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REUBEN E. BATES ET AL., APPELLEES, V. CHARLES B. SCHUELKE ET AL., APPELLEES, WILLIAM J. LINDSAY, TRUSTEE-PURCHASER, APPELLANT.

215 N. W. 2d 874

Filed March 21, 1974. No. 38977.

1. **Judgments: Judicial Sales.** The District Court has jurisdiction to set aside its own judgment during the term in which it is rendered if it believes that its former conclusion is erroneous.
2. **Judgments: Judicial Sales: Mistake: Fraud.** The power of the District Court to modify its own judgments at any time during the term in which they were pronounced is for the purpose of correcting errors or to relieve against fraud, accident, or mistake.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Robert G. Decker, for appellant.

Eugene T. Atkinson, for appellee Bates.

John E. Rice of Rice & Adams, for appellee Schuelke.

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

WHITE, C. J.

In this mortgage foreclosure case the District Court, during term, set aside its previous order of confirmation and ordered a new sale. The purchaser Lindsay appeals, contending generally that the District Court abused its discretion in exercising its power to set aside its former judgment of confirmation and that the purchaser is entitled to confirmation. We affirm the order and judgment of the District Court.

An extensive review of the facts is necessary to put the issues in this case in proper perspective. It may be said at the outset that the difficulty involved in this case arises out of a situation in which the District Judge, Judge Schmidt, who handled the preliminary proceed-

ings in the mortgage foreclosure and entered the decree, became deceased and his successor, Judge Reagan, issued a subsequent order and confirmed the sale. The appeal involves three classes of parties: The mortgagee-plaintiff Bates who sought foreclosure; the mortgagor-defendant Schuelke; and the appellant-purchaser Lindsay at the judicial sale. The decree of foreclosure was entered by Judge Schmidt, since deceased. The execution sale of the real property pursuant to the decree of foreclosure took place after Schuelke took his statutory stay of execution. It was in the intervening period of time that District Judge Schmidt became deceased. After the term of stay had expired Bates filed a praecipe for judicial sale. An order of sale was then issued, notice of the execution was published, and the sale was held. Lindsay was the highest bidder for the real estate in the sum of $38,300. Until this time, the proceedings were governed by Judge Schmidt. Upon his death, Judge Reagan presided over the subsequent proceedings, which are at issue in this case.

A motion to confirm the sale was filed by Bates. The court, Judge Reagan presiding, confirmed the sale and ordered a sheriff's deed to be made out and delivered to Lindsay. The clerk of the District Court prepared and filed with the register of deeds a certificate of satisfaction of Bates' entire mortgage on the real estate. Through all these proceedings Schuelke represented himself.

Schuelke did not vacate approximately 3¼ acres out of a total of approximately 61¼ acres and Lindsay filed a motion for a writ of assistance. At the hearing on the motion for the writ of assistance, Schuelke filed a motion to set aside the sale and confirmation on the ground that only 58 acres were to be sold. Lindsay demurred. All these matters were taken under advisement after testimony was heard. The dispute centers around whether the total acreage, approximately 61¼

acres, was to be sold, or whether Schuelke's house and approximately 3¼ acres around it were to be excluded. The first mortgage on 58 acres of the property was held by Bates, with a second mortgage on 3¼ acres. The first mortgage on the 3¼ acres was held by the First National Bank of Bellevue.

The decree of foreclosure governs which property is to be sold at the execution sale, regardless of the description of the property in subsequent documents and notices. For this reason, the decree is extremely important, and will be summarized in pertinent part below.

The decree first states that Bates has a lien upon the total real estate described, the total 61¼ acres. The decree then provides that Bates' lien is superior to all except the first and prior lien of the defendant First National Bank of Bellevue upon a portion of the real estate, described as 3¼ acres.

The decree next provides that the sheriff shall sell "the real estate above described *subject* to the prior lien of defendant First National Bank of Bellevue upon a *portion* of said real estate as above described, and apply the proceeds, first, to the payment of the costs herein, second to the payment of the several liens of the plaintiffs, as above set forth, with interest thereon, bringing the surplus, if any, into Court to abide the further order of the Court in the premises * * *." (Emphasis supplied.) The decree then states that upon sale and confirmation all the defendants *except the First National Bank of Bellevue* are foreclosed of all rights in the real estate.

Note that no proceeds were to go to the First National Bank of Bellevue, and its interest in the property was not to be foreclosed. The notice of sale, order of sale, and confirmation describe 61¼ acres as being sold, with absolutely *no mention of the prior lien* of the bank. This apparently led to confusion.

At the hearing on the motion for a writ of assistance

and the motion to set aside the sale, the following important testimony was received. Schuelke testified that during the entire process he believed only 58 acres were being sold, and that the 3¼ acres around his house were not being sold. An attorney for a judgment creditor of Schuelke testified that he thought only 58 acres were being sold. Even Bates testified that he thought only 58 acres were being sold under the foreclosure. Bates' attorney, who drew up the decree, testified that he intended to foreclose on the entire 61¼ acres, and that his client, Bates, had never told him only to foreclose on 58 acres. Thus there was either a misunderstanding or a conflict *between Bates' testimony and that of his attorney.*

Judge Reagan, who confirmed the sale, made the following critical holdings on what occurred at the hearing of confirmation over which he presided, and upon what he as the judge understood. The judge said that counsel for Schuelke told him only 58 acres were sold and the deed would be for only 58 acres. It was the judge's clear understanding that only 58 acres were to be sold and the deed would so provide. A deed for 61¼ acres was given. The judge stated he would not have confirmed the sale if he had known that 61¼ acres were being sold. The judge determined that the confirmation was obtained through irregularity. He declared that the sale should be set aside because of this irregularity. He also found that the price was inadequate for the entire 61¼ acres.

Judge Reagan subsequently entered a memorandum and order denying Lindsay's motion for a writ of assistance, overruling the demurrer, and granting Schuelke's motion to set aside the sale and confirmation. The judge ordered that a new execution sale take place upon the entire 61¼ acres. Lindsay filed a motion for a new trial which was overruled. This appeal followed.

The facts that we have set out are self-explanatory

and reveal the confusion and uncertainty both among the parties themselves as to the amount of land that was sold, and the uncertainty and confusion of the trial judge candidly conceded in his findings. They arise from the lack of continuity of the same judge handling all the proceedings, an inaccurate notice of sale, and from the rather complex situation where property is sold on a portion of which there is a valid and unforeclosed first mortgage. It is settled law that the District Court has jurisdiction to set aside its own judgment during the term in which it is rendered if it believes that its former conclusion is erroneous. First Nat. Bank v. First Trust Co., 145 Neb. 147, 15 N. W. 2d 386. In First Nat. Bank v. First Trust Co., *supra,* it was clearly pointed out that this power to modify its own judgments at any time during the term in which they were pronounced is for the purpose of correcting errors or to relieve against fraud, accident, or mistake. It is also clear that this power may be exercised without regard to error, fraud, accident, or mistake in the absence of an abuse of discretion. First Nat. Bank v. First Trust Co., *supra,* and cases cited therein. Further, in State Life Ins. Co. v. Heffner, 131 Neb. 700, 269 N. W. 629, a mistake was made in an advertisement of land sold under a mortgage foreclosure. On the basis of this mistake a sale was had and the sale was confirmed. The District Court set aside the sale and confirmation during term. Our court affirmed. This case is very close if not directly on point with the present case. In this case the notice of sale, order of sale, and confirmation describe 61¼ acres as being sold, with absolutely no mention of the prior lien of the bank upon the 3¼ acres. The decree, which governs, specifically stated that "the real estate above described *subject* to the prior lien of defendant First National Bank of Bellevue upon a *portion* of said real estate as above described, * * *." (Emphasis supplied.) The conclusion is clear from the findings

of the trial judge and the testimony of the witnesses that this created confusion in the minds of the bidders as to exactly what portion of the real estate and what amount was going to be sold free and clear of encumbrance. The trial court so found and its judgment is supported by the evidence introduced in the case. Its judgment in setting aside the sale, restoring the status quo, and ordering a new sale was obviously not an abuse of discretion and is in the interest of justice to all parties concerned, especially in light of the fact that a court of equity traditionally jealously guards the equity of redemption.

The judgment of the District Court setting aside the sale and ordering a new one is correct and is affirmed.

AFFIRMED.

SMITH, J., not participating.

SPENCER, J., dissenting.

I respectfully dissent from the abortion of a judicial sale herein. On August 18, 1971, the court entered a decree of foreclosure concerning various and sundry mortgages and liens on the 61¼ acres involved herein. The court specifically found that the First National Bank of Bellevue, Bellevue, Nebraska, held a mortgage on the 3¼ acres which was a first and prior mortgage lien on the 3¼ acres and which was not being foreclosed therein. The court decreed that all the 61¼ acres be sold subject to the mortgage lien of the First National Bank of Bellevue on the 3¼ acres.

On September 21, 1971, the appellee, Charles B. Schuelke, who was living in a residence on the 3¼ acres, filed his request for a stay of execution. After the expiration of 9 months stay and on August 7, 1972, the sheriff sold the 61¼ acres at sheriff's sale to William J. Lindsay, trustee, for the sum of $38,300, which sum was paid to the sheriff. The sale was confirmed by the court, and the sheriff was directed to execute and deliver a deed to the premises subject to the first and

prior lien of the First National Bank of Bellevue.

Subsequent to the sale and before the proceedings herein, appellee Schuelke assigned a portion of the proceeds to another creditor and this creditor was ordered paid in accordance with terms of said assignment. On September 1, 1972, the clerk of the District Court, pursuant to statute, prepared and filed with the register of deeds a certificate of satisfaction of the mortgage of appellee Bates on the described 61¼ acres. Subsequently, appellee Schuelke refused to vacate the 61¼ acres and the appellant herein moved for a writ of assistance. While that motion was pending appellee Schuelke filed a motion to set aside the order of confirmation and to order that another sale be held. It was on this motion that the sale was vacated.

The evidence is uncontradicted that the deputy sheriff who conducted the sale at no time indicated less than 61¼ acres were being sold. The order of sale covered the 61¼ acres and the sheriff had no authority to offer less. I assume that confusion was caused by the fact that the bank had a first and prior mortgage on the 3¼ acres and that the property was being sold subject to this mortgage.

To permit loose talk or idle conversation to control an express order of sale is opening a Pandora's box. To permit the setting aside of a confirmed judicial sale in the absence of a clear and convincing finding of fraud will bring extreme uncertainty into an area where none now exists.

BOSLAUGH, J., dissenting in part.

The decree, order of sale, notice of sale, and the sheriff's return all indicate 61¼ acres was sold. Under these circumstances, and in the absence of evidence of inadequate consideration, it is difficult to justify an order setting aside the confirmation.

As a condition to the order granting the motion to vacate the confirmation, the defendant mortgagor was

required to deposit a sum of money with the clerk of the court. Pursuant to this order, the defendant's attorney deposited $42,130 on January 12, 1973. The order of distribution entered at the time of confirmation on August 17, 1972, found the plaintiff was entitled to $29,188.28. It would seem the proper remedy here would be to permit or require the mortgagor to redeem.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH SANCHELL, APPELLANT.
216 N. W. 2d 504

Filed March 21, 1974. No. 39042.

1. **Criminal Law: Constitutional Law: Right to Counsel: Time.** The constitutional right of an accused to the presence and assistance of legal counsel does not apply as a matter of absolute right to a lineup or showup conducted by the police previous to the initiation of adversary judicial criminal proceedings.
2. **Criminal Law: Indictments and Informations: Prosecuting Attorneys.** The provisions of section 29-1606, R. R. S. 1943, are construed to include the requirement of approval by the trial court before an information may be dismissed. An agreement by a prosecuting attorney to dismiss an information against a defendant conditioned upon his "passing" a polygraph examination may not be enforced in the absence of approval by the court either of the agreement or of a dismissal requested by the prosecutor pursuant thereto.
3. **Criminal Law: Constitutional Law: Police Officers.** The conduct by the police, at whatever time, of identification procedures must not be so unnecessarily suggestive and conducive to a substantial likelihood of irreparable mistaken identification as to be a denial of due process of law.
4. **Criminal Law: Constitutional Law: Trial.** Whether an indentification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it.
5. **Criminal Law: Constitutional Law: Trial: Evidence.** Even though an identification procedure may have been suggestive, the in-court identification may be allowed to go to the jury if under the totality of the circumstances it is determined to

be reliable because it has an origin independent of the taint.

6. ———: ———: ———: ———. If identification procedures are such as to violate due process, the denial of a proper and timely motion to suppress and the admission of the in-court identification constitutes reversible error unless this court can say beyond a reasonable doubt that the error was harmless.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded for new trial.

Paul E. Watts, J. Joseph McQuillan, Bill Campbell, Gerald E. Moran, and George R. Sornberger, 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 charged on one count of forcible rape and three counts of robbery, and was found guilty by a jury. The offenses occurred during the early morning hours of January 22, 1972, in a women's residence hall on the campus of the University of Nebraska. The victims were three female students who resided in the hall. The convictions depended solely upon identification of the defendant by the victims. There was no circumstantial or other evidence to connect the defendant with the offenses.

Previous to trial two issues of significance on this appeal were raised. The defendant moved to dismiss the information because the State, acting through the prosecuting attorney, had violated an agreement with the defendant to dismiss the charges if the defendant submitted to and "passed" a polygraphic examination. The court denied the motion. The defendant also moved to suppress the identification testimony of the witnesses

because it was alleged they were the product of constitutionally tainted pretrial identifications which were so unnecessarily and impermissibly suggestive as to give rise to a substantial likelihod of irreparable misidentification in violation of the mandates of Gilbert v. California, 388 U. S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178; United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149; Stovall v. Denno, 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199; and Foster v. California, 394 U. S. 440, 89 S. Ct. 1127, 22 L. Ed. 2d 402; and thus defendant was denied due process of law at his trial. A suppression hearing was held on the motion and the trial court denied the motion without making any fact findings.

On this appeal the following errors are assigned: (1) The identifications should have been suppressed because the defendant was denied assistance of counsel at a one man showup on February 8, 1972. (2) One man showups on February 8 and March 1 and 2, 1972, violated principles of due process of law. (3) The identifications made at trial by the witnesses had no origin independent of the tainted identifications and therefore should have been suppressed. (4) The court should have granted the motion to dismiss because the State breached its agreement to dismiss if the defendant passed the polygraphic examination. (5) The erroneous admission by innuendo of the fact that the defendant had taken a polygraphic examination. (6) The evidence was insufficient to sustain the verdict.

Three of the assignments may be dealt with summarily.

The showup of February 8, 1972, occurred prior to the time any complaint in the matter had been filed against the defendant. Kirby v. Illinois, 406 U. S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411, makes it clear that the right to counsel does not attach until at or after the time adversary proceedings commence and that these

begin with the formal charge. The court in that case specifically held the accused was not entitled to counsel at a police station showup which occurred before the defendant had been formally charged. The first assignment is therefore without merit.

The fifth assignment is likewise unmeritorious. No reasonable inference can be drawn from the trial record which could lead the jury to conclude the defendant had taken a polygraph test. The record shows the rape victim took such a test for the purpose of determining the truth of her claim that an offense had been committed. The same police officer who administered that test was called later as a rebuttal witness to testify concerning a conversation had with the defendant. There was nothing in this testimony to indicate by any reasonable intendment that the conversation was related to a polygraph test. In any event, there was no objection to the testimony and no motion for mistrial.

The merits of the sixth assignment depend upon whether the identification testimony must be stricken in its entirety. Since we conclude that some but not all this testimony is admissible, a jury question on the credibility and accuracy of the identification testimony was presented. The sixth assignment is not well taken.

After the preliminary hearing it was agreed, in letters dated May 4 and May 9, 1972, between the defendant's lawyer and the member of the county attorney's staff charged with prosecuting the case, that if the defendant passed a polygraph test the charges would be dismissed. The prosecutor stated: "The only reservation that I would have is that in the event the Lie Detector Tests would be inconclusive, that the charges would not be dismissed." In no event were the results to be used if the case proceeded to trial. The tests were administered on June 21, 1972, by a member of the Lincoln police department who was a qualified polygraph examiner. Immediately following the examination the

examiner told the defense counsel that his client had passed the tests. However, when the written report was made to the prosecutor, he stated: "His reactions on a normal individual who had never been involved in this type of offense would indicate an innocent man, however, the reaction on the polygraph on this subject with his experience in thefts and other activity, indicate to me, that in my opinion that he is the guilty party."

At the hearing on the motion to dismiss because of the violation of the agreement, the examiner testified: "Q. Sir, in reaching the conclusion after you said on a normal person he would pass, you used extraneous matters not included in the test to draw the conclusion he wasn't telling the truth? A. Yes. . . . I told Mr. Watts here I honestly thought he had passed it; but I should not have said that. . . . Q. I will restate it. The test itself, excluding the extraneous matter, he passed? A. Yes."

The extraneous matters considered by the examiner were conclusions based largely on hearsay information about "his [the defendant's] experience in thefts and other activity." It is our conclusion that the defendant passed the test within the meaning of the agreement. It certainly contemplated no considerations extraneous to the tests and involving the subjective judgment of the examiner on matters unrelated to the defendant's guilt or innocence of the crimes charged.

The question is: Is the agreement enforcible? The defendant cites and relies on Butler v. State, 228 S. 2d 421, 36 A. L. R. 3d 1274 (Fla. App., 1969); and State v. Davis, 188 S. 2d 24 (Fla. App., 1966). In these cases the court held a refusal to honor the agreements deprived the defendants of due process of law and the convictions were reversed and the charges ordered dismissed. The agreements in those cases were somewhat different than in the present instance. In the Davis case the defendant was charged with first degree mur-

der. It was agreed that if the defendant passed the test the charge would be dropped and that if he failed he would plead guilty to manslaughter. If the test were inconclusive, neither side was bound. In Butler the charge was rape. The agreement was that if the defendant passed the test the charges would be dismissed. If he did not the results could be admitted in evidence against him. In both cases the agreements had been approved by the trial court.

We do not want to do anything to discourage the use of the polygraph as it is a useful tool in police and prosecutorial work and no doubt results in many determinations not to prosecute. It is our judgment that such an agreement, as in the present instance, requires court approval to be binding. Section 29-1606, R. R. S. 1943, provides that after preliminary examination the county attorney is required to file an information and if he determines he should not do so he must seek court permission and justify his action. If permission is denied he must then file the information and bring the matter to trial. The reasonable construction of this statute is that it requires approval of the court to dismiss an information once it has been filed. In this case the court denied approval. The agreement was not binding without court approval.

The second and third assignments are related and will be dealt with together. The determination of those assignments requires a summary of certain portions of the evidence, insofar as it relates to the identifications allegedly tainted by the suggestive showup and to the related question of whether or not the evidence discloses that the in-court identifications have sources independent of the taint. This summary is also relevant to the question we will determine later of whether any error is harmless beyond a reasonable doubt. We will first, however, state the applicable legal principles.

In United States v. Wade, *supra,* the United States

Supreme Court held that an in-court identification by a witness to whom the accused was exhibited in a post indictment lineup in the absence of counsel must be excluded unless it could be established that such identification evidence had an origin independent of the tainted lineup or that error in its admission was harmless. In Gilbert v. California, *supra,* the same question was presented as in Wade but an additional factor was present. There the trial court had admitted, apparently as substantive proof of identity, testimony by the identifying witness that the witness had at a tainted pretrial lineup identified the defendant. The court held that this constitutional error required (1) the testimony concerning the lineup identification be excluded, and (2) the in-court identification be excluded, without regard to the question of whether the in-court identification had an independent source. Stovall v. Denno, *supra,* established a "due process test" for identification issues as follows: If the "confrontation . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification" the defendant has been "denied due process of law. . . . However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it."

The latest applications of the principles by the United States Supreme Court are in Foster v. California, *supra,* and Neil v. Biggers, 409 U. S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401. In Neil v. Biggers, *supra,* the court summarized the development of the applicable principles in the following way: "We have considered on four occasions the scope of due process protection against the admission of evidence deriving from suggestive identification procedures. In Stovall v. Denno, 388 U. S. 293 (1967), the Court held that the defendant could claim that 'the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.'

Id., at 301-302. This, we held, must be determined 'on the totality of the circumstances.' We went on to find that on the facts of the case then before us, due process was not violated, emphasizing that the critical condition of the injured witness justified a showup in her hospital room. At trial, the witness, whose view of the suspect at the time of the crime was brief, testified to the out-of-court identification as did several police officers present in her hospital room, and also made an in-court identification.

"Subsequently, in a case where the witness made in-court identifications arguably stemming from previous exposure to a suggestive photographic array, the Court restated the governing test:

> " '[W]e hold that each case must be considered on its own facts, and that convictions based on eye-witness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' Simmons v. United States, 390 U. S. 377, 384 (1968).

"Again we found the identification procedure to be supportable. . . .

"The only case to date in which this Court has found identification procedures to be violative of due process is Foster v. California, 394 U. S. 440, 442 (1969). There, the witness failed to identify Foster the first time he confronted him, despite a suggestive lineup. The police then arranged a showup, at which the witness could make only a tentative identification. Ultimately, at yet another confrontation, this time a lineup, the witness was able to muster a definite identification. We held all of the identifications inadmissible, observing that the identifications were 'all but inevitable' under the circumstances. Id., at 443. . . .

"Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' Simmons v. United States, 390 U. S., at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in Foster. Suggestive confrontations are disapproved, because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the chance of misidentification is gratuitous. *But as Stovall makes clear, the admission of evidence of a showup without more does not violate due process.*

"What is less clear from our cases is whether, as intimated by the District Court, unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibility in seeking persons physically comparable to respondent, we do not think that the evidence must therefore be excluded. . . . Such a rule would have no place in the present case, since both the confrontation and the trial preceded Stovall v. Denno, supra, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury.

"We turn, then, to the central question, whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be

considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Applying these factors, we disagree with the District Court's conclusion." (Emphasis supplied.)

It appears to us that in Neil v. Biggers, *supra,* the court has implicitly, although not expressly, overruled the per se exclusionary rule of Gilbert v. California, *supra,* under which, if the prosecution on its direct case bolsters an in-court identification by evidence of an identification at a pretrial confrontation violative of due process standards, a reversal of the cause and exclusion of the identification evidence is mandatory. This seems true because in Neil v. Biggers, *supra,* the evidence consisted in part of testimony concerning the victim's visual and voice identification at a suggestive showup. Our conclusion is reinforced by the fact that in Foster v. California, *supra,* the court did not rely upon the per se exclusionary rule even though the cause came to it for direct review rather than by way of a habeas corpus proceeding.

We now summarize the evidence surrounding the showup of February 8, 1972. We will refer to the identifying witnesses by their first names. Renee was the victim of a rape and a robbery. These crimes took place and occupied the time between 5:30 and 6:15 a.m. Patricia was a robbery victim and that crime took place about 6:30 a.m. Ann was the victim of a robbery. The time of this offense is not fixed with reference to the hours of the clock, but circumstances indicate it occurred during about the same time span. The coincidence of time, methods used, and general description of the perpetrator by the witnesses would tend to prove that all

the offenses were committed by one person.

