provisions of Chapter 84, article 10, R. R. S. 1943. Roth v. Lieske ---------- 216

Workmen's Compensation.

1. On appeal of workmen's compensation case to Supreme Court, if there is reasonable competent evidence to support findings of fact in trial court, judgment, order, or award will not be modified or set aside for insufficiency of evidence. Klein v. Trinity Industries, Inc. ---------- 117

2. In workmen's compensation case, burden of proof upon claimant to establish that his disability caused by an accident arising out of and in course of his employment. Hartwig v. Educational Service Unit

No. 13 ---------- 339
3. Rule of liberal construction of Workmen's Compensation Act applies to law but not to the evidence offered in support of claim for benefits under the act. Hartwig v. Educational Service Unit No. 13 -- 339
4. On appeal of workmen's compensation case to Supreme Court, where there is reasonable competent evidence to support findings of fact in trial court, judgment, order, or award will not be modified or set aside for insufficiency of evidence; cause will be considered de novo in Supreme Court only where findings of fact not supported by evidence as disclosed by record. Hartwig v. Educational Service Unit No. 13 ---------- 339
5. Where claimant in workmen's compensation case fails to show with reasonable certainty that disability of which he complains arose out of and in course of his employment, proceeding will be dismissed. Hartwig v. Educational Service Unit No. 13 339
6. Under section 48-118, R. R. S. 1943, subrogated interest of employer, for computation and allocation of fees and expenses, not restricted to workmen's compensation benefits actually paid, but measured by workmen's compensation liability relieved or discharged by recovery against third party. Gillotte v. Omaha Public Power Dist. ---------- 444
7. Under Workmen's Compensation Act if employee accepts any payment from his employer or from any insurance company carrying risk, on account of personal injury, such action ordinarily constitutes release to employer of all claims or demands at law, if any, arising from injury. Edelman v. Ralph Printing & Lithographing, Inc. ---------- 763

Zoning.

1. Timely objection by litigant with standing may nullify rezoning resolution by county board that has not adopted comprehensive development plan conformable to statute. Bagley v. County of Sarpy 393
2. Under statutory provisions enacted in 1967, county engaged in zoning or rezoning ought to adopt comprehensive development plan within reasonable time. Bagley v. County of Sarpy ---------- 393
3. Timely objection by litigant with standing may nullify zoning regulations purportedly adopted by county board that has not adopted comprehensive

development plan conformable to statute. Deans v. West ---------- 518
4. Where location and boundaries of county zoning district can be determined only from an official zoning map or maps, maps must contain sufficient information to permit person of ordinary intelligence to locate on map any specific legally described tract of land, and to determine with reasonable accuracy and precision boundaries of any zoning district. Deans v. West ---------- 518
5. Official zoning map or zoning plan adopted by county board as part of county zoning regulations which incorporate map by reference, must be published in book or pamphlet form or in legal newspaper as required by section 23-114.03, R. R. S. 1943. Deans v. West ---------- 518
6. Failure to comply with statutory requirements for publication of official county zoning map prevents zoning regulations, of which map a part, from becoming valid, effective, or enforceable, at least where boundaries of zoning districts can only be determined from map. Deans v. West ---------- 518