Complaint was promptly made and the matter was investigated by the campus police and the Lincoln police department. As a result of an interview with Renee a composite line "drawing," front view, of the attacker's face was made by one of the officers with the aid of an identikit. This kit consisted of transparent overlays of portions of facial outline and features. Laid one over the other they make a complete drawing. A photograph of the result was taken and it is preserved in the record. It shows a rather broad-faced, wide-nosed, clean-shaven, male with Negroid features, a medium Afro cut, and moderate sideburns. It is apparent it could be used not to identify a particular individual but only to note a resemblance and a possibility of identity. Shortly after the incident Renee was shown pictures of football players apparently from a game program. This was done because she stated that the attacker wore a red and white athletic jersey with the numeral 41 on it. She made no identification, but picked out a couple of pictures of individuals who resembled the attacker. Some time later she was shown 10 mug shots of black males. A photo of the defendant was not among these. She picked out three. Later the picture of the composite was seen by an officer of the Lincoln police department. He stated that a black resembling the drawing had been in jail some time earlier. This was the defendant. Mug shots of the defendant were then shown to Renee. She added this picture to the list of those bearing a resemblance. Whether or not the defendant's picture was shown to her separately or together with the same pictures previously shown is not clear from the record.

The other victims viewing the same photographs picked out two pictures bearing a resemblance. Neither picked the defendant's picture. Only one picture did Renee and the other two girls choose in common. All

this occurred within a day or so of January 22, 1972.

On February 8, 1972, the defendant was to be arraigned on an unrelated charge, presumably the one for which he had been in custody earlier. The three victims and two other girl students who had seen an intruder in the residence hall about the same time were taken by an officer of the campus police to the county courtroom where the arraignment was to take place. The witnesses sat together during the proceedings. The testimony of the three victims as to their understanding of the purpose for which they were taken there is in some significant respects contradictory. At the suppression hearing Renee testified on direct examination: "We were told that we were to come in and sit down and just observe what happened and then later someone was going to question us about what we saw." On cross-examination after some prodding, she acknowledged that she had at the preliminary hearing testified that she had been brought to court on February 8 for the purpose of identifying "the person who attacked you." Patricia testified that Renee told her they were there to identify some man. After the showup on February 8 Renee made an identification of the defendant as her attacker and then identified him at the preliminary hearing. On cross-examination at the suppression hearing she stated: "I was told at some time that they had a person that they thought had raped me, but I am not saying on what occasion I was told this, because I don't remember when I was told." Her previously mentioned admission as to her testimony at the preliminary hearing shows the suggestion was made before her identification on February 8. The statement by the police, whenever made, was clearly suggestive since the police had no evidence at any time other than the witness' identification and no identification had been made until after the showup on February 8. If the suggestion was made previous to February 8, it

was of course unfounded. If it was made later then it had to be made on the basis of her own identification and could only have been intended to reinforce it.

Patricia testified on direct examination at the suppression hearing that she did not know why she was there on February 8. She made no identification of the defendant as the perpetrator immediately thereafter. The night before the suppression hearing on January 24, 1973, 1 year and 1 day after the crime, she first advised the prosecutor that she would make a positive identification. At the suppression hearing she testified on cross-examination: "I told him last night that I was going to identify him today." On direct examination she had answered the following leading question in the affirmative: "Now, . . . from the observation which you made in your room of this particular individual and observations which you made in the County Courtroom at the preliminary hearing in this matter and from hearing the defendant speak here in the courthouse today do you have an opinion as to whether or not the person that was in your room on the early morning of January 22nd, 1972, is here in the courtroom today?" She then identified the defendant as the man. On cross-examination she admitted that at the preliminary hearing she testified that he "fits the description." She testified that she had never heard his voice until the suppression hearing. It was the night before the suppression hearing that she decided she would testify positively that the defendant was the robber. She admitted that at the preliminary hearing she could not identify him because she had not seen his whole features at the time of the crime. She also acknowledged that she had told a police officer she "could not identify the person that robbed [her]".

The prosecutor stated to the court at the suppression hearing that he knew of no witness other than Renee

and Patricia who would positively identify the defendant as the party responsible.

Officer Jacobson of the Lincoln police department was called. He testified that Renee told him that she "couldn't identify positively . . . she said perhaps she could recognize the voice or a voice but she wasn't certain about the face." He admitted that he had written in his reports, apparently after the defendant was under suspicion, she "could not definitely identify him as being the party responsible." Also: ". . . she told you that she could not definitely identify the man that assaulted her? A. Yes." This testimony was attempted to be explained on cross-examination as follows: " 'So that when she was telling you that she could not identify the person who had assaulted her did that simply mean that she did not know who it was?' A. Yes." On redirect he reiterated his earlier quoted testimony.

Officer Edmunds of the campus security force testified relative to Renee as follows: She "said that if she . . . could see him that she thought she could identify him."

We now turn to the testimony at trial especially with reference to the opportunity for observation as both the United States Supreme Court and this court have emphasized the importance of this item in the determination of the question of whether the in-court identification has a source independent of the tainted identification.

Renee was awakened by a hand placed over her mouth. She saw a very large, black face very close to her face. She heard a threat: "If you look at me I will kill you." She then looked away, but was unable to resist looking back and turned her eyes toward the person. The same threat was repeated. She then covered her eyes with her hands because she was so scared she could not close her eyes. She was then blindfolded, the lights were turned on, the door was locked, and two acts of rape were accomplished through threats of death. While the acts

were occurring she, peering from underneath the blindfold, caught glimpses of parts of the attacker's features. It was in this way that either before or after the attacks she observed the athletic jersey and the numeral thereon. Her earlier brief views of the defendant's facial features were made in an unlighted room with drapes drawn, but she stated: ". . . it was early morning light coming in the windows." Following the attack the perpetrator carried on a rather lengthy conversation with Renee. She testified when asked whether there was any question in her mind about the identify of her attacker: "None whatsoever." At trial she testified to identification on February 8, 1972, and at the preliminary hearing.

Patricia was awakened when someone jumped or "lurched" on her. "It was a black — big, black man, and I — I just stared at him for about three seconds and then —" she closed her eyes because of his threats. She was blindfolded. The blindfold covered her eyes and she did not see him thereafter. At trial she made a positive identification of the defendant as the robber. The event she described transpired before 6:30 a.m. She stated she was able to see because it was not real dark. It was "just starting to get light. The sun I think was just beginning to rise. There was some sunlight. And there are floodlights from the dormitories . . . ." She admitted on cross-examination a prior inconsistent statement about artificial light. She also admitted that at the preliminary hearing she had testified: "'Do you say it's him?'" Answer: "'I can't say it's him because I didn't see his whole features, but it fits what I saw.'" She further admitted that at the preliminary hearing on March 1 and 2 she had not identified the defendant as the man. She included the defendant's voice as part of her identification, but as already noted, she had agreed to make a positive identification before she had ever heard the voice.

Two witnesses other than the three victims were called. Mary Ann could not identify him. "Well, he was very close to me, but it was dark . . . [he was] very big . . . his hand . . . was dark-skinned." She stated that the defendant appeared to be about the same size. The events in her room occurred between 6 and 6:30 a.m. Sharon testified: ". . . there was a man standing in the doorway . . . . He was a black man . . . over six foot, like six . . . three." She could not distinguish his facial features. She observed him for about 10 seconds.

Ann, the third robbery victim, had an opportunity to view a mirror image of the intruder in full artificial light although briefly. The robber had forced her from her bed, he was standing behind her, and she was facing away from him. She had been instructed to keep her eyes closed. He turned the lights on. She saw his face in a mirror. She realized he saw her eyes were open and she immediately closed them. She estimated her observation took about 2 seconds. She testified that the defendant fit the size and general description of the man who was in her room. She saw "the eyes and the outline of his face; and those fit." She had heard the defendant's voice at the suppression hearing for the first time. She stated: "It was — it was a voice I had heard before. Q. In your room on January 22nd, 1972? A. Yes." On cross-examination she said when questioned concerning the identification of the defendant as the robber: "I am saying that I think it is?" She admitted that her testimony at the preliminary hearing was: "I can't say definitely whether it's him or not, but it could be."

In the brief of the defendant our attention has been called to various inconsistencies, other than those which we have mentioned, between the testimony of an identifying witness at trial and at preliminary hearing and between that on direct and cross-examination. How-

ever, those items at most raise questions of reliability of observation and credibility which are for the jury to decide.

It is also pointed out that at Lincoln, Nebraska, on January 22, the sun does not rise until 7:43 a.m., central standard time, and that there could have been no "early morning light" until about 7 o'clock a.m. These facts, of course, are scientific facts of which we may take judicial notice as can the trial court. However, this again raises only questions of reliability or credibility. For example, in the case of Renee, even though she was mistaken as to the source of whatever light there was, it nonetheless appears that she could see well enough to give a description sufficient to make a composite resembling the attacker. It also appeared that the attacker could see her well enough even in the darkened room to note that she was looking at him and observing him and thus gave her a second warning. This would indicate, of course, that she could see him equally well.

Our conclusion is that the evidence shows the identification by Renee had a source independent of the arranged showup on February 8, 1972, and is sufficiently reliable so that the strictures of the pertinent rules are satisfied. In connection with the "identification" by Ann, it appears that she was not in fact testifyng positively as to identity. The facts pertaining to her testimony were all before the jury. It presents again only questions of reliability and credibility and these were clearly for the jury to decide.

On the other hand, we believe that the evidence we have set forth conclusively shows that the identification by Patricia was the product of the tainted showup on February 8, 1972, and the suggestive circumstances which preceded and followed it. It was not based upon her observations at the time of the crime. It must therefore be excluded. We find the implicit determination of the trial court that it had an independent origin to

be clearly wrong. Therefore on retrial in accordance with principles of Foster v. California, *supra,* and Neil v. Biggers, *supra,* the identification testimony of Patricia will not be admitted. This, of course, does not mean that she may not testify to the fact that she was robbed, but she simply will not be permitted to testify that the defendant was the perpetrator.

It is evident from what we have said that we have been unable to conclude that the refusal of the trial court to suppress the identification testimony of Patricia was harmless error beyond a reasonable doubt. Chapman v. California, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, 24 A. L. R. 3d 1065.

We now turn to the contention relative to an alleged showup on March 1 and 2, 1972. That was not a showup at all. It was the preliminary hearing on the charges filed after defendant had been identified by Renee. The facts and circumstances surrounding the hearing are not shown except by isolated references in cross-examination to the testimony of the witnesses given at the preliminary hearing. Counsel was there present. Witnesses, we assume, were segregated, or could have been. None of the evils surrounding ex parte showups and lineups can be attributed to that proceeding for the benefit of the defendant.

REVERSED AND REMANDED FOR NEW TRIAL.

SMITH, J., not participating.

BOSLAUGH, J., dissenting.

The identification testimony offered by the State in this case was not as satisfactory as it might have been. The opportunity of the victims to observe the offender was limited by the way in which the crimes were committed. If the exclusionary rules are applied too strictly in such cases, it becomes impossible to prosecute for offenses committed in such a manner.

At the time of the offense, January 22, 1972, the witness Patricia saw the profile of the offender at close

range and heard his voice. Following a hearing in another case on February 8, 1972, she failed to identify the defendant. At the preliminary hearing on March 1 and 2, 1972, she said the defendant "fit the description of exact-y (exactly) what I saw." She had an opportunity to hear the defendant's voice at that hearing and advised the prosecutor on January 23, 1973, that she could make a positive identification. She heard the defendant's voice again at the hearing on January 24, 1973, and made a positive identification at the trial based largely on profile and voice.

Her testimony was weakened by the failure to identify the defendant at the February 8, 1972, hearing and by some prior statements which were subject to interpretation. These matters were all before the jury, and in my opinion were questions to be decided by the jury. I would affirm the judgment of the trial court.

SPENCER, J., concurs in this dissent.

STATE OF NEBRASKA, APPELLEE, V. LUIGI GRAYER, APPELLANT.
215 N. W. 2d 859

Filed March 21, 1974. No. 39215.

1. **Criminal Law: Infants: Constitutional Law: Courts: Prosecuting Attorneys.** The authority vested in a prosecuting attorney to determine whether a child under 16 years of age who has committed a crime shall be prosecuted in the juvenile or criminal court is not violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States or Article I, section 3, Constitution of Nebraska.
2. **Criminal Law: Infants: Constitutional Law: Prosecuting Attorneys.** The discretion vested in a prosecuting attorney to determine in which court a minor shall be prosecuted is not violative of Article II, section 1, of the Constitution of Nebraska, as an unlawful delegation of legislative power.
3. ———: ———: ———: ———. **Due process does not require**

a prosecuting attorney to hold an adversary hearing prior to determining the manner in which a minor offender shall be proceeded against.

4. **Criminal Law: Infants: Constitutional Law: Courts.** Juvenile courts do not have the sole or exclusive jurisdiction of children under 18 years of age who have violated the laws of Nebraska.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Thomas P. Kelley, for appellant.

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

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and COLWELL and WARREN, District Judges.

NEWTON, J.

This is a post conviction proceeding. Defendant was 15 years of age at the time of his conviction for first degree murder while perpetrating a robbery. He entered a plea of guilty pursuant to a plea bargain wherein the prosecuting attorney agreed to recommend a life sentence. He contends error was committed in that: (1) Authorizing the county attorney to file charges in either the juvenile or criminal courts, at his discretion, violates the Fourteenth Amendment to the Constitution of the United States, and Article I, section 3, Constitution of Nebraska; (2) without legislative guidelines for the exercise of such discretion there is a violation of Article II, section 1, Constitution of Nebraska; (3) there was an abuse of the prosecutor's discretion in failing to investigate the defendant's background; (4) the guilty plea was invalid because not fully understood by the defendant and because it was obtained by coercion; (5) defendant's counsel was inadequate; and (6) when under 16 years of age, a defendant must be proceeded against in the juvenile court. We affirm the judgment of

the District Court overruling the defendant's motion to vacate and set aside the sentence.

The constitutional questions raised are readily answerable. In DeBacker v. Sigler, 185 Neb. 352, 175 N. W. 2d 912, this court held that vesting in the county attorney a discretionary power to proceed against juveniles in the juvenile or criminal courts was not an unconstitutional practice and did not violate the precepts of due process. The question was before the court in United States v. Bland, 472 F. 2d 1329 (1972), and Cox v. United States, 473 F. 2d 334 (1973). Both cases dealt with a similar discretion vested in the Attorney General of the United States under federal statutes. Both cases hold: "Congress could reasonably vest in Attorney General, rather than in a judge in a judicial proceeding, the responsibility of deciding whether or not to prosecute a juvenile as an adult." Cox v. United States, *supra,* The Bland case specifically states that such discretion does not violate due process.

The two last-mentioned cases also answer defendant's contention that the prosecutor should have investigated more thoroughly. The Bland case states: "While there may be circumstances in which courts would be entitled to review the exercise of prosecutorial discretion as to whether a person should be charged as a juvenile or as an adult, those circumstances would necessarily include the deliberate presence of such factors as race, religion or other arbitrary classification. * * *

"Due process does not require an adversary hearing before the prosecutor can exercise his age-old function of deciding what charge to bring against whom."

The Legislature has defined what acts shall constitute criminal offenses and specified punishments therefor. It has also created juvenile courts and determined who may be subjected to the jurisdiction of a juvenile court. It has not made this jurisdiction exclusive as pertains to minors who have committed crimes. See State v.

McCoy, 145 Neb. 750, 18 N. W. 2d 101. The laws of this state permit the prosecuting attorney to determine whether a felon of tender age shall be prosecuted in the juvenile court or in the District Court as an ordinary offender. The discretion so vested in the prosecuting attorney is akin to that permitting him to determine whether or not to prosecute, what charge should be made, and whether or not to dismiss, apply for immunity, or accept a plea to a lesser offense. All these matters represent necessary and essential decisions of an administrative character which of necessity are determined under varying factual circumstances. To fix reasonable legislative standards for the determination of such matters would be difficult and probably impossible due to the multiplicity of factual situations encountered. This same proposition was raised in People v. Handley, 51 Ill. 2d 229, 282 N. E. 2d 131, cert. den. 409 U. S. 914, 93 S. Ct. 247, 34 L. Ed. 2d 175. It is stated therein: "Historically, the office of the State's Attorney has involved the exercise of a large measure of discretion in the many areas in which State's Attorneys must act in the performance of their duties in the administration of justice. We do not find it constitutionally objectionable that the legislature has seen fit to grant discretion to the State's Attorney in removal matters under the Juvenile Court Act, particularly in view of the fact that the purposes of the Act * * * can be presumed to be considered by State's Attorneys in making determinations in these matters."

The assertion that one under 16 years of age *must* be referred to the juvenile court was answered in Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240, wherein this court held in the case of a 14-year-old defendant that: "A careful study of the act clearly indicates it is not intended the juvenile court shall have exclusive jurisdiction and control of all juveniles. * * * 'Juvenile courts do not have the sole or exclusive jurisdiction of chil-

dren under eighteen years of age who have violated our laws.' " See, also, Kennedy v. Sigler, 397 F. 2d 556 (8th Cir., 1968), which arrives at the same result in a similar case.

In regard to defendant's statement that the plea of guilty was not intelligently and voluntarily made, the record discloses that he was represented by an experienced lawyer who had some doubts as to his guilt and consulted the boy and his parents at length. The defendant persistently insisted that he had committed the murder and, this factor, together with other evidence, convinced defendant's lawyer and parents that a plea of guilty should be entered as a conviction seemed indicated if the case were tried. The decision to plead guilty was made after a full discussion and explanation to defendant and his parents and appeared to be free of any coercion. The facts do not sustain either defendant's contention that the plea was involuntary or that he was inadequately represented by counsel.

No error appearing, the judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

This court now puts the stamp of constitutional validity upon the unique laws of Nebraska dealing with the institution of proceedings against juvenile offenders. Nebraska law permits each individual county attorney to determine, in each case, without any requirements or standards of any kind to control his discretion, whether a juvenile offender will receive the benefits of the Nebraska Juvenile Court Act, or will be charged and tried in the adult criminal courts.

Nebraska is apparently unique among the states in holding that its Juvenile Court Act was not intended to grant sole or exclusive jurisdiction of juvenile offenders, but instead created concurrent jurisdiction in the juvenile court and the adult criminal courts and

that "the county attorney is not limited by the Juvenile Court Act in any way in his duty to file the proper complaints against wrongdoers and prosecute the same." See, State v. McCoy, 145 Neb. 750, 18 N. W. 2d 101 (1945); Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240. In other states, statutes generally provide for exclusive jurisdiction in the juvenile court with provisions for waiver or transfer of jurisdiction to the adult criminal courts under specified standards or statutory conditions. In some states, statutes spell out the requirements for filing specified proceedings against juveniles in specified courts. In Fugate v. Ronin, *supra,* this court said: "We have examined the cited opinions of other courts dealing with this subject. They are of little use here because they deal with statutes relating to juveniles which are either entirely different than ours or much broader in their scope." The fact that our laws dealing with juveniles may be different than some other states certainly does not change the application of basic constitutional principles.

Even before Gault, the United States Supreme Court held that the determination of whether to transfer a child from the statutory structure of the juvenile court to the criminal processes of the adult courts is a "critically important" proceeding; that it must satisfy the basic requirements of due process and fairness; and that it is incumbent upon the juvenile court, after hearing, to accompany its waiver order with a statement of the reasons or considerations therefor. See Kent v. United States, 383 U. S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84. In Kent the statute placed exclusive jurisdiction in the juvenile court with provisions for a waiver to the criminal courts by the juvenile court after full investigation.

Of major interest on the issues involved here is the policy memorandum embodied in the appendix to the opinion of the court in Kent. The policy memorandum

states that the waiver statute provided no specific standards for the exercise of the important discretionary act of waiving jurisdiction from the juvenile to adult courts but left the formulation of such criteria to the juvenile judge. The memorandum then states: "An offense falling within the statutory limitations will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or—even though less serious—if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action." The policy memorandum then sets out a list of eight specific determinative factors which are to be considered by the juvenile judge in deciding whether the juvenile court's jurisdiction over an offense will be waived.

It is incomprehensible that the "critically important" decision as to which court will have jurisdiction over a juvenile offender should be surrounded with constitutional safeguards when the decision is made by a juvenile court as in Kent, but be completely free of constitutional restrictions if the same decision is made by any one of some 93 county attorneys, as in Nebraska. Where the decision as to what actions and which juvenile offenders shall be tried in the juvenile courts and which shall be tried in the adult criminal court is left to the uncontrolled discretion of each county attorney in this state, without any guidelines or standards for the exercise of such discretion, the possibility, indeed the probability, of arbitrary and discriminatory action is clearly apparent. The Nebraska juvenile court framework validates the "critically important" decision, whether it is made without any standards, or under any individual set of standards adopted or used by any of the 93 county attorneys of this state. Statutes permitting and sanctioning such arbitrary action in the case of juvenile offenders violate the principles of equal pro-

tection, as well as due process of law, under both the federal and state Constitutions. See Schornhorst, "The Waiver of Juvenile Court: Kent Revisited," 42 Ind. L. J. 583.

It is undisputed that the Legislature has the exclusive power to establish a juvenile court system and to determine the nature and extent of its jurisdiction in all cases. It is also undisputed that the Legislature may delegate the power to determine the jurisdictional matters involved here, provided appropriate standards are established to guide the exercise of that discretion. Currently no standards of any sort have been established by the Legislature. Where no standards are set and no record required, there is also no basis for judicial review of the "critically important" decision. There is currently pending in the Legislature a bill to establish such standards. We shall not comment upon the specific provisions of that bill nor indicate any opinion as to the advisability of the specific limitations and standards set out. Nevertheless, the Legislature now recognizes that the determination of whether the Juvenile Court Act shall or shall not be applied to juvenile offenders is a legislative function and if delegated, the power must be exercised within limits and under standards set by the Legislature. To date, the Nebraska Legislature has left it to each county attorney to decide when and under what circumstances the Nebraska Juvenile Court Act will be given effect, and which juvenile offenders will be subject to its jurisdiction and which will not.

This court has repeatedly reaffirmed the fundamental principle of our system of government that the rights of men are to be determined by the law itself and not by the let or leave of administrative officers. A child's rights should be determined under the same constitutional standards. A statute which in effect reposes an absolute, unregulated, and undefined discretion in an

administrative officer or body bestows arbitrary power and is an unlawful delegation of legislative power. The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion. See School Dist. No. 39 v. Decker, 159 Neb. 693, 68 N. W. 2d 354.

In the Decker case this court held that a statute which delegated to the Superintendent of Public Instruction the right to approve high schools for free high school tuition purposes was unconstitutional because there were no legislative limitations or standards. As this court stated: "* * * it would have been a simple matter for the Legislature, which had the power and authority, to have incorporated limits and standards in the statute. As a consequence, without questioning the motives or ability of the Superintendent of Public Instruction, there might well be approval of some high schools upon one standard and a withholding of approval from others by a qualification of such standard or by virtue of another. Thus, defendant had arbitrary power over the life or death of all high schools in this state * * *."

In the Decker case, this court quoted with approval the following language: "It is true, as this court has frequently said, the method and manner of enforcing a law must of necessity be left to the reasonable discretion of administrative officers, but an act of the Legislature which vests in such officers the discretion to determine what the law is, or to apply it to one and refuse its application to another in like circumstances, is void as an unwarranted delegation of legislative authority." People v. Yonker, 351 Ill. 139, 184 N. E. 228.

"All the legislative power of the State is vested in the General Assembly, and it may not divest itself of its proper functions or delegate its general legislative authority to the discretion of administrative officers so as to give to them the power to determine whether the law shall or shall not be enforced with reference to

individuals in the same situation, without fixed rules or limitation for the exercise of such discretion. The legislature cannot delegate arbitrary power to any executive officer to say that under the same circumstances one rule of law shall apply to one or some individuals and another rule to others." People v. Federal Surety Co., 336 Ill. 472, 168 N. E. 401. See, also, Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834; American Power & Light Co. v. Securities & Exchange Commission, 329 U. S. 90, 67 S. Ct. 133, 91 L. Ed. 103; Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346.

Under the current Nebraska juvenile court framework, the 93 county attorneys in this state, as a result of legislative silence, have been vested with unrestricted and unlimited power to determine whether the Nebraska Juvenile Court Act shall or shall not be applied, and whether it will be applied to one or to some juveniles but withheld as to others in like circumstances. The exercise of that power is clearly the exercise of legislative power since it determines in effect the nature and the extent of jurisdiction under the Nebraska Juvenile Court Act. The delegation of such arbitrary discretionary power without any standards to guide its application and without any indications of the purpose or the boundaries of the delegation is clearly an unconstitutional delegation of legislative power and authority in violation of Article II, section 1, and Article III, section 1, of the Constitution of Nebraska.

The majority holding here validates the denial of the benefits of the Juvenile Court Act to any child offender for any reason, or for no reason, at the discretion of 93 individual county prosecutors. Not only has the Legislature delegated that legislative power by its silence, but it has done so without delineating the policy to be followed nor the method of application, nor even the most rudimentary standards for its exercise. Constitu-

tional principles ought to be applied with an equal hand, whether the persons affected are adults or children.

STATE OF NEBRASKA, APPELLEE, V. KENNETH M. EARLYWINE, APPELLANT.
215 N. W. 2d 895

Filed March 21, 1974. No. 39231.

1. **Criminal Law: Trial: Evidence.** To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence.
2. ———: ———: ———. Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused.

Appeal from the District Court for Douglas County: JAMES P. O'BRIEN, Judge. Reversed and dismissed.

Richard J. Bruckner of Schrempp, Bruckner & Dinsmore, for appellant.

Herbert M. Fitle, Gary P. Bucchino, and Richard J. Epstein, for appellee.

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

NEWTON, J.

The defendant was charged with, and convicted of, trespassing under an ordinance of the City of Omaha, Nebraska. He appeals to this court on the ground that the evidence is insufficient to sustain his conviction. We reverse the judgment of conviction and dismiss the case.

A portion of the property of W. T. Grant's store was surrounded by a high steel fence with a gate which could be readily opened when not locked. The gate was nor-

mally locked at night with a cable and padlock. The store on the evening in question closed at 10 p.m. At about 10:43 p.m. the defendant was observed walking outside the fence and was apprehended when a police officer observed the gate was partially open. Another individual who was not apprehended was observed in the vicinity. Nothing had been damaged or removed from the store premises. It was not shown that the gate was locked on the evening in question. The cable and padlock were missing and were never found.

The officers at the scene stated there had been some snow, and pictures disclose a light slushy film on the ground. Two sets of footprints were observed inside the fence and pictures were taken by an experienced police technician. The officers stated that one set of footprints disclosed a ridged-sole pattern similar to that made by the sneakers worn by the defendant, but pictures taken to verify this were not produced. The technician stated that they did not "turn out." He had been a photographer of crime scenes for 13 years.

The evidence indicates the ridged footprints led to the gate from the inside, then there was about a 4-foot area outside the gate where there were no prints, "just wet slushy snow." From this 4-foot area the prints continued to where defendant was apprehended. There is no evidence of footprints leading up to or entering the premises through the gate or of the presence or absence of a trail of footprints running from beyond the gate in the direction from which the defendant had come.

The officer arrived at the scene when defendant was still in the immediate vicinity. Any prints he left were necessarily very fresh but there were none in the slushy 4-foot area in front of the gate. Even "slushy snow" will ordinarily disclose signs of very recently-made footprints.

The fact that defendant was found in the immediate

neighborhood and that there were footprints similar to defendant's on the store property constitute circumstances giving rise to a suspicion of guilt. Mere suspicion or speculation is not sufficient to sustain a conviction. "To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. * * * Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused." State v. Faircloth, 181 Neb. 333, 148 N. W. 2d 187.

The evidence submitted is not inconsistent with the hypothesis that the footprints inside the fence made by a common variety of sneaker were made by some other person and that the defendant was simply passing by. To say the least, it is reasonably susceptible of two interpretations.

We hold the evidence to be insufficient to sustain the conviction of defendant. The judgment of the District Court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. NATHANIEL JOHNSON, APPELLANT.
216 N. W. 2d 517

Filed March 21, 1974. No. 39233.

1. **Criminal Law: Juries: Constitutional Law: Ordinances: Trial.** It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury when Article I, section 6, of the Constitution of Nebraska, is not violated.

2. ———: ———: ———: ———: ———. Where a defendant is charged with a violation of a city ordinance, with a maximum authorized penalty of 6 months incarceration, he is not entitled to a jury trial under the federal Constitution.

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

Gallup & Matejka, for appellant.

Herbert M. Fitle, Gary P. Bucchino, and Richard J. Epstein, for appellee.

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

WHITE, C. J.

In this prosecution for unlawfully providing facilities for gambling under an Omaha city ordinance the defendant appeals, asserting that the evidence is insufficient to sustain a conviction; that he was entitled to a jury trial; and that he should have been granted a change of venue. The defendant received a jail sentence of 100 days and a fine of $500. We affirm the judgment and sentence of the District Court.

The defendant was shown by the State's evidence as the owner-manager of the establishment at 2725 Q Street, known as the "Club 500" in the City of Omaha, Nebraska. This was a two-room club with the front room having restaurant facilities and a pool table and the second room containing another pool table. At the time of the arrest of the defendant, he was standing just inside the doorway of the second room facing the pool table he admitted owning. The pool table had rags stuffed in the corners and a green felt cloth covering it. There were approximately 6 males around the table who were shooting dice. One of the six parties had in his possession $49 in cash and a pair of red dice in the other hand. Five one-dollar bills were lying

on the pool table which none of the parties claimed as their property. The essence of the charge is that the defendant provided gambling facilities. The defendant seems to rely upon State v. Wallen, 185 Neb. 44, 173 N. W. 2d 372, which holds that a conviction may not be sustained on the basis of mere possession of gambling devices. What we have said in the very brief review of the evidence leaves no doubt but that a trier of fact could come to the conclusion that the defendant here was providing gambling facilities and that they were being used. There was much more than mere "possession." There is no merit to this contention.

Under the city ordinance applicable, the maximum possible exposure to imprisonment of the defendant was 6 months. It was not required that he have a jury trial under the United States Constitution. Duncan v. Louisiana, 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491, recently reaffirmed in Baldwin v. New York, 399 U. S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437. The Nebraska statute, section 24-536, R. S. Supp., 1972, excludes criminal offenses of the nature involved in this case from the availability of a jury trial. In State v. Amick, 173 Neb. 770, 114 N. W. 2d 893, we held that: "It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury when Article I, section 6 of the Constitution is not violated. * * *." See, also, State v. Peterson, 183 Neb. 826, 164 N. W. 2d 649.

The defendant appears to contend that he was entitled to a "change of venue." Trial here was to the court without a jury. The defendant complains of prejudice because of a newspaper article which appeared in a local Omaha paper. What the defendant is really asserting is that the judge was disqualified in the case because of this fact. The assertion is tantamount to asserting that all the 12 District Judges in the District Court for

Douglas County would be disqualified because of an editorial appearing in a newspaper. There is no showing of an abuse of discretion by the trial judge in this particular case. There is obviously no merit to this contention.

The judgment and sentence of the District Court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD JONES, APPELLANT.
216 N. W. 2d 519

Filed March 21, 1974. No. 39116.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

T. Clement Gaughan and Paul M. Conley, for appellant.

Richard R. Wood and Norman Langemach, Jr., for appellee.

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

CLINTON, J.

Defendant was convicted of a second offense violation of a municipal ordinance prohibiting operating a motor vehicle while his operator's license was under suspension. The penalty provided by the ordinance was a mandatory jail term of 6 months. The sole issue is whether defendant was entitled to a trial by jury. The question has been determined adversely to the defendant's contention. See State v. Johnson, *ante* p. 535, 216 N. W. 2d 517. Affirmed. Rule 20.

AFFIRMED.

ROSALIE BRYANT, APPELLEE, V. ROBERT L. BRYANT, APPELLANT.
216 N. W. 2d 162

Filed March 21, 1974. No. 39245.

Divorce: Alimony: Judgments: Time. An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification.

Appeal from the District Court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Andrew J. McMullen, for appellant.

John C. Mitchell and Timothy D. Whitty of Mitchell & Beatty, for appellee.

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

BOSLAUGH, J.

This is an appeal from a summary judgment denying the defendant's petition for modification of an alimony judgment. The petition for modification alleged the remarriage of the plaintiff and other changes in circumstances.

The parties were divorced on July 21, 1965. The decree approved a property settlement agreement between the parties which was incorporated by reference in the decree. The agreement provided the defendant would pay $150 per month to the plaintiff for a period of 8 years commencing the month following the date all the children of the parties attained the age of 18 years, married, died, or became self-supporting. The question presented is whether the alimony award was subject to modification.

An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in

full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification. Ziegenbein v. Damme, 138 Neb. 320, 292 N. W. 921; Ball v. Ball, 183 Neb. 216, 159 N. W. 2d 297; Karrer v. Karrer, 190 Neb. 610, 211 N. W. 2d 116. The present statute, section 42-365, R. S. Supp., 1972, is not applicable to judgments entered prior to July 6, 1972. Karrer v. Karrer, *supra.*

There was no provision in the decree or the property settlement agreement to indicate the payments due the plaintiff were intended as anything other than "alimony in gross." There was no provision regarding the death of the parties or the remarriage of the plaintiff. The trial court made no reservation of the power to modify. We conclude the award was not subject to modification.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HILDRED EUGENE PALMER, APPELLANT.

216 N. W. 2d 178

Filed March 21, 1974. No. 39253.

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, MCCOWN, NEWTON, and CLINTON, JJ., and BUCKLEY, District Judge.

McCOWN, J.

The defendant entered pleas of nolo contendere to charges of robbery and burglary. He was sentenced to 10 to 15 years on the robbery charge and 2 to 5 years on the burglary charge, the sentences to run concurrently. The statutory range of sentence for robbery was 3 to 50 years and for burglary 1 to 10 years. The sole assignment of error on appeal is that the sentences were excessive.

At the time of entry of the defendant's pleas, a second burglary charge was dismissed. The presentence investigation report discloses that the defendant was 35 years of age at the time the crimes were committed. He has had previous felony convictions in the states of Oregon, Washington, and Oklahoma. He has spent approximately 10 years of his adult life in some type of penal or correctional institution.

A sentence imposed within statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Zeigler, *ante* p. 322, 215 N. W. 2d 80. There was no abuse of discretion here.

The judgment is affirmed.

AFFIRMED.

VERNON ENGEL, APPELLEE, V. DARRELL MEAD, APPELLANT.
216 N. W. 2d 718

Filed March 28, 1974. No. 39195.

1. **Motions, Rules, and Orders: New Trial: Continuances.** A denial of a party's motion for continuance of a hearing on a motion for new trial is not an abuse of sound legal discretion.
2. **Judgments: Appeal and Error.** A judgment of the trial court, in a case tried without a jury, will not be disturbed on appeal unless it is clearly wrong.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

Dean E. Erickson, for appellant.

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

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and COLWELL and WARREN, District Judges.

WHITE, C. J.

In a trial to the court without a jury, the plaintiff recovered a judgment for unpaid wages. The defendant assigns error in the failure to grant a continuance of a hearing on his motion for a new trial, and that he was not permitted to argue his case before the court. We affirm the judgment of the District Court.

The defendant's motion for a new trial asserted prior error in the rulings of the court, and did not allege or assert any grounds by way of newly discovered evidence. The purpose of a motion for a new trial under our procedure is to give the trial court an opportunity after judgment to review and correct alleged errors in the previous proceedings. The granting of a hearing on a motion for a new trial rests within the sound discretion of the trial judge. This would seem to be particularly true where the trial is to the court only. No authority is cited for the proposition that a court is required to conduct another "trial" when a motion for a new trial is filed after judgment has been rendered. Nevertheless, in the present case, the trial court did grant a hearing; and notice of the hearing was received by the defendant 1 week before the scheduled date. One day before the scheduled hearing the defendant filed a motion for a continuance which was unsupported by an affidavit. See section 25-1148, R. R. S. 1943, which requires an affidavit to support a motion for a continuance. It is apparent, without further discussion, that this contention of the defendant is wholly without merit.

Even though the trial was before the court only, the defendant asserts that the District Court erred in not permitting the defendant to give an opening statement and a closing argument to the court after the plaintiff was earlier permitted such responses. The record shows, first, that the plaintiff did not make any closing argument to the court, and apparently the defendant's argument is directed to the plaintiff's argument on the motion for a directed verdict or dismissal at the close of all the evidence. Secondly, the record does not disclose any *refusal* on the part of the court to permit the defendant's attorney to make an opening and a closing statement. He simply failed to request the court's permission to make such argument and statement. There is no requirement that a court assist counsel for either litigant in a case in making a determination as to whether he desires or requests permission to make an opening statement or final argument. This would be particularly true where the trial is before the court only. There is no merit to the defendant's contention.

The defendant assigns as error that the judgment is not supported by the evidence. This assignment of error is not argued and therefore is not properly before us for consideration. The record reveals, moreover, that the assignment is utterly without merit. The plaintiff's rate of pay during this entire time was $400 per month. The difference in the wages earned by the plaintiff at the undisputed rate paid, and the wages paid by the defendant was in the amount of $1,666.80. The defendant's theory in his answer and cross-petition was that the plaintiff had been paid in full through merchandise, by the use of the defendant's equipment without paying a reasonable rental value for such use, and by payment of wages to the plaintiff in cash rather than check. As to these defenses, there is either utterly no proof, or a direct conflict in evidence. This is a law action tried to the court without a jury, and the finding and judg-

ment of the trial court will not be disturbed on appeal unless clearly wrong. There is no merit to this contention.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

R. C. WALTERS COMPANY, INC., A CORPORATION, APPELLEE, V. ERNEST E. DEBOWER ET AL., APPELLANTS, IMPLEADED WITH TRAVELERS INDEMNITY COMPANY, APPELLEE.
216 N. W. 2d 515

Filed March 28, 1974. No. 39203.

1. **Insurance: Notice: Time: Words and Phrases.** The word immediate in referring to the notice required in an insurance policy means with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances of each particular case.
2. **Bonds: Notice: Time: Principal and Surety.** When a contractor's performance bond requires that notice of default by the contractor be given to the surety within a reasonable time and the failure to give such notice results in prejudice or damage to the surety, the principal cannot recover on the bond.

Appeal from the District Court for Colfax County: C. THOMAS WHITE, Judge. Affirmed.

A. C. Sidner of Sidner, Svoboda, Schilke & Wiseman, for appellants.

Crosby, Pansing & Guenzel and Theodore L. Kessner, for appellee R. C. Walters Co., Inc.

Peterson, Bowman, Coffman & Larsen and Kirk E. Naylor, Jr., for appellee Travelers Ind. Co.

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

NEWTON, J.

This is an action in which the County of Colfax, Nebraska, seeks to recover from the Travelers Indemnity Company on a performance bond guaranteeing performance by R. C. Walters Company of a contract to reappraise property in Colfax County for taxation purposes. A judgment was entered for the Travelers Indemnity Company which we affirm.

The bond contained the following provision: "PROVIDED, HOWEVER, IT shall be a condition precedent to any right of recovery hereunder that; in the event of any default on the part of the Principal, a written statement of the particular facts showing the date and nature of such default shall be immediately given by the Obligee to the Surety and shall be forwarded by registered mail to the Surety."

For convenience, the parties will be hereinafter referred to as "the county," "Travelers," and "Walters." The reappraisal contract was entered into on October 23, 1967, and approved by the State Tax Commissioner on November 14, 1967. Walters thereby agreed to classify and appraise all taxable property in the county, develop property record cards, submit a project report with supporting data, to meet monthly with the county to discuss progress and problems arising, to supply a performance bond, to complete the project within 24 months, to pay liquidated damages of $50 per day for noncompletion after the expiration of 24 months, to defend its appraisal, and to submit a written progress report each month and a final report on completion.

It is conceded that Walters never did complete performance of the contract. Negotiations between the county and Walters for completion of the contract and an extension of time continued until June 1971, but no further agreement was arrived at. This action was instituted in June 1971. In its answer the county declared Walters to be in default as of October 23, 1969. The

county had paid $42,700 on the contract. Written notice of default was given Travelers on September 28, 1971, and it first learned difficulties were being encountered in August 1971, after suit was filed. Travelers had requested status reports from the county on October 1, 1968, and January 23, 1969, and was informed the work was 45 or 50 percent completed. Later similar requests were ignored by the county. Prior to trial Walters had been declared bankrupt.

It was stipulated that evidence, if introduced by Travelers, would show that as of November 14, 1969, the appraisal work was 50 percent completed and had substantial value to anyone completing performance of the contract; that its value progressively declined and was of little, or no, value on September 28, 1971. There was uncontradicted evidence to the effect that Travelers, had it employed another contractor to complete performance, might thereby have salvaged the completed work.

It is evident that the county failed to give written notice of default as required in the bond until September 28, 1971, almost 2 years after actual default by Walters occurred. The county seeks to justify this delay because during this period it was seeking to negotiate with Walters for completion of the appraisal work and did not consider the contract to be in default until suit was filed. It is true that the bond sets out the contract was to be performed by Walters on or before 2 years from its date and with the lapse of that period of time, Travelers should have been aware the contract was either completed or in default. The court barred evidence of the payment of subsequent premiums which would have been material on this point but no error is assigned on this ground. Consequently the record does not disclose that Travelers had actual knowledge of the default prior to the filing of suit and receipt of the written notice of default.

The only issues remaining deal with the timeliness of the written notice of default and possible prejudice resulting from delay. Both parties concede that the requirement in the bond that notice of default "be immediately given" means within a reasonable time. "The word 'immediate' in referring to the notice required in an insurance policy means with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances of each particular case." Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co., 177 Neb. 287, 128 N. W. 2d 773. See, also, 17 Am. Jur. 2d, Contractors' Bonds, § 30, p. 212; Haddock Constr. Co. v. Wilber, 178 Ore. 659, 169 P. 2d 599.

When a contractor's performance bond requires that notice of default by the contractor be given to the surety within a reasonable time and the failure to give such notice results in prejudice or damage to the surety, the principal cannot recover on the bond. See, Knight & Jillson Co. v. Castle, 172 Ind. 97, 87 N. E. 976; Springfield Cooperative Freeze Locker Plant, Inc. v. Wiggins, 115 Vt. 445, 63 A. 2d 182; Haddock Constr. Co. v. Wilber, *supra;* Winston Corporation v. Continental Casualty Co., 361 F. Supp. 1023 (1973); Coleman Capital Corp. v. Travelers Indemnity Co., 443 F. 2d 47 (2d Cir., 1971).

The record discloses that the work completed by Walters was of material value at the time Walters defaulted but progressively declined in value with the passage of time and was of little, if any, value at the time notice of default was given to Travelers. Had Travelers been given prompt notice of the situation it could likely have arranged for completion of the work by Walters or another appraisal firm and reduced the damages sustained. The period of 22 months elapsing between default and notice of default to Travelers constituted an unreasonable delay which bars recovery.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in result.

ROBERT P. FORD, APPELLEE, V. LINDA M. FORD, APPELLANT.
216 N. W. 2d 176

Filed March 28, 1974. No. 39206.

1. **Divorce: Infants: Parent and Child: Right to Counsel.** When it appears that minor children in a divorce action may have interests, independent of the parents, in the outcome of the litigation, the District Court should ordinarily appoint counsel to represent them under section 42-358, R. S. Supp., 1972.
2. **Divorce: Infants: Parent and Child: Evidence: Paternity.** Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock.

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

William L. Monahan, John F. Brennan, and Valerie Scott, for appellant.

Daniel F. Murphy and Jerome P. Grossman of Grossman, Sloma, Murphy & Brown, for appellee.

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

WHITE, C. J.

This is a divorce action wherein the only real issue presented to the District Court was the paternity of the two minor children. The District Court found that the two children were illegitimate and denied relief by way of child support and alimony. We reverse the judgment

of the District Court and remand the cause for a retrial upon the issue of paternity.

Section 42-358, R. S. Supp., 1972, provides that: "The court may appoint an attorney to protect the interests of any minor children of the parties. Such attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify on matters pertinent to the welfare of the children. The court shall by order fix the fee, including disbursements, for such attorney, which amount shall be taxed as costs and paid by the parties as ordered, unless the court finds the party responsible is indigent and orders the county to pay." It is elementary that minor children in a divorce action are under the jurisdiction of the court and become wards of the court with an independent duty of the court to protect their interests. It is clear that the District Court, either on motion or sua sponte, may appoint legal counsel to protect the interests of any minor children of the parties to a divorce action. Pieck v. Pieck, 190 Neb. 419, 209 N. W. 2d 191.

We review this issue de novo. We realize that in the trial of most divorce actions, adequate representation by counsel for the parties, and the independent investigative powers and duties of the court, together with its continuing jurisdiction over minor children, adequately protects the children's interests and renders unnecessary the extra expense and delay of cases by court appointment of counsel to independently represent the children. However, it is abundantly clear that this action is indicated in the present case. This opinion is based upon two fundamental reasons appearing in this case. First, a decision as to legitimacy is one in which the two children, independent of the dispute between the parents, have a vital and enduring interest affecting their own life, which requires that they be independently protected by the court and the representation of counsel. The children's interests may be adverse

to both parents in the case. We observe that it is not only the stigma attached to the determination of illegitimacy, but a much deeper impact upon the children as they grow older as to their identity, the procuring of their necessary support from the real father, inheritance rights, and many others. Second, the evidence in this case is inadequate, under the existing standards, to sustain a finding of illegitimacy. Further exploration of areas of competent evidence by adverse representation may require a different determination by the District Court. The evidence establishing and supporting the finding of illegitimacy is persuasive but does not reach the standard of proof required in a paternity case. Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock. § 42-377, R. S. Supp., 1972; Schmidt v. State, 110 Neb. 504, 194 N. W. 679; In re Estate of McDermott, 125 Neb. 179, 249 N. W. 555; In re Estate of Oakley, 149 Neb. 556, 31 N. W. 2d 557; Hudson v. Hudson, 151 Neb. 210, 36 N. W. 2d 851.

A brief sketch of the evidence will be recited to show the evidentiary problem involved. There is evidence indicating that for extensive periods of time prior to the separation there had been no sexual relations between the parties. Robert testified that the last time he had sexual relations with Linda was before he was involved in a motorcycle accident on May 27, 1972. Robert suffered a leg injury in that accident. After this accident, the parties while residing in the home of Robert's sister, Jan Paul, slept apart. Then on June 14, 1972, Linda left for Hawaii to be with one Mike Pechar. There is evidence that Linda menstruated just before leaving for Hawaii. Linda remained in Hawaii for approximately 1½ months. She returned to Ne-

braska on August 9th or 10th, 1972, and it was about 6 days later that Robert learned that she was pregnant. Linda gave birth to twin girls on March 27, 1973, with a pregnancy duration of approximately 286 days, whereas the average duration of pregnancy is around 266 days. 5B Lawyers' Medical Encyclopedia, § 37.2a, p. 10. Jan Paul, Robert's sister, stated that she had been told by Linda that Robert was not the cause of Linda's pregnancy. Linda, however, asserts that she made no such admission to Jan Paul. According to Linda, Robert is the father of her twin children, conception having occurred in June of 1972, just prior to the time that Linda left for Hawaii to be with Mike Pechar. The most significant aspect of the evidentiary picture in this case is in the lack of blood tests and expert testimony thereon, which might be highly significant in establishing that Robert was *not* the father of the children. Houghton v. Houghton, 179 Neb. 275, 137 N. W. 2d 861. Moreover, there was no medical evidence or expert testimony with relation to the issues of the duration of the term of pregnancy, the medical condition of Linda during the period of the pregnancy, the condition and maturity of the twins at the time of birth, and possibly significant testimony as to Robert's partial sterility. Testimony touching on these areas was received by the trial judge but it was obviously hearsay and wholly incompetent to sustain the necessary burden of proof required in a case of this type. The trial court found that the respondent, Linda, "had failed to prove that the petitioner was the father of her children born during the marriage." We do not pass upon the question of the proper weight to be given to the testimony that was introduced or the question of whether the trial judge applied an incorrect standard as to the burden of proof. It is apparent that the competent evidence introduced at the trial did not reach the level of being clear, satisfactory, and convincing evidence rebutting

the presumption of legitimacy. It is clear since the independent interests of the children as to the determination of their legitimacy and paternity are concerned, that this court should order a retrial.

In the District Court there was no issue presented as to the granting of the divorce. Consequently, on remand the issues should be limited to the question of paternity and legitimacy and any consequent issue of award of child support that may follow. The record almost conclusively supports a finding of indigence of both parties and there is no evidence that will support an award of alimony.

The judgment of the District Court is reversed and the cause remanded for a new trial with directions to the District Court to appoint counsel in conformity with section 42-358, R. S. Supp., 1972, and to limit the issues on retrial in conformity with the opinion herein.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., concurs in result.

PAUL RHODES, APPELLANT, V. NELLA T. JOHNSTONE ET AL., APPELLEES.

216 N. W. 2d 168

Filed March 28, 1974. No. 39217.

1. **Appeal and Error: Records: Evidence: Trial.** Proceedings in error are brought to determine if the final order of the inferior tribunal is in accordance with law. Such proceedings are based on the record of the proceedings before the tribunal; and new evidence may not be introduced to show errors of law before the tribunal.
2. **Appeal and Error: Records: Evidence.** Any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions.
3. **Appeal and Error: Records: Evidence: Pleadings.** In the absence of a bill of exceptions, the only issue on appeal is the sufficiency of the pleadings to support the judgment.

Appeal from the District Court for Box Butte County: HUGH STUART, Judge. Affirmed.

W. H. Kirwin, for appellant.

Reddish & Curtiss and A. James Moravik, for appellees.

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

WHITE, C. J.

This controversy concerns a will contest involving the estate of Ethel M. White, a resident of Box Butte County, Nebraska. Error is assigned in the denying of admission to probate of a will executed on December 19, 1962, and in admitting to probate a will of the testatrix dated November 2, 1962. The county court denied the admission to probate of the will of December 19, 1962, and on error proceedings in the District Court, the District Court affirmed the judgment of the county court. We affirm the judgment and order of the District Court.

The testatrix, Ethel M. White, executed a will on November 2, 1962. This will made 22 specific bequests, together with certain other provisions, and gave the residue of the property to Nella T. Johnstone, appellee herein. She executed a codicil to that will, on December 17, 1962, and added an additional specific bequest and some instructions with respect to a bequest to the Episcopal Church in Alliance, Nebraska. On December 19, 1962, 2 days after the date of the codicil which merely amplified the will of November 2, 1962, she executed a new will making three specific bequests and leaving all the residue of her property to Paul Rhodes, the attorney who drew the will. The record shows that a trial and hearing was held with reference to the admission of the wills involved and that the will of December 19, 1962, was denied admission to probate. There

was no bill of exceptions from the county court to the District Court, and there is no bill of exceptions from the District Court to the Supreme Court herein. There was no praecipe for a bill of exceptions filed in either court.

The difficulty with the appellant's contentions is that this is an error proceeding taken from the county court's judgment to the District Court. No appeal by the appellant was ever filed and no bill of exceptions was requested or prepared or filed. All the appellant's assignments of error relate to the findings of the county judge after the hearing and the introduction of evidence with reference to the probate of the two wills. It is settled law that in an error proceeding, as distinguished from an appeal, the sole issue is the determination of whether the final order of the inferior tribunal is in accordance with the law. This determination must be made solely from the record of the proceedings before the inferior tribunal, the county court in this case. And where evidence is required to establish any alleged error of law by an inferior tribunal, it must be presented in the District Court by a bill of exceptions. New evidence may not be introduced in the District Court to show that errors of law occurred in the proceedings before the tribunal. Dlouhy v. City of Fremont, 175 Neb. 115, 120 N. W. 2d 590 (1963); In re Estate of Vance, 149 Neb. 220, 30 N. W. 2d 677 (1948); Dovel v. School Dist. No. 23, 166 Neb. 548, 90 N. W. 2d 58 (1958). The appellant neither requested, presented, nor filed a bill of exceptions containing the evidence introduced before the county court in these proceedings.

We have repeatedly held that in the absence of a bill of exceptions no question will be considered, a determination of which requires an examination of the evidence produced in the District Court, and that any assignment of error, as here, that requires an examination of evidence cannot prevail in the absence of a bill of

exceptions. Brown v. Shamberg, 190 Neb. 171, 206 N. W. 2d 846 (1973); Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N. W. 2d 396 (1953). The only question therefore presented on this appeal is the sufficiency of the pleadings to support the judgment. State ex rel. Hartman v. Weiss, 181 Neb. 685, 150 N. W. 2d 264 (1967); Goger v. Voecks, 156 Neb. 696, 57 N. W. 2d 621 (1953); Jones v. City of Chadron, 156 Neb. 150, 55 N. W. 2d 495 (1952). It is not suggested or argued that the pleadings do not support the judgment of the county court admitting the will of November 2, 1962, to probate. The transcript reveals that the petition for the probate of the November 2, 1962, will alleged the death of Ethel M. White on February 4, 1969, a resident of Box Butte County, Nebraska; that she left a last will and testament and codicil, which were being offered for probate; that there was property subject to probate; and further that there were no heirs-at-law. The transcript reveals that an order for hearing was entered and that notice thereof was given as provided by law. These pleadings amply support the order of the county court admitting the November 2, 1962, will to probate and directing the issues of letters testamentary to the appellee Nella T. Johnstone.

The assignments of error asserted by the appellant may not be considered by this court, and the judgment and order of the county court as affirmed by the District Court are correct and are affirmed.

AFFIRMED.

IN RE JOINT APPLICATION OF THE NEBRASKA PUBLIC POWER DISTRICT AND NORRIS PUBLIC POWER DISTRICT REQUESTING APPROVAL OF A JOINT APPLICATION OF WHOLESALE SERVICE AREA AGREEMENT NUMBER 3.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, V. NEBRASKA PUBLIC POWER DISTRICT ET AL., APPELLEES.

216 N. W. 2d 722

Filed March 28, 1974. No. 39220.

1. **Public Policy: Legislature.** Public policy in matters within the legislative powers of government is for the Legislature to determine.
2. **Constitutional Law: Statutes.** If legislation violates no constitutional provision the courts have no authority to declare it void because they might doubt its wisdom.
3. **Public Service Commissions: Electricity: Contracts: Public Utilities: Administrative Law.** Before the Nebraska Power Review Board may approve an agreement between suppliers of energy under the provisions of section 70-1002.01, R. R. S. 1943, it must have before it evidence which will support affirmative finding that under the terms of the agreement it can be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the area and customers to be served.
4. **Public Service Commissions: Electricity: Contracts: Public Utilities: Constitutional Law: Administrative Law.** The statutory provision requiring determination by the Nebraska Power Review Board of whether the "proposed agreement or amendment can reasonably be expected to provide a reliable wholesale power supply at a reasonable cost for the area" is a sufficiently definite standard to guide the Nebraska Power Review Board in the exercise of the delegated legislative power of determining the facts on which approval of agreements under section 70-1002.01, R. R. S. 1943, are to be founded. Accordingly the delegation in this instance is not unconstitutional.
5. **Administrative Law: Trial: Evidence.** An administrative agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their offices.
6. **Witnesses: Trial.** An expert witness may usually give his expert opinion on the basis of facts within his own knowledge and to which he has testified.

Appeal from the Nebraska Power Review Board. Affirmed.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellants.

Barlow, Watson & Johnson and Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

Mattson, Ricketts, Davies, Stewart & Calkins, for amicus curiae.

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

CLINTON, J.

This is an appeal from an action of the Nebraska Power Review Board approving upon the joint application of the Nebraska Public Power District and Norris Public Power District an agreement between the two districts limiting the areas in which and the present and future customers to whom the respective districts would furnish electrical energy at wholesale. The agreement was entered into pursuant to the provisions of Laws 1971, L.B. 349, now sections 70-1002.01, 70-1002.02, 70-626.01, and 70-1001, R. R. S. 1943. At the hearing before the board the City of Lincoln, the City of Fairbury, and the City of Crete made appearances, cross-examined witnesses for the applicants, and presented evidence on their own behalf. At the conclusion of the hearing the board approved the agreement and the three named municipalities each appealed.

Under the terms of the agreement Nebraska promised to limit its wholesale service in Lancaster, Gage, Saline, Jefferson, and Thayer Counties to 31 specifically named municipal electric systems which include the three appellants. Norris agreed to limit its service to the named counties excluding the specifically named municipalities.

Each of the three municipalities owns and operates its own electrical generating and distribution system. The City of Lincoln presently purchases part of its energy from Nebraska and sells energy to Nebraska under agreements for exchange of power. Fairbury generates its own power and also purchases power from the Bureau of Reclamation. Crete generates its own power and presently purchases from neither of the districts. The municipalities object to approval of the agreement because they do not want to become "captive customers" and desire to preserve their option in the future to negotiate with either district for power. Norris as well as Nebraska has the capacity for serving all three municipalities either directly or through their statutory rights of interconnection and wheeling.

Four issues are presented on this appeal: (1) Whether L.B. 349 is unconstitutional and void because it violates Article X, section 3, of the Nebraska Constitution, and whether it is contrary to the public policy of Nebraska as expressed in other statutes. (2) Whether L.B. 349 is absolutely void because of inherent and irreconcilable conflicts in the statute. (3) Whether L.B. 349 is unconstitutional and void because it delegates legislative power to an administrative body without designating adequate standards governing the delegation. (4) The sufficiency of the evidence to sustain the findings of the board that the statutory criteria for approval of the agreement were met.

We hold the statutes constitutional and affirm the finding of the board.

L.B. 349 provides as follows: "All suppliers of electricity, including public power districts, public power and irrigation districts, municipalities, electric membership associations, and cooperatives, shall have authority to enter into written agreements with each other limiting the areas in which or the customers to which a party to the agreement shall provide or sell electric

energy at wholesale. Wholesale electric energy is hereby defined as electric energy which is sold to another agency for resale to the ultimate user, hereafter referred to as the retail customer. Before such agreements shall become effective, they shall be submitted to and approved by the Nebraska Power Review Board created by section 70-1003. It is declared to be the purpose of this section to promote and encourage the making of such agreements. Such agreements may be amended by the parties thereto at any time, and such amendments shall require the approval of the Nebraska Power Review Board. When requested to approve such an agreement or amendment thereto, the Nebraska Power Review Board shall consider whether or not the proposed agreement or amendment can be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the area covered by the agreement. It may make such investigation as it determines is necessary and hold a hearing if it determines one to be desirable. At the conclusion of its investigation, the Nebraska Power Review Board shall approve the agreement or amendment unless it determines that it cannot be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the area covered. Such agreements when approved by the Nebraska Power Review Board shall not be binding upon other suppliers that are not parties to the agreement and the Nebraska Power Review Board shall have no authority to impose conditions that will be binding or applicable to other suppliers that are not parties to such agreements. Such agreements shall not be considered as establishing service areas within the meaning of Chapter 70, article 10." § 70-1002.01, R. R. S. 1943.

"No supplier shall offer, provide or sell electric energy at wholesale in areas or to customers in violation of any agreement entered into and approved by the Nebraska

Power Review Board pursuant to section 70-1002.01." § 70-1002.02, R. R. S. 1943.

Section 3 of the act amended section 70-626.01, R. S. Supp., 1969, which previous to its amendment required: ". . . public power district[s] . . . to sell electrical energy [to municipalities] at wholesale." The amendment placed limitations on this mandatory direction by providing: "if such sale is not in violation of an agreement of the generating power agency approved by the Nebraska Power Review Board."

Section 4 of the bill amended section 70-1001, R. R. S. 1943, by extending the policy of the act to "wholesale" as well as retail sales of electrical energy.

We treat the issues in the order in which we have listed them. (1) Article X, section 3, of the Constitution of Nebraska, provides in part as follows: "The Legislature may by law require all public utilities and common carriers to exchange business through physical connections, joint use, connected service, or otherwise." The appellants' argument for unconstitutionality based on the above provision is somewhat abstruse in that they combine it with contentions that L.B. 349 is contrary to public policy because section 70-1001, R. R. S. 1943, establishes a policy of "adequate electric service at as low overall cost as possible," which they claim L.B. 349 will defeat because it eliminates competition; that the act impinges on other sections of the statute which require interconnection, wheeling, and sale of surplus power; and that the agreement itself is void because it creates a monopoly contrary to public policy.

We find the appellants' position is not well taken for two reasons: (a) The constitutional provision in question is couched in permissive language. It authorizes the Legislature to act, but does not compel it. (b) The interwoven arguments founded upon alleged conflicting statements of public policy, policies against monopoly, and ambiguities concerning which no issue presently

exists may all be answered by the following principles. Public policy in matters within the legislative domain is for the Legislature to determine. City of O'Neill v. Consumers Public Power Dist., 179 Neb. 773, 140 N. W. 2d 644. If legislation violates no constitutional provision this court has no authority to determine its wisdom. State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63.

(2) The appellants assert there are direct conflicts between the provisions of sections 1 and 2 of L.B. 349 which are not susceptible of resolution by construction and therefore the statute is void. They point to the provision of section 1 which states that the agreement between the suppliers to limit territory and customers shall not be binding upon other suppliers which are not parties to the agreement. It is claimed this conflicts with section 2 which says: "No supplier shall offer, provide or sell electric energy at wholesale in areas or to customers in violation of any agreement entered into and approved by the Nebraska Power Review Board pursuant to section 1 of this act (now § 70-1002.01)."

We do not believe there is any irreconcilable conflict between the two sections. It seems fairly apparent to us that the supplier referred to in section 2 is one who is a party to the agreement. One who is not a party to an agreement simply cannot violate it. The legislative discussion during the consideration of the bill confirms our construction. In construing a legislative act, if more than one reasonable construction is possible, that construction which sustains legislation will be adopted. Bodenstedt v. Rickers, 189 Neb. 407, 203 N. W. 2d 110.

(3) Appellants contend the statute is unconstitutional because it delegates legislative power to the board without providing for sufficiently clear standards to guide the exercise of the power. The substance of the pertinent portion of the statute in question is the following:

"Board shall consider whether or not the proposed agreement or amendment can be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the area." § 70-1002.01, R. R. S. 1943. Appellants argue that the term "reasonable cost" does not supply a reasonable guideline and an understandable fact standard. They make no similar contention with reference to the standard of providing "a reliable" power supply. Appellants further contend the statute directs and authorizes the board to approve such agreements in the absence of any evidence supporting a factual finding on "reasonable cost."

We do not construe the statute as authorizing the board to act in the absence of any evidence to support a finding that the statutory criteria of reliability of supply and reasonableness of cost have been met. The statute, section 70-1002.01, R. R. S. 1943, directs what the board shall consider when asked to approve such an agreement, namely, reliability of supply and reasonableness of cost. It may make "such investigation *as it determines is necessary.*" It may hold a public hearing. "At the conclusion of its investigation," it shall approve "unless it determines that it cannot be reasonably expected" to provide a reliable supply at reasonable cost. The foregoing provision contemplates, in our view, that the board will not approve an agreement in the absence of some evidence either gathered as a result of its own investigation or produced at a public hearing, which evidence will enable it to find affirmatively that the criteria are met.

There is another reason why it is clear the Legislature intended that the board must have evidence before it can act. The statute provides for an appeal to this court "in the same manner as appeals are taken from decisions of the State Railway Commission." § 70-1016, R. R. S. 1943. If there is no evidence before this court on appeal there would be no way for us to

carry out our duty to determine whether the requirements of the controlling statute have been followed and whether substantial evidence supports the finding. If this court were by the statute required to make a determination either in the absence of evidence or de novo on the record that would obviously constitute a clear and unconstitutional invasion of the legislative domain. City of Auburn v. Eastern Nebraska Public Power Dist., 179 Neb. 439, 138 N. W. 2d 629; Cornhusker P. P. Dist. v. Loup River P. P. Dist., 184 Neb. 789, 172 N. W. 2d 235; City of Schuyler v. Cornhusker P. P. Dist., 181 Neb. 704, 150 N. W. 2d 588; Williams v. County of Buffalo, 181 Neb. 233, 147 N. W. 2d 776; Keller v. Potomac Electric Power Co., 261 U. S. 428, 43 S. Ct. 445, 67 L. Ed. 731. We cannot construe the statute in such a way as to attribute to the Legislature an intent to make a delegation of legislative power to this court. The language of the statute does not support any such construction.

We accordingly construe the statute to require that before the board can make the factual determinations required it must have before it evidence produced by its own investigations or otherwise that will support its fact findings.

Is the criteria of "reasonable cost" a sufficiently definite standard? In 1 Am. Jur. 2d, Administrative Law, § 118, p. 926, we find the following statement: "The policy of the lawmaking body and the standards to guide the administrative agency may be laid down in very broad and general terms which get precision from the technical knowledge or sense and experience of men and thereby become reasonably certain. The purpose of the statute, the requirements it imposes, and the context of a particular provision may show that the broad standard it establishes does not require a construction as comprehensive as the words alone permit and is not so vague and indefinite as to amount to a complete

absence of a standard." It is to be borne in mind in this case that the term "reasonable cost" refers to a determination of the reasonableness of charges for electrical energy, in other words, the reasonableness of utility rates. There are well-established general principles as to the manner in which such determinations are made. 73 C. J. S., Public Utilities, § 13, p. 1008, § 17, p. 1013, § 25, p. 1032; 1 Priest, Principles of Public Utility Regulation, pp. 45, 139.

The Legislature has heretofore delegated to administrative bodies the duty of determining "feasibility" of formation of public power districts and this court has approved the sufficiency of such a standard. State ex rel. Wright v. Lancaster County Rural P. P. Dist., 130 Neb. 677, 266 N. W. 591. In the present context the words "reasonable cost" acquire certainty from the "technical knowledge or sense and experience of men." It may be that one element of cost of service, namely, return on rate base, may be determined somewhat differently in the case of a utility which is a creature of the Legislature than in the case of one which has stockholders to whom a return must be made. That difference, if it exists, would no doubt lie in the purpose for which the Legislature authorized creation of the utility and in the Legislature's policy statement as to rates. That question, of course, is not before us in this case, but we mention it simply because such a difference would not, in our opinion, make the standard of "reasonable cost" uncertain. It would merely require a somewhat different determination on one element of the cost of service. We hold that the statutory provision requiring determination by the board of whether the "proposed agreement or amendment can be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the area." is a sufficiently definite standard to guide the board in the exercise of the delegated legislative power of determining the

facts on which approval of agreements under L.B. 349 are to be founded. We would point out that the power here delegated is not a rule or regulation-making power, but is solely a delegation of power to determine facts upon which the exercise of a proprietary function of a subdivision of government depends. It appears to us entirely reasonable that in such cases a less strict standard than in the case of delegation of power to make rules or regulations is constitutionally acceptable.

(4) Does the evidence support the findings of the board that the agreement will provide the affected customers and area with "a reliable wholesale power supply at a reasonable cost"?

The board in this case did not make an investigation of its own, nor introduce any evidence into the record, nor take judicial notice of any fact. The evidence was introduced by the two districts which were parties to the agreement. The deputy general manager of Nebraska testified. He is an electrical engineer by profession and had been employed by Nebraska for 24 years in a number of capacities. He described in considerable detail the utility systems involved, including planned construction, and introduced supporting documentary evidence. He described the arrangements with various customers and potential customers and their energy sources, and gave as his own conclusion that reliable service would be supplied under the agreement.

He testified that Nebraska's rates are "a cost of service rate. In other words, the rate structure is so designed that it returns the full cost of the operating of the District." He then rendered his opinion that the "area covered by this agreement can be provided reliable wholesale power at a reasonable cost."

Representatives of the appellants, operating personnel rather than counsel, then cross-examined the witness. The cross-examination was, for the most part, directed to matters other than the question of "reasonable cost."

Insofar as it was directed to rates, it brought out the fact that there were variables which affected rates dependent upon conditions of service. Redirect examination established that such variances were related to the cost of service under particular conditions. On cross-examination by the board of this witness, some details of determination of cost of service were brought out.

The general manager of Norris testified. He had been the manager of the district since 1947. He stated that he had heard the Nebraska manager's testimony and agreed with it. He had taken part in the negotiations for the agreement. He then testified without further foundation: "Q In your opinion, Mr. Trussell, can the Norris District be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the wholesale service areas assigned to it in the application that is being heard? A Yes, it can. Q And, in your opinion, can Nebraska District be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the areas assigned to it in this Wholesale Service Area Agreement? A Yes." Cross-examination of this witness did not relate to the question of reasonableness of cost nor the foundation for his opinion testimony.

Statements were then made by representatives of the three municipalities. The primary thrust of the statements was that they objected to the agreement solely because it prevented them from buying from Norris in the future should they ever desire to do so. One of these representatives had particular objection to an element in the rate structure in Nebraska referred to as the "blend eliminator." One of these representatives testified that he was familiar with the Nebraska rate structure but not that of Norris. They introduced no evidence to contradict the conclusions of the witnesses for Nebraska and Norris.

This is a contested case within the meaning of Chapter

84, article 9, R. R. S. 1943, which prescribes rules for administrative agencies. See § 84-901(3), R. R. S. 1943. Section 84-914, R. R. S. 1943, provides in part that in contested cases: "(1) An agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence; Provided, that any party to a formal hearing before such agency, from which a decision may be appealed to the courts of this state, may request that such agency be bound by the rules of evidence applicable in district court by delivering to such agency at least three days prior to the holding of such hearing a written request therefor . . . ." This section further provides: "(4) Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence. (5) . . . An agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it."

Although the opinion testimony of the two witnesses for the contracting parties, especially that of the Norris representative, was minimal on foundation, we cannot say that it was as a matter of law without probative value within the meaning of section 84-914, R. R. S. 1943. It is clear that the two witnesses for the parties were qualified by training and experience to give their expert opinions. It is further clear that their opinions were based on facts within their own knowledge. This is usually sufficient to permit the admission of the opinion. Mathine v. Kansas-Nebraska Nat. Gas Co., Inc., 189 Neb. 247, 202 N. W. 2d 191. The record makes it clear that the appellants did not at the hearing intend to challenge the conclusions of the witnesses for the contracting parties.

The League of Nebraska Municipalities has filed a brief amicus curiae in this case. That brief, as do those of the appellants, makes strong arguments attacking the wisdom of making municipalities "captive customers" of one power district rather than giving them the option if they wish to bargain with both. The power of the Legislature is plenary. As against the state the districts cannot invoke either the contract clause or the Fourteenth Amendment to the Constitution of the United States. City of O'Neill v. Consumers Public Power Dist., *supra;* City of Trenton v. New Jersey, 262 U. S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A. L. R. 1471. The Legislature may any time it wishes undo what the districts have done and which has been approved by the board. The arguments must be directed to the Legislature and not to this court.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein because I am convinced that a fair appraisal of the situation reveals the sole purpose of the agreement between Norris Public Power District and Nebraska Public Power District is to limit competition and institute a captive market. Such application of our statutes is contrary to public policy.

Section 70-625.02, R. R. S. 1943, states: "It is declared to be the policy of the State of Nebraska that electric transmission facilities and interconnections which are defined as being electric lines having a rating of thirty-four thousand five hundred volts and higher will be provided and made available to all power agencies so as to result in the lowest possible cost for the transmission and delivery of electric energy over the transmission and interconnected facilities of any public power district, public power and irrigation district, municipality, governmental subdivision, or nonprofit electric cooperative corporation."

It certainly cannot be said that the above-declared policy of the State of Nebraska is being effectuated by limiting a municipality's access to a source of power through a wholesale sale agreement. It is patently apparent an opposite result is being achieved.

Section 70-1001, R. R. S. 1943, provides in part: "* * * it is the policy of this state to avoid and eliminate conflict and competition * * * in furnishing electric energy to retail and wholesale customers, to avoid and eliminate the duplication of facilities and resources which result therefrom, and to facilitate the settlement of rate disputes between suppliers of electricity." This should obviously be interpreted as follows: "* * * it is the policy of this state to avoid and eliminate conflict and competition * * * (in order) to avoid and eliminate duplication of facilities and resources which result therefrom, and (in order) to facilitate the settlement of rate disputes * * *."

That is, the purpose of these statutes is not to avoid conflict in competition per se, but rather to avoid those particular sorts of conflict and competition which cause costly and unnecessary duplication of facilities and impede the settlement of rate disputes.

In order for any particular application of these statutes to accord with the public policy, it is necessary that such application conform to the purpose of these statutes outlined above. The public policy which serves as the underpinning for such anti-competition agreements is very limited. It is a carefully defined exception to the rule that agreements which limit competition are normally contrary to public policy. Obviously it follows that an application of these statutes which serves to destroy the normal competitive market system, while not furthering the announced purposes of these statutes, is void as contrary to our public policy. In most instances the general public is being adequately served before the implementation of the limiting agree-

ment. Consequently, the agreement is not serving the interest of the general public but rather that of the power companies.

A limiting agreement of this sort cannot be held to further the purposes declared by our Legislature unless there is evidence indicating that retention of the present form of service will result in costly and unnecessary duplication of facilities or impede settlement of rate disputes. In this case, the evidence is definitely otherwise. Diversity of sources, an ability to shop around, so to speak, becomes important to a municipality operating its own facility. Only by matching its particular consumption pattern with that of several suppliers can it be assured of the lowest possible cost per unit of power purchased. It is apparent that as each competing source of supply is eliminated the municipality faces a much more difficult task in minimizing the cost of electrical energy to its retail customers.

It is here argued that wholesale agreements actually hold down costs. This definitely is not true in the present situation. In Crete for example, Norris is not allowed to sell to, or buy from, the city even though its lines are already close by, and actually interconnected into the city through the NPPD system. These lines are a necessary length in the power grid rather than a duplication of facilities, and will be utilized whether Crete is able to purchase from Norris or not. It makes little sense to say there is a saving of money when the necessary facilities for purchasing a district's power are already in existence and are maintained by the district. It should be noted that this situation is not only common to the city of Crete, but is also found in many other municipalities throughout the state.

Many of the evils that led to the passage of antitrust legislation are present where public power districts have agreed to divide their service areas. Trade area agreements rarely have any purpose other than to suppress

competition and correspondingly increase costs. Through such an agreement a public supplier acquires monopolistic power and is able to manipulate rates while at the same time dictating terms of sale.

I cannot agree with the majority opinion that there is evidence sufficient to sustain a finding that wholesale power can be supplied to the area at a reasonable cost. Representatives of both districts simply testified by way of conclusion that such would be the case. No sufficient showing was made to sustain that conclusion. The evidence offered in opposition was to the effect that the rates were different, and therefore would have an adverse or different effect, depending upon who the supplier was.

While it is true that an administrative agency can forego some of the stringencies of the rules of evidence, it is not true that it can entirely ignore them when the approval of the agreement is dependent upon a specific finding, and the parties fail to produce evidence to sustain that finding. In Midwest L. C. Co. v. Tri-State L. C. Co. (1967), 182 Neb. 41, 151 N. W. 2d 908, we said: "While an administrative agency may relax the strict rules of evidence in affording a full and fair hearing, it must in every instance require any action taken by it to be supported by competent and relevant evidence."

In City of Schuyler v. Cornhusker P. P. Dist. (1967), 181 Neb. 704, 150 N. W. 2d 588, we held: "An order of the Nebraska Public Power Review Board which is not sustained by the evidence will be reversed." See, also, Cornhusker P. P. Dist. v. Loup River P. P. Dist. (1969), 184 Neb. 789, 172 N. W. 2d 235.

ELEVEN EIGHTEEN CO., A NEBRASKA CORPORATION, DOING BUSINESS AS AQUARIUS LOUNGE, APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.
216 N. W. 2d 720

Filed March 28, 1974. No. 39260.

1. **Administrative Law: Licenses: Intoxicating Liquors.** The Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied and deciding whether licenses should be suspended or revoked upon violations of the liquor law. This discretion, however, must not be abused.
2. **Administrative Law: Appeal and Error: Intoxicating Liquors.** The order of the Nebraska Liquor Control Commission will not be upheld if it is found to be arbitrary or unreasonable.
3. ———: ———: ———. The review of discretion of the Nebraska Liquor Control Commission on appeal applies to the findings of fact and all applications of the law, including the penalty assessed.

Appeal from the District Court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, and Robert R. Camp, for appellant.

Kelley & Kelley by Tom Kelley, for appellee.

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

SPENCER, J.

This is an appeal from an order of the District Court modifying the penalty imposed by the Nebraska Liquor Control Commission for a violation of section 53-149, R. S. Supp., 1972, of the Liquor Control Act. We affirm.

Appellee corporation, the stock of which is owned equally by Robert and Helen Dillon, operates the Aquarius Lounge in an entirely commercial area at Seventy-second and Pacific Streets, in Omaha, Nebraska. The appellee has approximately $500,000 invested in the

lounge. From 1968 to May 1, 1970, the liquor license on the premises was in the name of the appellee. Shortly before May 1, 1970, appellee transferred the business to Shirley Bonacci and leased the premises to her. On May 1, 1970, a liquor license was issued in her name.

As of August 1, 1971, Bonacci was approximately $60,000 in arrears on rent. By oral agreement Robert Dillon took charge of the financial end of the business with Shirley's husband, Pete Bonacci, continuing to operate the business. In December of 1971, a person by the name of Mickey Sparano was brought in by Robert Dillon to operate the business. He was to operate it on the same basis as the Bonaccis. The license remained in the name of Shirley Bonacci. In March 1972, appellee filed an application for a Class C license, which was issued effective May 1, 1972. Mickey Sparano continued to operate the business, paying appellee $150 per day for the use of the premises, but in all other respects controlling the business. This operation continued until July 1, 1972, when appellee took over the entire operation of the lounge and put Mickey Sparano on a salary.

The record indicates that during the period from May to September 1972, the operation of the lounge was under discussion with representatives of the commission. On September 25, 1972, after a hearing, the Nebraska Liquor Control Commission revoked the license issued to Eleven Eighteen Company for permitting someone else to operate under its license, and this appeal followed.

The District Court found the violation was within the spirit, although not the letter, of section 53-149, R. S. Supp., 1972, of the Liquor Control Act, and the only question presented was the severity of the penalty. The trial judge concluded the penalty imposed was excessive, and determined an appropriate one would be suspension for 30 days.

Section 53-1,116, R. R. S. 1943, provides, so far as material herein: "(5) Any decision of the commission * * * revoking * * * a license or permit for the sale of alcoholic liquors, including beer, may be reversed, vacated, or modified by the district court of the county where * * * the licensee resides * * *. * * *

"(8) The appeal, provided for or referred to in subsections (5), (6), and (7) of this section, shall be heard and tried de novo in the district court in the manner provided for the trial of suits in equity. Additional testimony may be introduced at the hearing on appeal."

The Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied and deciding whether licenses should be suspended or revoked upon violations of the liquor law. T & N P Co., Inc. v. Nebraska Liquor Control Commission (1973), 189 Neb. 708, 204 N. W. 2d 809. This discretion, however, must not be abused. The order of the Nebraska Liquor Control Commission will not be upheld if it is found to be arbitrary or unreasonable. The review of discretion on appeal applies to the findings of fact and all applications of the law, including the penalty assessed.

There is no question the District Judge, on the record from the commission and additional evidence adduced, determined that the action of the Nebraska Liquor Control Commission in assessing the maximum penalty was arbitrary and unreasonable. We cannot say he erred in reaching that conclusion. The judgment of the District Court is affirmed.

AFFIRMED.

MARIE P. LEARY, APPELLEE, V. MARTIN K. EBY CONSTRUCTION COMPANY, INC., A CORPORATION, APPELLANT.
216 N. W. 2d 750

Filed April 4, 1974. No. 38900.

1. Negligence. One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
2. ————. Darkness alone calls upon a person to exercise greater care for his own safety than is ordinarily required. Where light has failed, obstructions have been encountered, and there are no special circumstances requiring a person to proceed, he who goes forward into an unfamiliar dark space does so at his own risk, and if accident and injury follow, he is guilty of negligence, as a matter of law, which bars recovery.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Reversed and dismissed.

Thomas J. Walsh and Michael R. O'Malley of Walsh, Walentine & Miles, for appellant.

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

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

WHITE, C. J.

This is a tort case in which the plaintiff, Marie P. Leary, alleged that her fall over a tarpaulin and a hidden trowel was caused by the negligence of the defendant, Eby Construction Company. The verdict and judgment in the District Court were for the plaintiff. Eby Construction Company appeals, contending that its motions for a directed verdict and judgment notwithstanding the verdict should have been sustained. We reverse the judgment of the District Court and dismiss the action.

We test the evidence in this case by the usual standard that the successful party is entitled to have every controverted fact resolved in his favor and to have the

benefit of every inference that reasonably can be deduced from the evidence. The defendant construction company had repaved an area about 2 or 3 feet wide covering the course of the repair of a water main across the plaintiff's driveway. To protect the new strip of pavement across the plaintiff's driveway the defendant covered it with a tarpaulin. In length the tarpaulin covered the entire strip of pavement which crossed the entire width of the driveway. This tarpaulin strip was about 2 or 3 feet wide. The evidence shows that the tarpaulin did not lie completely flat; it was "bunched" and folded, creating irregular elevations at various places. It is undisputed that the plaintiff knew of the presence of the tarpaulin and its condition. She and her husband had driven over the tarpaulin in order to go up their driveway. From the evidence we must assume that prior to the accident she had walked or crossed over the tarpaulin strip without difficulty. The conclusion is inescapable that she knew of the tarpaulin, knew of its irregular contour and condition, and was attempting to cross over it when she stumbled and fell. On October 9, 1968, about 8 p.m., when it was very dark, the plaintiff left her house to get her mail from the mailbox. She could have proceeded by different routes but as was her usual custom, she left from the back door and walked down the driveway. As she was walking down the driveway she walked across the 2 or 3 foot width of the tarpaulin, tripped, fell, and sustained injury. Later inquiry and inspection the next morning revealed the presence of a trowel that had been placed underneath the tarpaulin. The trowel was not introduced into evidence. There is no evidence that the height of the trowel or its location formed a risk significantly different than the other irregularities, elevations, or bunching, previously present in the tarpaulin. The plaintiff's basic contention is that the presence of the trowel was evidence of negligence and that the

question of contributory negligence was for the jury.

The defendant contends that the plaintiff assumed the risk and that she was guilty of contributory negligence. We discuss only the issue of contributory negligence as it is dispositive of the case. The rule in Nebraska with respect to contributory negligence is: "One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent." Mendoza v. Aguilera, 184 Neb. 94, 165 N. W. 2d 360 (1969). In Johnson v. Goodier, 182 Neb. 172, 153 N. W. 2d 445 (1967), this court quoted with approval the following portions of the syllabus from Wentink v. Traphagen, 138 Neb. 41, 291 N. W. 884 (1940): "Darkness alone calls upon a person to exercise greater care for his own safety than is ordinarily required * * *. Where light has failed, obstructions have been encountered, and there are no especial circumstances requiring a person to proceed, he who goes forward into an unfamiliar dark space does so at his own risk, and if accident and injury follow, he is guilty of negligence, as a matter of law, which bars recovery."

The plaintiff testified that it was very dark when she attempted to walk over the tarpaulin. The tarpaulin had been positioned across the driveway for a considerable period of time. She had walked over the tarpaulin several times earlier and was fully familiar with the risk of crossing it. She also testified that even though it was very dark she could discern outlines or shapes. Under these circumstances, it becomes immaterial whether she did stumble over a trowel which was underneath the tarpaulin or stumbed on some portion of the tarpaulin itself. It is clear that she relied upon her previous knowledge of the area and assumed it was in the same condition as when she had crossed over it before. Paraphrasing Wentink v. Traphagen, *supra,* the plaintiff was

proceeding in darkness where light had failed, encountering an obstruction and risk with which she was fully familiar. She went forward into a dark space being fully aware of the dangers and risks involved. The defects and dangers were open on the surface of the pavement and she was generally familiar with them. Under these circumstances her testimony to the effect that she was not aware of the precise irregularity or the presence of the trowel over which she tripped becomes wholly immaterial.

We conclude that the plaintiff was capable of understanding and discretion, had knowledge of the dangers she was about to encounter, and failed to exercise ordinary care and prudence to avoid the very defects and dangers of which she knew or should have known, and was therefore guilty of contributory negligence as a matter of law.

We therefore hold that under the facts of this case the plaintiff was guilty of contributory negligence as a matter of law and that the defendant's motions for a directed verdict and judgment notwithstanding the verdict should have been sustained.

The judgment of the District Court is reversed and the action dismissed.

REVERSED AND DISMISSED.

SMITH, J., not participating.

STATE SECURITIES COMPANY, A CORPORATION, APPELLEE, V. JAMES CORKLE ET AL., APPELLANTS.
216 N. W. 2d 879

Filed April 4, 1974. No. 39191.

1. **Mortgages: Equity: Trial.** An action brought to foreclose a mortgage on personal property and for a deficiency judgment is an action in equity and a trial by jury is not required by section 25-1104, R. R. S. 1943.

2. **Pleadings: Trial.** A motion to amend the pleadings to conform to the evidence, made at the close of all evidence, rests within the sound judicial discretion of the trial court either to permit amendment of the pleadings in furtherance of justice, or to refuse the right of amendment. § 25-852, R. R. S. 1943.
3. ————: ————. Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or matter to avoid, will be treated as admitted, although the answer also contains a general denial.
4. **Interest: Usury.** An industrial loan and investment company computing interest at the maximum rate, on the basis of a 360-day year, does not contract for and receive an annual return in excess of that allowed by sections 8-435 and 8-441, R. R. S. 1943.

Appeal from the District Court for Holt County: WILLIAM C. SMITH, JR., Judge. Affirmed as modified.

Robert E. Paulick and Richard E. Gee, for appellants.

William W. Griffin, Herman Ginsburg, and Ronald Rosenberg, for appellee.

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

CLINTON, J.

Appellee, State Securities Company, brought this action against appellants Corkle to foreclose liens upon certain chattels created by a note and security agreement dated August 11, 1967, and an additional security agreement. Appellee also prayed for a deficiency judgment. The trial court entered judgment for the appellee.

Appellants assign the following as errors below: (1) The denial of appellants' request for a jury trial. (2) The failure of the trial court to allow appellants to responsively plead to appellee's petition which was amended at the close of all evidence to conform to the facts proved. (3) Failure of the appellee to establish the execution of the notes by appellant Blanche Corkle.

(4) The amount of the judgment is not supported by the pleadings or evidence. (5) The transaction here involved was usurious. We will discuss these assignments in the order noted above.

Section 25-1104, R. R. S. 1943, establishes a right to jury trial in certain civil matters and states, in pertinent part, as follows: "Issues of fact arising in actions for the recovery of money or of specific real or personal property, shall be tried by a jury unless a jury trial is waived . . . ." Appellants argue, on the basis of the above-quoted statute, that the trial court erred in denying their request for jury trial. Appellants cite Cook v. Wilkie, 181 Neb. 596, 150 N. W. 2d 124 (1967), in which the plaintiff sought an accounting and recovered a money judgment. On appeal the defendant contended he was entitled to a jury trial. This court stated: "Finally defendant contends, since a money judgment only was entered, that he was entitled to a jury trial. This is a suit for an accounting. Both parties ask for a determination of the amount due resulting from a large number of interrelated transactions that took place over many years. Both ask for equitable relief. This is a proper basis for equity jurisdiction because of the inadequacy of the remedy at law. [Citations omitted.] There is no merit to this contention." The foreclosure of a mortgage is an action in equity. Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545 (1943). Issues in equity cases are triable to the court without a jury. Smith v. Perry, 52 Neb. 738, 73 N. W. 282 (1897). The denial of a jury trial in this case was not error.

The mortgage sought to be foreclosed was given to secure a promissory note executed by the appellants on August 11, 1967. This note was given to extend the payment date of previously outstanding notes from appellants to appellee and for additional advances. At trial the appellants requested the earlier notes be pro-

duced. These notes and business records relating thereto were produced and were the subject of considerable cross-examination by appellants' counsel. At the close of all evidence the appellee moved, perhaps out of caution, to amend its petition to conform to the evidence. That motion was granted, but appellants' motion to responsively plead to the amended petition was denied.

Section 25-852, R. R. S. 1943, states in part: "The court may . . . in furtherance of justice, and on such terms as may be proper, amend any pleading . . ., when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." In McCarty v. Morrow, 173 Neb. 643, 114 N. W. 2d 512 (1962), this court stated: "After the issues have been fully made up it rests within the sound judicial discretion of the trial court either to permit amendment of the pleadings in furtherance of justice, or to refuse the right of amendment." Since the amendment here allowed did not substantially alter the nature of the claim against appellants, the appellants were not prejudiced by this action. There was no abuse of discretion in the denial of appellants' motion to responsively plead to appellee's amended petition.

Appellee's initial petition alleged that it had a special ownership interest in certain described personalty by virtue of a financing statement and security agreement executed and delivered by appellants Corkle to secure an indebtedness represented by a promissory note. Appellants answered by a general denial, but further alleged that they had "made payments to the Plaintiff throughout the years," that "any notes executed are usurious in their interest rates and in excess of that amount of interest allowed or charged by an industrial loan and investment company under and pursuant to the laws of the State of Nebraska," and that any property mortgaged had died or been disposed of with con-

sent of the appellee. Appellants now assert that appellee failed to show the execution of any of these instruments by Blanche Corkle. Appellee counters that both appellants admitted the execution of these instruments by the pleading of material in avoidance of appellee's petition.

In Nason v. Nason, 79 Neb. 582, 113 N. W. 139 (1907), this court held that the execution of an instrument may be admitted in pleadings where matters in avoidance are specifically pleaded, even though the answer also contains a general denial, stating: "Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or matter to avoid, will be treated as admitted, though the answer also contains a general denial." See, also, Johnson v. School Dist. No. 3, 168 Neb. 547, 96 N. W. 2d 623 (1959); Anderson v. Anderson, 155 Neb. 1, 50 N. W. 2d 224 (1951); Hueftle v. The Farmers Elevator, 145 Neb. 424, 16 N. W. 2d 855 (1944). Appellants' general denial was not effective as to the question of the execution of these instruments in view of the specific allegations of their answer. The execution of these instruments by both appellants was properly treated as admitted.

The appellants contend the amount of the judgment entered is incorrect. The prayer of appellee's petition requests $29,345.82 with interest at $8.20 per day from March 27, 1972. Judgment for appellee was entered effective December 1, 1972, for $31,870.18. There appears to have been an error of $482.56 in computing the amount due. The judgment is reduced by that amount.

Finally, appellants claim the rate of interest charged by appellee was in excess of that permitted by section 8-435, R. R. S. 1943. That section provided that an industrial loan and investment company may contract for and receive interest on a loan not in excess of 18 percent per year on the first $1,000 and 12 percent per year on the balance over $1,000. The controversy here

centers around the manner in which the 12 percent simple interest is to be calculated. Appellee computed interest on the basis of a year composed of 12 30-day months, or a 360-day year, in arriving at a daily interest factor. Appellee used a 360-day year, relying upon section 8-441, R. R. S. 1943, which states: "For the purpose of computing charges, . . . a month shall be any period of thirty consecutive days, and the rate of charge for each day shall be one-thirtieth of the monthly rate." Appellants' testimony establishes that the daily interest factor achieved by use of a 360-day year, when charged for 365 days, produces a return in excess of 12 percent simple interest. Is such a charge within the contemplation of the statute? We believe that it is. The term "year" in section 8-435, R. R. S. 1943, is not further defined in the statute. However, section 8-441, R. R. S. 1943, requires that the daily interest rate be one-thirtieth of the monthly rate. Since interest computed in accordance with section 8-441, R. R. S. 1943, at 12 percent a year, or 1 percent a month, would divide that monthly rate into thirty equal parts for the purposes of a daily interest figure, one must assume either that the term "year" in section 8-435, R. R. S. 1943, contemplates a 360-day year, or that section 8-441, R. R. S. 1943, could allow, on a 365-day year, interest in excess of the stated maximum. Reading the two sections together, we find that the 360-day method of computing interest used by appellee, under these statutes, was not usurious.

In view of the above holdings it is ordered that the judgment be reduced by the amount of $482.56.

AFFIRMED AS MODIFIED.

ELM CREEK STATE BANK, APPELLANT, V. DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA ET AL., APPELLEES, FEDERAL DEPOSIT INSURANCE CORPORATION, INTERVENER-APPELLEE.

216 N. W. 2d 883

Filed April 4, 1974. No. 39211.

1. **Banks and Banking: Administrative Law: Trial.** In a proceeding instituted by a state bank under the provisions of section 8-195, R. R. S. 1943, the bank has the burden of going forward with the evidence to establish that a declaration of insolvency made and filed by the Director of Banking under the provisions of section 8-194, R. R. S. 1943, was erroneous. In the absence of a contrary showing, this court will presume that the Director of Banking complied with the law.
2. **Appeal and Error: Pleadings.** In the absence of a bill of exceptions, no questions regarding the evidence presented in the trial court will be considered, and under such circumstances the only issue on appeal is the sufficiency of the pleadings to support the judgment.
3. **Motions, Rules, and Orders: Appeal and Error: Continuances.** A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal.

Appeal from the District Court for Buffalo County: DONALD H. WEAVER, Judge. Affirmed.

Kenneth Cohn, Theodore J. Furry, and Phyllis M. Beck, for appellant.

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

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

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and WHITE, District Judge.

MCCOWN, J.

This is an action by a state bank to enjoin further

administrative proceedings by the Director of Banking, State of Nebraska, after the Director had taken possession of the bank and declared its insolvency in accordance with section 8-194, R. R. S. 1943. The action here was brought under the provisions of section 8-195, R. R. S. 1943. At the hearing the plaintiff bank requested a continuance. Upon denial of the continuance, the plaintiff bank refused to proceed and the court granted the motion of the Department of Banking to deny the plaintiff bank any relief. The bank has appealed.

On April 20, 1973, the Department of Banking of the State of Nebraska, through its Director, took possession of the Elm Creek State Bank of Elm Creek, Buffalo County, Nebraska, in accordance with the provisions of sections 8-187 and 8-188, R. R. S. 1943. On May 8, 1973, the Director of Banking filed a declaration of insolvency of the Elm Creek State Bank in the District Court for Buffalo County, as provided by section 8-194, R. R. S. 1943, together with an inventory of the property, assets, and liabilities of the bank, as provided in section 8-192, R. R. S. 1943. These filings were designated as case No. 3382.

On May 16, 1973, the Elm Creek State Bank filed this proceeding in the District Court for Buffalo County against the Department of Banking and Henry E. Ley, Director, under the authorization granted in section 8-195, R. R. S. 1943. The initial pleading was designated as a motion for an order to show cause. The filings by plaintiff bank were designated as case No. 3393. On the same day, May 16, 1973, the court notified the parties that the motion for equitable relief would be heard on its merits on May 19, 1973. On that date the bank filed its motion to disqualify the trial judge. The trial judge disqualified himself and on May 21, 1973, the successor trial judge set the matter for hearing on June 4, 1973, and directed counsel for each party to submit a trial brief not later than May 30, 1973. On May 24, 1973, the

Federal Deposit Insurance Corporation filed its petition to intervene in case No. 3393, alleging that it had been in possession of all the assets of the Elm Creek State Bank since May 8, 1973; had begun making payments to depositors on May 19, 1973; and that the Elm Creek State Bank was insolvent. On May 29, 1973, the Federal Deposit Insurance Corporation was allowed to intervene and was made a party.

On June 4, 1973, after two continuances until later in the day, the bank filed an amended motion to inspect and copy certain records. The motion was sustained as to the first four paragraphs and overruled as to the balance. Based on stipulation of counsel, cases Nos. 3382 and 3393 were ordered consolidated and the matter was continued until the following day.

On June 5, 1973, the Department of Banking filed its response to the motion for order to show cause. On June 5, 1973, the Elm Creek State Bank filed a "motion for discovery," alleging that it was necessary to take the depositions of 10 individuals. The motion stated that six of the persons were individual customers or borrowers having material information as to their transactions with the bank. Another individual was an allegedly hostile witness involved in an application for a national bank in Elm Creek. Two individuals were employees of the Federal Deposit Insurance Corporation, and one was the Director of Banking for the State of Nebraska, who was an individual party. The testimony of these four was indicated to be material to establish the motivation for the proceedings against the bank. The only reason stated in the motion as justification for taking these requested depositions was that the trial court had stated that plaintiff "is required to sustain the burden of proof * * *." Along with the "motion for discovery," the Elm Creek State Bank filed a motion for continuance. The only ground stated in support of the motion for continuance was to give the

plaintiff bank time to complete the depositions referred to in the "motion for discovery."

The judge's minutes show that the motion for continuance was overruled and that the bank was ordered to proceed to trial and refused to proceed. The Department of Banking moved that the bank's motion to set aside the order of the banking department be denied. That motion was sustained and the bank's motion for relief was denied. Thereafter the motion of the Elm Creek State Bank for a new trial was overruled and this appeal followed. There is no bill of exceptions, but the transcript is 467 pages.

This case turns upon the issue of who had the burden of proving the solvency or insolvency of the Elm Creek State Bank in a proceeding under section 8-195, R. R. S. 1943. A secondary issue is whether or not the refusal to grant a motion for continuance made on the day set for trial was an abuse of discretion.

Section 8-195, R. R. S. 1943, provides: "Whenever any bank of whose property and business the director has taken possession or whose insolvency has been declared as provided in section 8-194 deems itself aggrieved thereby, it may, at any time not later than ten days after such declaration of insolvency has been filed with the clerk of the district court of the county in which the bank is located, petition the district court to enjoin further proceedings, and the court, after citing the director to show cause why further proceedings should not be enjoined, and hearing the allegations and proofs of the parties and determining the facts, may, upon proof by the bank, its officers or directors, that it is solvent, that the business of the bank has been and is being conducted as provided by law, that it is not endangering the interests of its depositors and other creditors, and that the director has acted arbitrarily and abused his discretion either by taking possession of the bank or by finding and declaring the bank to be

insolvent and ordering its liquidation, set aside such declaration of insolvency and enjoin the director from proceeding further, and direct him to surrender the business and property to the bank. On proof that the bank is insolvent and that its stockholders have failed to restore solvency as provided by law, or that the bank is being operated in violation of law, and that the director has acted within his powers, the petition shall be dismissed by the court."

This section provides the statutory method of appeal or collateral attack upon a determination of insolvency of a state bank made by the Director of Banking under the provisions of section 8-194, R. R. S. 1943.

The transcript here reflects a maze of confusion, both substantive and procedural. There is no "petition" by the plaintiff but only a motion for an order to show cause, which we shall treat as an initial pleading to institute the action. There is no order to show cause, but we shall treat the court's notification that the motion for equitable relief would be heard on a specified date sufficient notice. There are no findings of fact nor is there any journal entry of judgment. Only the judge's minutes are available and for the purposes here, we shall assume that the minutes showing the plaintiff bank's motion for relief is denied was intended also to constitute a dismissal of the proceedings.

Whether the proceedings instituted by a state bank under section 8-195, R. R. S. 1943, are regarded as an appeal or as a statutory form of collateral attack is actually immaterial. Under either theory, the bank has the burden of going forward with the evidence to establish that the order or finding, or action or proceeding, appealed from or attacked, was erroneous. The plaintiff bank contends that the Director of Banking must affirmatively establish that his previous action was authorized and legally valid. That contention assumes that official action taken by an administrative agency

under statutory authority is presumed to be illegal until its legality is judicially confirmed. The law is just the opposite. It is a presumption of law that public officers will perform their public duties. In the absence of a contrary showing, this court will presume that the Director of Banking complied with the law. Douglas County Bank v. Department of Banking, 187 Neb. 545, 192 N. W. 2d 401.

In an appeal the appellant has the burden of establishing that there was error in the proceeding from which he appeals. That rule is so fundamental that it needs no citation of authority. The corollary rule in an action for an injunction is equally clear. The plaintiff in an injunction proceeding must prove by competent evidence every controverted fact necessary to entitle him to the relief asked. See, Beckman v. Lincoln & N.W. R.R. Co., 79 Neb. 89, 112 N. W. 348; World Realty Co. v. City of Omaha, 113 Neb. 396, 203 N. W. 574; Gering Irr. Dist. v. Mitchell Irr. Dist., 141 Neb. 344, 3 N. W. 2d 566.

It is undisputed that at the hearing the plaintiff refused to introduce any evidence, and was consequently entitled to no relief. There are no affirmative findings of fact in the transcript and there is no bill of exceptions. There is nothing to show that evidence was not introduced at the hearing to prove that the bank was insolvent and that its stockholders had failed to restore solvency as provided by law. Section 8-195, R. R. S. 1943, requires such proof before the proceedings can be dismissed and in the absence of a bill of exceptions we must assume that the trial court complied with the statute. In the absence of a bill of exceptions, no questions requiring the examination of evidence produced in the trial court will be considered. Under such circumstances, the only issue on appeal is the sufficiency of the pleadings to support the judgment. State ex rel. Hartman v. Weiss, 181 Neb. 685, 150 N. W. 2d 264. There

is no question but that the pleadings by the Department of Banking, as well as by the intervener, Federal Deposit Insurance Corporation, are each more than sufficient to establish that the Elm Creek State Bank was insolvent and that its stockholders had failed to restore solvency as required by law.

A dismissal of the proceedings here was fully justified unless the denial of the continuance requested constituted an abuse of judicial discretion. The motion for continuance was not supported by affidavit as required by statute, but disregarding that, the grounds stated as reflected in the transcript were wholly insufficient. There was not even an intimation that due diligence had been used to obtain the testimony of the witnesses whose depositions the plaintiff wished to take. The Director of Banking had taken possession of the plaintiff bank more than 6 weeks before the hearing date. The declaration of insolvency, together with the specifications regarding it, and the inventory of assets and liabilities, had been filed in the District Court almost a month before the hearing. The only real issue before the court at the hearing was whether or not the Elm Creek State Bank was insolvent. See Farmers State Bank v. Luikart, 131 Neb. 692, 269 N. W. 627. Obviously that issue might be established by plaintiff's own officers and employees. There is no showing of any kind that the testimony of various customers of the bank would be critical or necessary on the single vital issue of the solvency or insolvency of the bank.

In addition to the factors already discussed, it is apparent from an examination of section 8-195, R. R. S. 1943, that prompt and expeditious determination of the issues of solvency and failure to restore solvency is a practical necessity in administrative receivership proceedings involving state banks. Not only do the interests of stockholders, depositors, creditors, and claimants require prompt judicial action, the interests of the public

and of the State in the financial stability of state banks also require prompt and accurate determination of these issues. The limit of 10 days for filing a petition under section 8-195, R. R. S. 1943, and the lack of any specification of time for the issuance of an order to show cause are graphic illustrations of the intention of the Legislature to expedite the proceedings as far as it can reasonably be done. A reasonable time to establish and determine the critical fact of solvency or insolvency is also necessary. In any event, the situation cannot justify waiting until the moment of hearing to begin to marshal the necessary evidence. A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. Jindra v. S.M.S. Trucking Co., 187 Neb. 502, 192 N. W. 2d 139.

Under the condition of the record in this case there was no abuse of discretion and the judgment is affirmed.

AFFIRMED.

SPENCER, J., concurs in the result.

BOSLAUGH, J., concurring.

I concur in the result reached in this case. However, I do not agree that in all cases the Director of Banking is required to prove the bank is insolvent before proceedings under section 8-195, R. R. S. 1943, may be dismissed.

The banking laws of this state provide for administrative as distinguished from judicial liquidation of insolvent state banks. See Farmers State Bank v. Luikart, 131 Neb. 692, 269 N. W. 627.

Here the director had taken possession of the bank and had filed a declaration of insolvency. There was a presumption the action of the director was valid. In an action under section 8-195, R. R. S. 1943, to enjoin further proceedings, the bank had the burden of going forward with the evidence. This means the bank was

the party who would be defeated if no evidence was introduced. The bank's refusal to proceed after it was ordered to proceed to trial justified the dismissal of the proceedings.

HENRY J. BUETTNER, APPELLANT, V. JOHN L. SULLIVAN, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, ET AL., APPELLEES.

216 N. W. 2d 872

Filed April 4, 1974. No. 39239.

Administrative Law: Appeal and Error: Time: Motor Vehicles. Any person appealing an order of the Director of the Department of Motor Vehicles must execute and file the required bond within 20 days of the date of the final order complained of, and such filing is a jurisdictional requirement and a condition precedent to the initiation of the appellate process.

Appeal from the District Court for Boone County: C. THOMAS WHITE, Judge. Affirmed.

Oliverius & Dugan, for appellant.

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

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

HASTINGS, District Judge.

Plaintiff appealed to the District Court from proceedings had before the Department of Motor Vehicles, State of Nebraska, relating to the point system as set out in sections 39-794 to 39-796, R. S. Supp., 1972, and section 39-7,129, R. R. S. 1943. The trial court sustained defendants' motion to dismiss the appeal for the reason that no bond was filed within 20 days of the order of revocation entered on January 29, 1973, by the defend-

ant John L. Sullivan, Director of said Department of Motor Vehicles, and plaintiff has appealed to this court.

On January 22, 1973, plaintiff paid a fine of $20 and costs for a speeding violation to which he had entered a plea of guilty the previous June in the justice of the peace court of the City of Columbus, following which an abstract of conviction report was furnished to the Department of Motor Vehicles. The plaintiff now having acquired 12 or more points in a 2-year period, under the requirements of section 39-7,129, R. R. S. 1943, the defendant Sullivan, by order dated January 29, 1973, revoked his driving privileges for 1 year. Upon receipt of this order of revocation, plaintiff went to the former justice of the peace, now an associate county judge, who then issued an abstract of conviction report covering the same offense, but which now provided for 90 days probation instead of the original fine which had been paid. This latter abstract of conviction report was delivered to the Department of Motor Vehicles which prompted a letter from the defendant W. C. Peterson, supervisor, financial responsibility and driver records, directed to plaintiff and dated February 1, 1973, which stated in part as follows:

"This letter to (sic) to notify you that your Order of Revocation dated January 29, 1973 for a period of one year (#A23-3319) is in effect.

"The matter of a probation and the amended abstract that you presented to me on Wednesday, January 31st has been viewed as invalid by the Director of our Department after consultation with the State's Court Administrator and the Attorney General's office."

On February 17, 1973, plaintiff's attorney wrote to the Department of Motor Vehicles in part as follows:

"On January 29, 1973 the Director of the Department of Motor Vehicles revoked the driving privileges of the above mentioned driver. Mr. Buettner has asked this office to represent him in this matter.

"Please be advised that Mr. Buettner desires to appeal the revocation to the District Court of Boone County."

A proper bond as required by section 60-420, R. R. S. 1943, was filed on February 21, 1973. Plaintiff's petition filed in District Court ". . . prays . . . an Order be entered upholding the validity of the 'Abstract for Conviction Report' dated January 31, 1973, and ordering the Director of the Department of Motor Vehicles to cancel and revoke his Order of January 29, 1973 . . . ."

All the foregoing information was gleaned from the transcript as there was no bill of exceptions.

Section 39-7,129, R. R. S. 1943, requires the Director of Motor Vehicles to revoke for a 1-year period the driving privileges of any person who shall have accumulated 12 or more points within any 2-year period as reflected by abstracts of conviction for violation of traffic offenses which have been forwarded to him as provided for by sections 39-794 and 39-795, R. S. Supp., 1972. This was the authority under which the defendant Sullivan acted in issuing the order of January 29th.

Section 39-7,130, R. R. S. 1943, provides in part as follows: "Any person, who feels himself aggrieved because of such revocation, may appeal therefrom to the district court of the county wherein such person resides . . . in the manner prescribed in section 60-420." Section 60-420, R. R. S. 1943, provides in part as follows: "Any person who feels himself aggrieved because of any order of the director on account of his refusal to issue any license contemplated under sections 60-418 and 60-419, may appeal therefrom to the district court of the county . . . wherein such person resides, in the manner following: . . . The applicant, licensee or appellant shall within twenty days from the date of the final order complained of, execute a bond for costs to the State of Nebraska in the sum of two hundred dollars with sufficient surety to be approved by the Auditor of Public

Accounts. The bond shall be filed in the office of the director."

The bond in this case was filed 23 days after the January 29th order of revocation and was therefore out of time. Lydick v. Johns, 185 Neb. 717, 178 N. W. 2d 581, an appeal in an implied consent proceeding, found the appellant without any approved bond within the time required by law. In ruling that this was a jurisdictional defect requiring dismissal of the appeal by the District Court, this court said: "The language of the statute is clear. The bond filed must be approved by the Auditor of Public Accounts. To hold otherwise would constitute an amendment of the statute. We hold that the filing of an approved bond is a jurisdictional requirement. Its filing is a condition precedent to the initiation of the appellate process." Plaintiff agrees with this conclusion both in his oral argument and on page 9 of his brief where after stating that if he had elected to appeal from such order of January 29th he goes on to say: ". . . the defendant would be correct in his contention that the bond for costs . . . was not timely filed. . . . nowhere on the record is there any indication that the plaintiff has ever questioned the validity of the action which the defendant took on January 29, 1973. On that day, . . . the defendant revoked the plaintiff's driver's license as he was required by statute to do."

However, plaintiff contends that defendant Peterson's letter of February 1, 1973, notifying plaintiff that the order of revocation "is in effect" and viewing as invalid the "matter of probation and the amended abstract" was a final appealable order within the meaning of the language in section 60-420, R. R. S. 1943, which he sets out in his brief as "'Any person who feels himself aggrieved because of any order of the director . . . may appeal therefrom to the district court. . . .'" Very importantly, however, the first ellipsis replaces the

language "on account of his refusal to issue any license contemplated under sections 60-418 and 60-419" found in the section of the statute cited. Section 60-418, R. R. S. 1943, makes reference to licenses suspended as provided in "this act" which refers to sections 60-401 to 60-440, R. R. S. 1943, and which have nothing to do with point revocations. Section 60-419, R. S. Supp., 1972, refers to the revocation and reissuance of the licenses of those committed or incarcerated in various state institutions. Therefore, the remaining matter that can be appealed under the provisions of section 60-420, R. R. S. 1943, is an order of revocation as provided for in section 39-7,130, R. R. S. 1943. Certainly defendant Peterson's letter of February 1, 1973, was not an order of revocation and the only such order ever entered in this case was the one dated January 29, 1973, from which no timely appeal was perfected. The District Court was correct in dismissing plaintiff's appeal and its judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOE LOUIS MOORE, APPELLANT.

216 N. W. 2d 748

Filed April 4, 1974. No. 39243.

Criminal Law: Sentences. 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 on appeal unless there appears to be an abuse of such discretion.

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 Harold Mosher, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and COLWELL and WARREN, District Judges.

COLWELL, District Judge.

On pleas of guilty to a two-count information defendant was adjudged guilty of the crimes of escape under section 28-736, R. R. S. 1943, and to theft under section 28-522, R. R. S. 1943. On the crime of escape defendant was sentenced to imprisonment to a term of not less than 1 year nor more than 2 years. On the crime of theft defendant was sentenced to a term of imprisonment of 2 years. The sentences imposed were to run consecutively to each other and consecutively to the term of imprisonment being served by the defendant at the time of his escape. The statutory limit of punishment for each crime is a minimum of 1 year and a maximum of 10 years. The issue on this appeal is the excessiveness of the sentences.

The defendant, aged 37 years, was represented by the public defender during all these proceedings and this appeal. We affirm.

The presentence investigation report is a part of the appeal record. Defendant, a trusty, escaped from the Nebraska Penal and Correctional Complex on June 27, 1970, with another prisoner. During the escape a guard was threatened and restrained with ropes. Following the escape a state-owned motor vehicle was stolen by the defendant and abandoned at Omaha, Nebraska. Defendant was apprehended in April 1973, at Sioux City, Iowa. 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 on appeal unless there appears to be an abuse of such discretion.

State v. Williams, 187 Neb. 708, 193 N. W. 2d 570.

A review of the record does not show any abuse of discretion by the trial court. The sentences imposed were not excessive.

AFFIRMED.

JOHN WISNIESKI, APPELLANT AND CROSS-APPELLEE, V. ERNEST L. COUFAL ET AL., APPELLEES AND CROSS-APPELLANTS.
216 N. W. 2d 736

Filed April 4, 1974. No. 39244.

1. **Trial: Appeal and Error.** A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable ruling.
2. **Pleadings: New Trial.** Permission to file a counterclaim on remand for a new trial rests within the sound discretion of the trial court.
3. **Trial: Evidence: Appeal and Error.** Generally, the action of the trial court in excluding testimony of a witness during his direct examination may not be reviewed on appeal in the absence of an offer to prove what it is claimed the testimony would show.

Appeal from the District Court for Colfax County: C. THOMAS WHITE, Judge. Affirmed.

Homer E. Hurt, Jr., and James A. Gallant, for appellant.

Otradovsky & Bieber, for appellees.

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

WHITE, C. J.

This is an action by plaintiff, a real estate broker, to recover from the defendants, owners of a farm, a broker's commission under the terms of a listing contract. The jury returned a verdict for the defendant

owners. This appeal follows. We affirm the judgment of the District Court.

This case was previously before this court on an appeal from a directed verdict for the defendants. Wisnieski v. Coufal, 188 Neb. 200, 195 N. W. 2d 750 (1972). We reversed and remanded, holding that under section 36-107, R. R. S. 1943, the terms of a sale need not be included in a listing contract for the sale of land, but may be supplied by parol evidence. A listing contract must be in writing, signed by both parties, describe the land to be sold, and state the compensation. Wisnieski v. Coufal, *supra.*

At the second trial, the plaintiff claimed that the defendants executed a written listing contract offering to sell their farm on terms partially set forth in the listing agreement and partially set forth by oral agreement of the parties. The listing agreement gave the broker exclusive right to sell a described 120 acres until a specified date for the sum of $400 per acre. The broker's commission under the written listing agreement was 5 percent.

In attempting to establish the terms of the sale by parol, in accordance with our earlier decision in this case, the plaintiff testified that the defendants had orally agreed to sell the land upon the following terms: $8,000 down, an annual payment of $1,800 for 9 years, 5 percent interest per year on the principal balance, with the balance due at the end of the 10-year period.

The plaintiff claims that he fully performed the terms and conditions of the agreement by supplying four willing purchasers upon these terms. He claims that the first three buyers were objected to by the defendants solely because of inadequacy of their financial condition and that the defendants agreed and knew that all three purchasers were only asked to pay $8,000 down. Plaintiff strongly urges that the defendants at all times indicated that an $8,000 downpayment was sufficient.

The defendants say they were only told to check the financial condition of the first three prospective buyers and that they never knew that the broker was only asking for an $8,000 downpayment until the fourth buyer was presented.

The plaintiff and defendants apparently agreed that the defendants could refuse to accept a buyer if his financial condition was unsatisfactory. The plaintiff did not ask for his commission after any of the first three buyers were refused.

The defendants' testimony would indicate that the first time they knew the broker was only asking for an $8,000 downpayment was upon presentment of the purchase agreement of the fourth prospective buyer. The defendants testified that they always made it clear that a 29 percent downpayment was necessary.

The defendants contend that they agreed orally to sell their land upon the following terms: 29 percent down, consisting of $8,000 at the signing of the purchase agreement and the balance of the 29 percent upon possession, annual payments for 5 years, 5 percent interest per year on the principal balance, with the balance due at the end of 5 years. After the fourth buyer was rejected on the basis of insufficiency of the downpayment, rather than financial condition, the broker asked for his commission. The defendants refused to convey the land and the commission has never been paid.

Thus, the evidence presented a conflict as to whether the parties orally agreed to an $8,000 downpayment, or a 29 percent downpayment. This factual question for the jury was crucial to a decision upon the issue of whether the broker had fulfilled his obligations under the listing agreement and was entitled to his commission. The jury resolved this issue in favor of the defendants.

The broker complains that the trial court committed error by: (1) Allowing an attorney, testifying as a

witness, to assert the attorney-client privilege, (2) allowing defense counsel to engage in misconduct, and (3) allowing the defendants to amend their answer and file a counterclaim at the beginning of the second trial. The defendants cross-appeal alleging error in refusal to submit their counterclaim to the jury.

One of the defendants testified on direct examination that they had consulted two attorneys and received advice to sell their land on contract with a 29 percent downpayment. There was vigorous cross-examination by plaintiff's counsel on this testimony. After the trial court allowed the plaintiff to reopen his case, the plaintiff called as a witness one of the attorneys who had given the advice to the defendants. When the attorney was asked if he had given tax advice concerning the sale of the farm to the defendants on a previous occasion, the witness claimed the attorney-client privilege. Plaintiff's counsel asked for a ruling and the trial court ruled that the attorney-client privilege was properly invoked and had not been waived. Plaintiff's counsel never objected to the ruling, nor did he anywhere during the trial, or prior to the motion for new trial, assert that there had been a waiver of the privilege previously at the trial. Most importantly, however, plaintiff's counsel never made any offer of proof as to the content of the excluded testimony. The action of the trial court in excluding testimony of a witness during his direct examination may not be reviewed on appeal in the absence of an offer to prove what it is claimed the testimony would show. Cook v. Ketchmark, 174 Neb. 222, 117 N. W. 2d 375 (1962). Finally, the attorney did testify that as a general rule he recommended a 25 percent downpayment upon a contract sale of land. He additionally stated that a seller could demand 29 percent down, but that you have to be exceedingly careful for tax purposes. In view of this testimony, even if the exclusion of the attorney's testimony was improper,

it appears that it could not have been prejudicial. Either 25 or 29 percent was substantially more than the $8,000 downpayment contended for by the plaintiff. But, the absence of an offer of proof to the excluded testimony is dispositive of this issue.

Plaintiff contends that the defense counsel's conduct should be a ground for a new trial. Many of the objections to testimony raised by the plaintiff's counsel were sustained, so any error could not be prejudicial. Plaintiff's counsel never asked that the answers be stricken from the record, nor asked for a mistrial. A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict. Johnson v. Nathan, 161 Neb. 399, 73 N. W. 2d 398 (1955).

Lastly, plaintiff claims the court erred by allowing the defendants to amend their answer and file a counterclaim at the beginning of the second trial. Upon a reversal by this court for a new trial, it is within the discretion of the trial court to allow amendments to the pleadings. Here there was no abuse of that discretion. Louis Hoffman Co. v. Western Smelting & Refining Co., 150 Neb. 524, 34 N. W. 2d 889 (1948); Walkenhorst v. Apolius, 172 Neb. 830, 112 N. W. 2d 31 (1961).

The defendants contend that the trial court incorrectly did not submit their counterclaim to the jury. The substance of the counterclaim alleged that the broker was negligent in drafting the listing agreement. Upon a review of the evidence we are unable to find any testimony which would support the conclusion that the broker was negligent. The issue in the case was the terms of the agreement. The ruling of the trial court is correct.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

DONNA M. ERKS, APPELLEE, V. GARY W. ERKS, APPELLANT.
216 N. W. 2d 742

Filed April 4, 1974. No. 39250.

1. **Divorce: Infants.** It is generally the best policy to keep minor children within the jurisdiction of the court, but this policy must yield to the paramount consideration which is the best interests of the children.
2. **Divorce: Infants: 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.
3. ———: ———: ———. 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 on appeal unless there is a clear abuse of discretion.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Douglas McArthur, for appellant.

Paul E. Galter of Bauer, Galter, Scott & Geier, for appellee.

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

NEWTON, J.

This is an appeal from a decree of the District Court changing the custody of minor children. Defendant contends there has not been a sufficient change in circumstances to justify the change of custody and that the children should be kept within the jurisdiction of the court. We affirm the judgment of the District Court awarding custody to plaintiff.

The defendant obtained a decree of divorce from the plaintiff Donna M. Erks on January 7, 1971, and was awarded custody of the three minor children, two boys

and a girl, respectively 8, 7, and 6 years of age at time of this hearing.

Perusal of the record discloses that both parties have remarried and plaintiff's present spouse has two children by a previous marriage. Plaintiff now resides in a farm home at Cedar Falls, Iowa. Her husband has been employed for 7 years at the John Deere plant in Waterloo and is presently employed as a tractor systems operator there. He earns $181.40 per week. Defendant is an employee at a Texaco station earning $120 per week and receives help from the Lincoln Housing Authority. His present wife has one child born to her prior to her marriage to defendant and another born to her and defendant. She works from 7 a.m. to 4 p.m. and earns about $60 per week. The children when not in school are left with a babysitter during her absence. Both homes are physically adequate.

It is conceded that at the time of the divorce the parties agreed to permit defendant to have custody of the children. Plaintiff said she did this because at that time her place of residence and employment were unsettled and subject to change. She also said that defendant wanted custody to enable him to avoid the draft. This statement defendant denies.

Following the divorce the children lived with plaintiff until September 1971, and through the summer of 1972, but the two boys lived with defendant during school sessions. The youngest child remained with plaintiff until September 1972, when school started.

It is generally the best policy to keep minor children within the jurisdiction of the court, but this policy must yield to the paramount consideration which is the best interests of the children. See, Syas v. Syas, 150 Neb. 533, 34 N. W. 2d 884; Hossack v. Hossack, 176 Neb. 368, 126 N. W. 2d 166.

Since the entry of the divorce decree both parties have remarried and established new homes. Neither

has been found unfit to have custody of the children and their custody has been largely shared by their parents. This is not a situation in which the children have been primarily in the custody of one parent and a change of custody would result in tearing up roots established by life with one parent and in one community. The primary reason of stability is not applicable and the court is in the same position with reference to determining custody as it was in the first instance. In this case the court was required to determine which of the two homes offered would be best from the standpoint of the children. "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." Lanz v. Lanz, 189 Neb. 578, 203 N. W. 2d 761.

The trial court has resolved the issue and we are unable to find that there has been a clear abuse of discretion. "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." Lanz v. Lanz, *supra*.

The judgment of the District Court is affirmed.

AFFIRMED.

SPENCER, J., concurs in result.

EDGAR NINE, APPELLEE, V. INEZ LURZ ET AL., APPELLANTS.
216 N. W. 2d 744

Filed April 4, 1974. No. 39257.

1. **Summary Judgments.** It is error to sustain a motion for summary judgment when there is any genuine issue of material fact.
2. ———. The purpose of a summary judgment is not to serve as a substitute for a trial.

3. **Summary Judgments: Trial.** In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed.

Appeal from the District Court for Cherry County: WILLIAM C. SMITH, JR., Judge. Reversed and remanded.

Michael V. Smith for Smith & King, for appellants.

Nelson, Harding, Marchetti, Leonard & Tate, Alan L. Plessman, and John C. Coupland, for appellee.

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

FLORY, District Judge.

This is an action by the plaintiff, Edgar Nine, against the defendants, Inez Lurz and LeRoy Lurz, to set aside a deed from Inez and her husband Eustach to LeRoy as a conveyance in fraud of creditors. The trial court sustained plaintiff's motion for summary judgment. Defendants appeal.

It is undisputed: On December 10, 1967, Inez and her husband Eustach executed a note and mortgage to the plaintiff for $6,806.96 to purchase a home from plaintiff. On November 25, 1969, Inez and Eustach deeded a half section in Cherry County, Nebraska, to LeRoy, their son, without consideration. LeRoy was one of 11 children. On December 10, 1969, plaintiff commenced a foreclosure action on the note and mortgage and after a decree on March 2, 1970, purchased the house at the foreclosure sale for $500. Eustach died June 10, 1971. On October 27, 1971, plaintiff recovered a deficiency judgment against Inez for $6,983.17. This action was commenced on November 11, 1971. On hearing plaintiff's motion for summary judgment the trial court had before it in evidence the court files of the foreclosure and deficiency judgment actions, the pleadings in this case, and depositions of Inez and LeRoy all offered by

the plaintiff. Defendants offered no evidence.

Section 36-406, R. R. S. 1943, provides: "The question of fraudulent intent in all cases arising under the provisions of sections 36-401 to 36-409 shall be deemed a question of fact, and not of law, and no conveyance or charge shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration."

Defendants concede that a conveyance between close relatives without consideration is presumed to be fraudulent as to existing creditors and that the burden of overcoming the presumption falls on them. Plaintiff appears to contend that the presumption is conclusive.

Section 25-1332, R. R. S. 1943, provides that a summary judgment shall be rendered if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In this case the sole material fact in issue is that of fraudulent intent.

Piper v. Hill, 185 Neb. 568, 177 N. W. 2d 509, holds: "The issue to be tried on a motion for summary judgment is whether there is any genuine issue of material fact, and not how that issue should be decided. * * *

"In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. * * *

"In a summary judgment proceeding, the burden is upon the movant to show that no genuine issue of fact exists, and the purpose of a summary judgment is not to serve as a substitute for trial, but is only a proper remedy when the movant is entitled to judgment as a matter of law."

In this case there was no direct evidence before the trial court of fraudulent intent. Only the presumption from the admitted facts was present. From the testi-

mony of the defendants, and the inference that could reasonably be drawn therefrom in the depositions, a finder of fact could determine that the conveyance to LeRoy was a testamentary plan to keep the land in one unit and avoid the difficulties of dividing it between all 11 children.

By the presence of a genuine issue as to a material fact the defendants are entitled to a trial and are not required to try the issue on a motion for summary judgment.

The judgment of the trial court sustaining the motion for summary judgment is reversed and the cause remanded for trial on the merits.

REVERSED AND REMANDED.

EARL SCHMITT, APPELLANT, V. CITY OF OMAHA, APPELLEE.
217 N. W. 2d 86

Filed April 4, 1974. No. 39267.

1. **Appeal and Error: Records: Pleadings.** The requirement that a plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified within the time specified is mandatory and jurisdictional.
2. **Municipal Corporations: Pleadings.** Section 14-804, R. R. S. 1943, provides all claims against the city must be filed with the city comptroller. This filing is mandatory.
3. **Municipal Corporations: Administrative Law: Pensions.** The city council of the city of Omaha acts quasi-judicially in processing applications for a full salary disability pension under section 7.36.195 of the Omaha municipal code.
4. **Municipal Corporations: Appeal and Error.** The action of the city council is reviewable in the District Court by way of petition in error or appeal.
5. **Judgments: Appeal and Error.** A judgment will not be reversed on appeal if the result is correct, merely because the trial court assigned the wrong reason for its decision.

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

John J. Powers of White, Lipp, Simon & Powers and Marvin L. Green, for appellant.

Herbert M. Fitle, Thomas F. Dowd, Jr., and George S. Selders, Jr., for appellee.

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

SPENCER, J.

This case involves a claim for full salary payments under a 1967 amendment to section 7.36.195 of the Omaha municipal code. Earl Schmitt is a totally disabled former city fireman who was dropped from the fire department in February of 1958. His previous application for disability benefits in July of 1958 was denied and an action in the compensation court was dismissed. When his claim under the amended ordinance was rejected by the city council on February 13, 1968, plaintiff processed an appeal to the District Court under section 14-813, R. R. S. 1943. Defendant answered, pleaded res judicata, and subsequently moved to dismiss for lack of jurisdiction, on the theory that section 25-1905, R. R. S. 1943, was the only remedy available. The trial court sustained the motion and dismissed the appeal. We affirm.

Plaintiff concedes if a proceeding in error is the only remedy, he did not file a transcript of the proceedings with his petition, as required. We held in Adams v. City of Omaha (1966), 179 Neb. 684, 139 N. W. 2d 885: "The requirement that a plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified within the time specified is mandatory and jurisdictional."

It is, however, plaintiff's contention that the proper procedure is by appeal, as outlined in section 14-813, R. R. S. 1943. Plaintiff argues that his claim for a disability pension is a claim against the city within the ambit of section 14-804, R. R. S. 1943. This section, so far as material herein, reads: "Before any claim against the city, except officers' salaries earned within twelve months or interest on the public debt is allowed, the claimant or his agent or attorney shall verify the same by his affidavit, stating that the several items therein mentioned are just and true and the services charged therein or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount charged and claimed is due and unpaid, allowing all just credits. * * * All claims against the city must be filed with the city comptroller. When the claim of any person against the city is disallowed, in whole or in part, by the city council, such person may appeal from the decision of said city council to the district court of the same county, as provided in section 14-813."

We agree with plaintiff the language of section 14-804, R. R. S. 1943, is broad enough to include pension and disability claims. See Lobeck v. State ex rel. Nebraska Bitulithic Co. (1904), 72 Neb. 595, 101 N. W. 247, which involved almost identical language from section 33 of the Omaha city charter. In that case the court said: "The relators contend that the section above quoted has no application to cases like the one at bar. In other words, that the estimate on which the allowance was made was not a claim within the meaning of said section. We find ourselves unable to assent to this proposition. The law is broad and sweeping in its terms, and was evidently intended to include all claims of every kind and nature requiring for their payment the withdrawal of money from the city treasury, except, of course, officers' salaries, interest on the public debt,

and claims for torts, which are presented and prosecuted in a different manner."

However, as the District Court found, plaintiff was not filing a claim under section 14-804, R. R. S. 1943. That section provides all claims against the city *must* be filed with the city comptroller. This filing is mandatory. See Wheeler v. City of Omaha (1924), 111 Neb. 494, 196 N. W. 894. Plaintiff argues that this point is moot because the city council acted on his request as a claim, and by its conduct waived the requirements of verification and filing with the city comptroller. As Wheeler v. City of Omaha, *supra,* suggests, the city council cannot waive this requirement.

Plaintiff states: "If the form of the claim were imperfect, if it were not filed in conformance with the statutory provisions, the defect should have been pointed out or objected to in a lower tribunal, that is, in the City Council, before any hearing on the merits of the claim was conducted." Defendant's response is the issue was not raised in the lower tribunal because it was not aware plaintiff intended to use section 14-813, R. R. S. 1943, as his appeal procedure until he actually attempted to use it, nor was it aware in the lower tribunal that he was contending his claim was under section 14-804, R. R. S. 1943.

In Watts v. City of Omaha (1969), 184 Neb. 41, 165 N. W. 2d 104, we held that the city council of the city of Omaha acts quasi-judically in processing an application for a full salary disability pension under section 7.36.195 of the Omaha municipal code. We there held the action of the city council is reviewable in District Court by way of petition in error or appeal.

The District Court was in error in holding that petition in error was the only remedy available. It reached the right result, however, because it is obvious plaintiff did not attempt to process his claim in conformity with section 14-804, R. R. S. 1943. Our law is well settled

that a judgment will not be reversed on appeal if the result is correct, merely because the trial court assigned the wrong reason for its decision.

The judgment is affirmed.

AFFIRMED.

REUBEN REISIG, APPELLANT, V. CLARA REISIG, APPELLEE.
216 N. W. 2d 731

Filed April 4, 1974. No. 39270.

1. **Divorce: Trial: Evidence: Appeal and Error.** In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusions of the trial court as to such reliability will be carefully regarded by the Supreme Court on review.
2. **Divorce: Alimony: Judgments.** A judgment of a trial court fixing the amount of alimony, or making a distribution of property, will not be disturbed on appeal unless good cause is shown.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

James R. Hancock, for appellant.

Holtorf, Hansen, Kovarik & Nuttleman, for appellee.

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

NEWTON, J.

This is an action for divorce in which the sole question presented is the division of the property of the parties. We affirm the judgment of the trial court.

The case is triable de novo on appeal and, for the most part, the facts are not in serious dispute. The evidence is conflicting in regard to issues pertaining to contributions made in the purchase of the nursing home,

its operation, and the disappearance of certain cash assets. Resolution of these conflicts in the evidence which depends primarily on oral evidence must be made with the following rule in mind. "In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusions of the trial court as to such reliability will be carefully regarded by the Supreme Court on review." Buchanan v. Buchanan, 186 Neb. 89, 180 N. W. 2d 886. See, also, Dennis v. Dennis, 179 Neb. 200, 137 N. W. 2d 694.

On examination of the record we find the following facts have been established. The parties were married October 6, 1940, and have two minor sons who were 14 and 15 years of age when suit commenced. Their custody was awarded to their mother, respondent herein. The property of the parties included the nursing home valued at approximately $100,000. To maintain its license, repairs and improvements to the home costing in excess of $30,000 are required, and it is encumbered in the sum of $14,297.07. The nursing home and a duplex valued at $8,500, but included in the nursing home valuation of $100,000, were awarded to respondent. Respondent also received the home in Morrill, Nebraska, valued at $30,000 and subject to a mortgage of $8,000. Respondent contributed $25,000 to the purchase of the nursing home. She also operated it and all family living expenses were paid out of its earnings. At the time of its purchase, petitioner was $30,000 in debt, which was eventually paid out of the earnings of the nursing home, and he has contributed little, if anything, toward its purchase or operation. On the contrary, he used his earnings, and money from the nursing home, to purchase and repair other property. Petitioner concedes he took from the home savings bonds valued at $2,550. He also appears to have taken

$10,000 in cash, and nearly $15,000 from a checking account.

Petitioner was awarded nine properties with equities amounting to a minimum of $18,850. He also received tools, saddles, guns, boats, a 1973 Pontiac, a Ford tractor, a 1967 and a 1973 Cadillac, and several horses. He was not required to pay child support. Costs, including a $2,000 attorney's fee, were taxed to respondent.

In view of the manner in which petitioner milked the nursing home assets, his failure to contribute to the support of his family, his being relieved of child support payments and costs, the encumbrance on the property awarded respondent, the necessity for expensive improvements on the nursing home, and respondent's contributions to its purchase and operation, we conclude that the property division made by the trial court is not inequitable.

A judgment of a trial court fixing the amount of alimony, or making a distribution of property, will not be disturbed on appeal unless good cause is shown. See Newton v. Newton, 188 Neb. 242, 196 N. W. 2d 116.

The judgment of the District Court is affirmed. Costs, including the allowance of a $500 attorney's fee to respondent, are taxed to petitioner.

AFFIRMED.

JOAN C. PENCE, APPELLANT, V. VIRGIL W. LIERMANN, APPELLEE.
216 N. W. 2d 746

Filed April 11, 1974. No. 39161.

1. **Negligence: Motor Vehicles: Highways.** The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on the highway to be entered.
2. **New Trial: Negligence.** Newly discovered evidence is not sufficient reason for a new trial of a cause if diligence before the

trial would have produced notice or knowledge of the alleged recently discovered evidence.

Appeal from the District Court for York County: HOWARD V. KANOUFF, Judge. Affirmed.

Charles J. Knight, for appellant.

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

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

BUCKLEY, District Judge.

In this action for damages, the jury returned a verdict for the defendant on plaintiff's petition and for defendant on his cross-petition. Plaintiff appeals.

Notwithstanding that plaintiff did not move the court to direct a verdict at the close of all the evidence, she now contends that the evidence will not support the jury's verdict. Plaintiff testified that, on a dense, foggy morning, she entered U. S. Highway No. 34 from her farm driveway, turned to her right, and proceeded west on the highway and was struck in the rear by defendant's automobile, which she did not see before the collision. Later, plaintiff, her huband, and a third party measured the distance from the driveway to the point of impact as approximately 350 feet.

Defendant testified that he could see only 50 to 60 feet ahead in the heavy fog, and that he first saw one of the taillights of plaintiff's car "just as if it either come on or come on the road." He struck plaintiff's car 40 to 45 feet from her driveway.

The driver of a vehicle entering a public highway from a private road or drive shall yield the right-of-way to all vehicles approaching on such public highway. Helferty v. Mickels, 171 Neb. 246, 106 N. W. 2d 40. The

key issue was the distance plaintiff traveled after entering the highway before she was struck by defendant, and the jury evidently resolved this question in favor of the defendant. Plaintiff questions the inability of defendant to see plaintiff's automobile until he was 20 feet away when he could see 50 to 60 feet ahead in the fog. The jury could reasonably conclude that the defendant saw only one taillight of plaintiff's car 20 feet ahead because the car was at an angle and coming on to the highway at the time and that the impact occurred a short distance from the driveway. The issue of negligence as to both drivers was clearly a question for the jury.

Plaintiff contends she should be granted a new trial on the basis of newly discovered evidence. In her supporting affidavit she states that she discovered a witness after trial, one Michael Naber, who was absent from the jurisdiction for at least 1 year before trial, and who would testify that the distance from the driveway to the point of impact was approximately 528 feet. From defendant's counter affidavit and plaintiff's subsequent affidavits in reply thereto, we learn that the witness was a deputy sheriff who apparently investigated the accident and that there is a serious dispute plaintiff knew of this witness and of his whereabouts before trial. The most that can be said from plaintiff's own affidavits is that the witness' whereabouts were unknown to the York County sheriff for the last 5 weeks before trial.

"In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor his counsel could have discovered by the exercise of reasonable diligence, that it was not merely cumulative, but competent, relevant, and material and with relation to a material issue, and of such character as to reasonably justify a belief that its admission would probably bring about

a different result if a new trial were granted." In re Guardianship of Carstens, 151 Neb. 425, 37 N. W. 2d 581. See, also, Wiegand v. Lincoln Traction Co., 123 Neb. 766, 244 N. W. 298.

We said in Wiegand v. Lincoln Traction Co., *supra:* "What is reasonable diligence? Facts and circumstances must be clearly set out by the affidavits of the attorneys as well as of the party appealing, from which the court may determine whether the party did in truth use reasonable diligence in searching for this newly discovered evidence before the former trial. Todd v. City of Crete, 79 Neb. 677. In fact, the party must negative every circumstance from which a lack of diligence might be inferred. Axtell v. Warden, 7 Neb. 186. He must show that all proper efforts had been made to discover it before the first trial. Brazil v. Moran, 8 Minn. 236, 83 Am. Dec. 772. . . .

"Defendant must show that the evidence came to him since the trial and was not equally available to him previous to that trial, and was not simply discovered by exercise of belated diligence."

Here, the affidavits lack any showing as to what efforts were made to locate the deputy sheriff before the trial and in what way he was located by the time the motion for new trial was filed 8 days later. No showing is made that any contact with the sheriff's office or any other investigation was made to determine if the sheriff had investigated the accident. Considering the obvious serious question of liability, the failure of plaintiff or her counsel to investigate such possible source of information falls far short of the reasonable diligence required as a condition of securing another trial because of newly discovered evidence. Newly discovered evidence is not sufficient reason for a new trial of a cause if diligence before the trial would have produced notice or knowledge of the alleged recently discovered evidence. The law will not intervene to assist

a litigant who has not exercised due diligence to prevent the result of which he complains and which is attributable to his inattention. See Wemmer v. Young, 167 Neb. 495, 93 N. W. 2d 837. The motion for a new trial was properly denied.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

EDITH EDQUIST, APPELLEE AND CROSS-APPELLANT, V. COMMERCIAL SAVINGS AND LOAN ASSOCIATION, APPELLANT AND CROSS-APPELLEE.

217 N. W. 2d 82

Filed April 11, 1974. No. 39241.

1. **Appeal and Error: Motions, Rules and Orders.** An order overruling a motion made after verdict for judgment in conformity with a previously denied motion for a directed verdict is an appealable order.
2. **Appeal and Error: Rules of Court.** A right to a cross-appeal exists only by virtue of Rule 1 d, Revised Rules of the Supreme Court, 1971, and in order to perfect a cross-appeal the appellee need comply only with Rule 8 b 3, Revised Rules of the Supreme Court, 1971.
3. **Banks and Banking: Interest: Time.** When a bank or savings institution is found to be liable for the unauthorized withdrawal of funds from a depositor's account, the depositor is entitled to interest from the date of the unauthorized withdrawals to date of judgment.
4. **Trial: Evidence.** In every case before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Reversed in part and remanded with directions.

Haney, Wintroub & Haney, for appellant.

Yost, Schafersman, Yost & Lamme, for appellee.

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

CLINTON, J.

The plaintiff brought this action against the defendant savings and loan association to recover the sum of $9,666.72 withdrawn from her savings account when the association honored six withdrawal slips on which the plaintiff's signature had been forged by her son. Insofar as issues on appeal are concerned, the association defended on the basis of an allegation in its answer: ". . . that any damages sustained by the Plaintiff were not to the extent alleged in Plaintiff's Petition for the reason that a substantial portion of the funds allegedly withdrawn by Plaintiff's son was either delivered to the Plaintiff or used for the support and maintenance of the Plaintiff and consequently the Plaintiff has received the benefits thereof."

The trial court directed a verdict for the plaintiff on the issue of liability and submitted to the jury only the assessment of the amount of damage, thus in effect submitting to the jury the question of whether and to what extent the plaintiff received the benefit of the withdrawals as alleged in the answer. The jury rendered a verdict for the plaintiff in the amount of $8,466.72, thus in effect finding that the plaintiff had benefited by the withdrawals in the sum of $1,200.

Because of issues raised on the appeal, it is necessary to set forth a partial summary of the procedure in the trial court. The court entered judgment on the verdict on June 26, 1973, the day it was returned. On June 28, 1973, the plaintiff filed a motion for judgment in the amount of $9,666.72, notwithstanding the verdict and for allowance of prejudgment interest in the amount of $3,249.54. On July 9, 1973, the trial judge granted

the motion for allowance of interest and entered an order as follows: "The Court now finds that the judgment of plaintiff with interest calculated, is now in the sum of $2,978.27, and judgment for said amount is now entered in favor of the Plaintiff and against the Defendant. Said judgment in the total sum of $11,444.99." The interest was calculated by the trial court on a principal amount of $8,466.72 and at the rate that amount would have earned had it remained on deposit.

On July 23, 1973, the association filed a motion for a new trial on the issue of allowance of prejudgment interest and on the same date the motion was overruled as was the plaintiff's motion for judgment notwithstanding the verdict. The association timely filed a notice of appeal as follows: ". . . intends to prosecute an appeal to the Supreme Court from the order of July 9, 1973 sustaining Plaintiff's motion for an addition of interest to judgment, and the order of July 23, 1973 overruling this Defendant's motion for a new trial on the question of addition of interest to judgment."

In this court the association assigns as error the allowance of prejudgment interest and supports the assignment by the argument that the plaintiff's claim was for an unliquidated amount and therefore prejudgment interest was not allowable. The plaintiff, in accordance with Rules 1 d and 8 b 3, Revised Rules of the Supreme Court, 1971, has perfected a cross-appeal, assigning as error (1) the denials of her motion for a directed verdict in the amount of $9,666.72 and her subsequent motion for judgment notwithstanding the verdict, and (2) that since the principal amount is less than the plaintiff was entitled to, the amount of prejudgment interest allowed is incorrect. She claims the interest should have been allowed at 6 percent under the provisions of section 45-104, R. R. S. 1943, rather than at the lesser rate provided by the deposit contract.

The association contends that the issues raised by

the plaintiff on her cross-appeal are not properly before this court because the association appealed only from the order allowing interest and not from the judgment on the verdict. It in effect asserts that perfection of a cross-appeal under the previously mentioned rules of this court is proper only where the cross-appeal relates to the same order concerning which the association has taken its appeal. Stated in another form, it argues that the judgment on the verdict and the allowance of interest are separate judgments and the plaintiff would have had to timely take steps to perfect a direct appeal from the orders about which she complains in order to bring those matters before this court.

We determine the issues adversely to the contentions of the association and reverse in part and remand the cause with directions.

The association's position on the cross-appeal issue would be arguable if there existed two separate judgments. See, Parish Bank & Trust Co. v. Uptown Sales & Service Co., Inc., 300 Ill. App. 73, 20 N. E. 2d 634; Robbins v. Campbell, 65 Ill. App. 2d 478, 213 N. E. 2d 641; Kinney v. White, 215 Ala. 247, 110 S. 394; 4 C. J. S., Appeal & Error, § 35, p. 140. A party may not cross-appeal if he has no interest in the judgment upon which the appellant appeals. County of Lancaster v. Schwarz, 152 Neb. 15, 39 N. W. 2d 921.

When the court entered the order on July 9, 1973, it was in effect merely amending the judgment. This it had the power and duty to do if, as a matter of law, the plaintiff was entitled to interest.

In Heusser v. McAtee, 151 Neb. 828, 39 N. W. 2d 802, we said: "In Calnon v. Fidelity-Phenix Fire Ins. Co., 114 Neb. 194, 206 N. W. 765, this court held: 'Where, from the verdict and the pleadings, as in this case, it appears that, if plaintiff is entitled to recover at all he is entitled to recover interest, the court should make

the computation and cover the amount of interest in the judgment.'

"In Swygert v. Platte Valley Public Power and Irrigation Dist., 133 Neb. 194, 274 N. W. 492, citing Calnon v. Fidelity-Phenix Fire Ins. Co., supra, this court said: 'Where the law requires interest not included in a verdict, the court may make the computation and include the amount in the judgment.'

"In Blum v. Truelsen, 136 Neb. 896, 287 N. W. 782, followed in 139 Neb. 282, 297 N. W. 136, it was said: 'This court has held that, when the jury fail to add interest in the verdict returned, the court may make the proper computation and include the amount of the interest in the judgment, without any amendment of the verdict whatsoever.'

"Also, in Bank of Axtell v. Johnson, 125 Neb. 154, 249 N. W. 302, this court held: 'The trial court should either amend the verdict or calculate interest and cover the amount thereof in the judgment, where it appears from the pleadings and verdict that plaintiff is entitled to interest and the jury have omitted it from their verdict.' "

The association argues that an order denying a motion for a judgment notwithstanding the verdict is not an appealable order. It relies upon the provisions of section 25-1315.03, R. R. S. 1943, and contends that that statute authorizes an appeal only from (1) an order granting a new trial, (2) an order denying a new trial, or (3) an order granting a motion for judgment notwithstanding the verdict. It is obvious that this statute defines certain appealable orders. Its definitions, however, are not exclusive. See, § 25-1911, R. R. S. 1943; Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N. W. 2d 609. We have at least twice held contrary to the association's position. In re Estate of Fehrenkamp, 154 Neb. 488, 48 N. W. 2d 421; Bailey v. Williams, 189 Neb. 484, 203 N. W. 2d 454; § 25-1315.02, R. R. S. 1943.

An order overruling a motion made after verdict for judgment in conformity with a previously denied request for a directed verdict is an appealable order.

A cross-appeal, as distinguished from the perfection of a direct appeal, exists in this state only by virtue of the previously mentioned rules of this court. There is no statutory authorization for the procedure. See, 4 C. J. S., Appeal & Error, § 35, p. 139; Ternes v. Watke, 134 Neb. 798, 279 N. W. 718. We have several times modified the procedure. See, Rule 7 a 2, Rules of Court, 1938; and Rule 7 d, Revised Rules of the Supreme Court, 1941. In order to perfect a cross-appeal an appellee need comply only with the provisions of Rules 1 d and 8 b 3, Revised Rules of the Supreme Court, 1971. The general language used by us in Gebhart v. Tri-State G. & T. Assn., 181 Neb. 457, 149 N. W. 2d 41, describing the nature of a cross-appeal, has no application to cross-appeals under the above rules. The discussion in that case was related to the statutes governing appeals to the District Court under the eminent domain statutes.

We are accordingly in a position to examine the assignments made in the cross-appeal as well as those raised by the association.

When a bank or savings institution permits the withdrawal of a depositor's funds on the basis of a forged instrument and is found to be liable for the principal amount, the depositor is entitled to interest from the date of the unauthorized withdrawals until the debt is merged in the judgment. Pierce v. Boston Five Cents Savings Bank, 129 Mass. 425, 37 Am. R. 371; Southwest Nat. Bank of Dallas v. Underwood (Tex. Civ. App.), 295 S. W. 253; Farmers' Nat. Bank of Somerset v. Dodson, 234 Ky. 518, 28 S. W. 2d 777; 9 C. J. S., Banks and Banking, § 356e, p. 758, § 1021, p. 1439; Gibson v. First Nat. Bank of Jefferson City, 213 Mo. App. 63, 245 S. W. 1072. The authorities cited by the association

related to unliquidated claims and have no application.

In connection with the plaintiff's contention that she was entitled to a directed verdict in the amount of $9,666.72 and interest, we have carefully examined the evidence. We conclude that the motion should have been granted. The evidence conclusively supports the plaintiff's position that she did not receive the proceeds of the account or the benefits thereof.* In every case before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed. Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605.

We need not decide whether interest should be computed at the legal rate of 6 percent rather than the rate provided for by the deposit contract, because no such claim was made in the trial court. We will not decide an issue raised for the first time in this court.

The judgment is reversed in part and the cause is remanded with directions to enter judgment for the sum of $9,666.72, together with interest to the date of the verdict on the principal amount at the contract rates.

REVERSED IN PART AND REMANDED WITH DIRECTIONS.

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*We do not need to pass upon the question of whether and to what extent the matter plead in the answer did afford a legal defense because the plaintiff raised no issue on that question.

JULIE A. BEHRENS, APPELLEE, V. KEN CORPORATION, DOING BUSINESS AS HOLIDAY INN, APPELLANT.
216 N. W. 2d 733

Filed April 11, 1974. No. 39256.

1. **Workmen's Compensation: Appeal and Error: Judgments.** The District Court is authorized to modify an award of the Workmen's Compensation Court upon an appeal from a rehearing before the full compensation court if the findings of fact are not supported by the record.
2. **Workmen's Compensation.** When an employee is unable to perform the work for which he has previous training or experience as a result of an injury covered by the Workmen's Compensation Act, he is entitled to vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Affirmed.

Deutsch & Hagen, for appellant.

Jewell, Otte, Gatz, Magnuson & Collins, for appellee.

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

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act. The plaintiff was employed as a maid in the motel operated by the defendant. In April 1971, she was disabled by a contact dermatitis caused by chemicals and cleaning agents used in her employment.

After a hearing before one judge of the Workmen's Compensation Court, the plaintiff recovered an award for temporary total disability and her medical and hospital expenses. After a rehearing before the full compensation court, one judge dissenting, the plaintiff again recovered an award for only temporary total disability and her medical and hospital expenses. The plaintiff then appealed to the District Court.

The District Court found that in addition to temporary total disability and her medical and hospital expenses, the plaintiff was entitled to compensation for a 10 percent permanent partial disability to the body as a whole and was entitled to vocational rehabilitation benefits. The defendant has appealed.

The issues on appeal are whether the plaintiff was entitled to compensation for permanent partial disability and vocational rehabilitation benefits. The District Court is authorized to modify an award of the compensation court upon an appeal from a rehearing before the full compensation court if the findings of fact are not supported by the record. § 48-184 (3), R. R. S. 1943.

The plaintiff testified she first noticed difficulty with her hands in October 1970. It started out as a rash and later turned into blisters. She consulted a local physician in April 1971, and was referred to Dr. Richard Q. Crotty, a dermatologist, in June 1971.

Dr. Crotty testified he found the plaintiff in great distress due to swelling and pain, and emotionally upset because she had been unable to rest. She had marked skin changes of the hands and forearms described as swelling edema, pustule formation, and exudation of the skin. There was weeping of the skin where the blisters were broken, and secondary infection in the inflamed areas. There were scattered lesions all over her body. The plaintiff was hospitalized at that time for 5 days.

As a result of the treatment and medication administered to the plaintiff, her condition improved, but Dr. Crotty testified she would never completely recover from the sensitization reaction and loss of the acid mantle layer of the skin on her hands. In his opinion she had sustained a 10 percent permanent disability to the body as a whole.

The plaintiff was examined on October 6, 1972, by Dr. Olin J. Cameron, a dermatologist, at the request of the defendant. Dr. Cameron found a small irritated area on

her left hand and a pustule on her left index finger. He described her condition as a trace of contact dermatitis and pyroderma or skin infection. Dr. Cameron did not believe the plaintiff had sustained any permanent disability but agreed she would have to avoid strong cleansing agents and would be unable to work as a motel maid, baby sitter, or waitress.

Dr. Cameron's opinion was based in part upon an assumption that the plaintiff had been able to do her housework, such as washing clothes and dishes, without trouble or difficulty for the previous 6 or 7 months. This was contrary to the plaintiff's testimony that a rash would develop when she washed dishes. We think the record did not support the finding by the compensation court that the plaintiff had not sustained a permanent partial disability. The finding of the District Court that the plaintiff had sustained a 10 percent permanent partial disability to the body as a whole was sustained by the record.

The right to vocational rehabilitation benefits was added to the Workmen's Compensation Act in 1969. When an employee is unable to perform the work for which he has previous training or experience as a result of an injury covered by the act, he is entitled to vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment. § 48-162.01, R. S. Supp., 1972. Except in unusual cases, the training, treatment, or service shall not extend beyond 26 weeks. The benefit is in addition to other benefits payable under the act, including temporary disability. An employee undergoing rehabilitation is entitled to receive compensation for temporary disability. § 48-121, R. S. Supp., 1972.

The record shows the plaintiff was 20 years of age at time of trial. She had completed the 9th grade in high school, but had received no type of special training. She had worked for 3 years before she became disabled as a result of contact dermatitis. She was unable to return to

the employment in which she had experience, and was unable to perform any kind of work in which her hands would be in contact with chemical irritants of any kind. This would include work in a dental laboratory, bottling company, or clothing store. She had been refused employment a number of times because she was not qualified to perform the duties of the employment. The plaintiff could do office work if she had the proper training.

The trial court found the plaintiff was entitled to vocational rehabilitation services for secretarial or office training at the Northeast Nebraska Technical Community College in Norfolk, Nebraska, for a period of 26 weeks. This finding is sustained by the record. The finding of the compensation court that the plaintiff was not entitled to vocational rehabilitation benefits was not sustained by the record.

The judgment of the District Court is affirmed. The plaintiff is allowed $750 for the services of her attorney in this court.

AFFIRMED.

DONALD PARRY ET AL., APPELLEES AND CROSS-APPELLANTS, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, ET AL., APPELLANTS.
216 N. W. 2d 875

Filed April 11, 1974. No. 39269.

1. **Appeal and Error: Equity.** In appeals from the District Court to the Supreme Court in suits in equity, it is the duty of this court to retry the issues of fact involved upon the evidence in the record and upon such trial de novo reach an independent conclusion.
2. **Reformation of Instruments: Insurance: Contracts.** When a soliciting agent of an insurance company and the insured mutually agree upon the terms and conditions of the insurance contract, and the policy, later issued by the company, omits one of the essential elements of the contract, which is not discovered by

the insured until after a loss occurs, he may then have the policy reformed so as to express the real agreement of the parties.

3. **Reformation of Instruments: Trial: Evidence.** In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. To sustain that burden of proof, evidence that is plain and convincing beyond reasonable controversy is required. A mere preponderance of the evidence is not sufficient.

Appeal from the District Court for Platte County: C. THOMAS WHITE, Judge. Reversed and dismissed.

Ray C. Simmons, for appellants.

Winkle & Allphin, for appellees.

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

MCCOWN, J.

This is an action for reformation of an automobile insurance policy by the addition of a provision for $5,000 death indemnity coverage and the removal of a limitation of $1,000 for funeral expenses under the medical coverage provisions. The trial court found generally for the plaintiffs on the death indemnity coverage issue and against them on the funeral expense limitation issue, and entered judgment for $5,000, plus interest and attorney's fees. The defendants have appealed and plaintiffs have cross-appealed.

The plaintiffs, Donald and Virginia Parry, lived on a farm near Newman Grove, Nebraska. They were the parents of three daughters, all of whom were single at the times relevant here. On February 26, 1972, the plaintiffs had five motor vehicles, all of which were insured by the defendant, State Farm Mutual Automobile Insurance Company, under five separate policies of insurance, each with a different renewal date and on

each of which the premiums were payable semiannually. The plaintiffs had carried all their motor vehicle insurance with the defendant insurance company for a period of approximately 10 years and relied upon the agent to provide coverage. There were three passenger cars, one pickup, and one truck insured under the five policies.

The plaintiffs, Donald and Virginia Parry, were the named insureds in a policy covering a 1968 Dodge automobile, and were also named as the persons insured for $5,000 each under coverage S (Accidental death benefit coverage). Only the plaintiffs' names appeared on that policy.

The insurance policy on a 1967 Cougar automobile named the plaintiff, Donald Parry, and the two older daughters, Ann and Nancy, as the three named insureds. Ann and Nancy were also named as the two persons insured for $5,000 each under coverage S on that policy.

The insurance policy covering a 1966 Dodge Charger designated the plaintiff, Donald Parry, and his oldest daughter, Ann, as the named insureds and did not name any individual as insured under coverage S.

The insurance policy covering a Ford truck designated the plaintiffs, Donald Parry and Virginia Parry, as the named insureds and did not name any persons as insured under coverage S. The insurance policy on the pickup truck was not introduced into evidence but is assumed to carry the same coverage as the truck.

The coverage for accidental death benefits (coverage S) is supplementary coverage which must be specifically requested. Persons insured under that coverage are only those specifically named, and only for the amounts specified for each person. A separate additional premium is paid for each person named under the coverage. Persons insured under coverage S and the amount of insurance for each is shown separately on the first page of the policy.

The plaintiff, Donald Parry, was a named insured on

all five of the policies. The plaintiff, Virginia Parry, was a named insured under three of them. The plaintiffs' daughter, Ann, was a named insured on two policies and the plaintiffs' daughter, Nancy, was a named insured on one policy. The plaintiffs, Donald and Virginia Parry, were named as persons insured under coverage S on one policy. Ann and Nancy, the two older daughters, were named as persons insured under coverage S on another policy. The remaining three policies did not include any S coverage for anyone.

Plaintiffs had notified the defendants at the time their daughter, Ann, became 16 and began to drive in 1966, and again when Nancy became 16 and began to drive in 1967. They were not named in any policy however until May 8, 1969. On that date, both were designated as named insureds, and both named as persons insured under coverage S in the policy covering the 1967 Cougar.

The plaintiffs' youngest daughter, Connie, became 16 years old on March 12, 1971. About 6 months before that date when Connie obtained her learner's permit, her mother, Virginia Parry, testified that she called the insurance agent and told him that Connie would be driving "our car." Plaintiffs' evidence is that at about the time of Connie's birthday in the spring of 1971, her father, the plaintiff, Donald Parry, called the defendant insurance agent by telephone and "just told him I wanted her put on the policy like the rest of us, added on like the rest of us." He testified that the accidental death benefit "was not even mentioned. I just told him I wanted her added on like the rest of us." Plaintiff, Donald Parry, testified that he did not specify which car or cars he wanted Connie added on, nor which car she would be driving. According to plaintiffs' testimony, the defendant insurance agent came to their home a few days thereafter and obtained the num-

ber on the driver's license of Connie and checked a driver's education certificate of hers. There was no discussion about any $5,000 coverage or any $5,000 death benefit. Thereafter the plaintiffs continued to pay the insurance premiums as they were billed until the accident which gave rise to this litigation.

The defendant insurance agent testified that he had no recollection of a telephone call with the plaintiffs or either of them at the time Connie obtained her learner's permit or at the time she obtained a driver's license. He also testified that the first time he was even aware that plaintiffs had a daughter named Connie was after an accident which Connie had in January of 1972, when she was driving the 1968 Dodge automobile. That accident was reported by plaintiff, Donald Parry, to the defendant insurance agent and apparently satisfactorily adjusted.

The evidence is undisputed that Connie, as a member of the household, was insured under all her father's insurance policies, whether she was a named insured or not, except for coverage S. It is also undisputed that the addition of Connie's name to the policy as a named insured would not have changed the premium rate for any coverage other than coverage S. If she had been named as a person insured under coverage S, there would have been an additional premium for that specific coverage, although the amount of the premium is not specified.

On February 26, 1972, Connie was killed in an accident while driving the 1968 Dodge automobile. The named insureds on the policy on that car were the plaintiffs, Donald and Virginia Parry, and each of them were also designated as a person insured under the S coverage in the amount of $5,000 each. Connie's name did not appear on this policy nor on any other policy held by the plaintiffs.

The funeral expenses were $1,354.70. The defend-

ants paid the collision loss and the sum of $1,000 specified in the policy as the limitation of liability under coverage M "for funeral expenses incurred for each person." This action followed.

This action seeks only to reform the automobile insurance policies covering the 1968 Dodge and the 1967 Cougar. A suit to reform an instrument is an action in equity. In all appeals from the District Court to the Supreme Court in suits in equity, it is the duty of this court to retry the issues of fact involved upon the evidence in the record and upon such trial de novo reach an independent conclusion. See § 25-1925, R. R. S. 1943.

Plaintiffs' right to reform these automobile insurance policies rests upon the rule approved by this court in Du Teau Co., Inc. v. New Hampshire Fire Ins. Co., 156 Neb. 690, 57 N. W. 2d 663: " 'When a soliciting agent of an insurance company and the insured mutually agree upon the terms and conditions of the insurance contract, and the policy, later issued by the company, omits one of the essential elements of the contract, which is not discovered by the insured until after a loss occurs, he may then have the policy reformed so as to express the real agreement of the parties, and his failure to promptly examine the policy when received and discover the departure therein from the real agreement will not defeat his right to have reformation of the policy.' "

In that same case however, this court also stated: "In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. If the proofs are doubtful and unsatisfactory and if there is a failure to overcome this presumption by testimony entirely *plain and convincing beyond reasonable controversy,* the writing will be held

to express correctly the intention of the parties." (Emphasis ours.)

The same rule was similarly expressed in a Nebraska case in the federal court: " 'The party alleging the mistake must show exactly in what it consists and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. * * *.' The burden of proof rests upon the complainant and, to sustain it, *evidence that is plain and convincing beyond reasonable controversy is required. A mere preponderance of the evidence is not sufficient.*" (Emphasis ours.) Maryland Casualty Co. v. United States for Use of Green, 169 F. 2d 102 (8th Cir., 1948).

The evidence of the plaintiffs fails to establish beyond reasonable controversy that the insurance agent and the plaintiffs ever reached actual agreement as to the specific terms and conditions of the alleged reformation or which policy or policies were to be affected. This is particularly important where the alleged agreement involves supplemental coverage but the language used could be used or applied to primary or supplemental coverage or both. The evidence of plaintiffs was not plain and convincing beyond reasonable controversy and was insufficient to overcome the presumption that the terms of the written policy or policies of insurance were binding upon the parties.

The plaintiffs also assert in their cross-appeal that they are entitled to avoid the limitation of liability to $1,000 for "funeral expenses" under coverage M by classifying the costs involved in the funeral as "services" and "expenses," or by dividing the total sum of $1,354.70 between two or more insurance policies. The specific language of the policies prevents the latter interpretation, and no realistic interpretation of "funeral expenses" could properly exclude the professional services of a funeral director nor differentiate such costs

from other funeral expenses. In addition, there is simply no evidence to support the allegations for reformation on this issue, and this claim was properly dismissed.

That portion of the judgment of the District Court denying plaintiffs' claim for reimbursement for funeral expenses was correct and plaintiffs' cross-appeal has no merit. That portion of the judgment for plaintiffs on the issue of death indemnity coverage and for attorney's fees and costs is reversed and plaintiffs' cause of action is dismissed.

REVERSED AND DISMISSED.

BILLY L. BOURN, APPELLANT, V. HUGH L. JAMES, APPELLEE.
216 N. W. 2d 739

Filed April 11, 1974. No. 39286.

1. **Workmen's Compensation: Appeal and Error: Process.** Section 48-183, R. R. S. 1943, relating to service of the petition on appeal after a rehearing before the full Workmen's Compensation Court is directory and not jurisdictional.
2. **Workmen's Compensation.** A workman may not recover benefits under the Workmen's Compensation Act unless the injury arose out of the employment. In order to recover there must be a causal connection between the injury and the employment.
3. ———. In determining under the Workmen's Compensation Act whether a risk arises out of employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard.

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

Philip T. Morgan, for appellant.

Kelly & Kelly, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH,

McCOWN, NEWTON, and CLINTON, JJ., and FLORY, District Judge.

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act. There is no issue concerning the applicability of the act to the defendant who is a rancher and farmer engaged in the purchase and sale of livestock. He lives at Ericson, Nebraska, and has a yard there where he keeps cattle. The plaintiff was employed to work at the yard and help care for the cattle. His duties included feeding and vaccinating the cattle and doing the regular chores.

The plaintiff lived in a small trailer owned by the defendant and located at the yard on the defendant's property. He was injured by a fire while asleep in the trailer at about 3 a.m., on December 4, 1971. The Workmen's Compensation Court found the plaintiff was entitled to compensation for temporary total disability, permanent partial disability, and his medical and hospital expenses. After a hearing before the full compensation court, the defendant appealed to the District Court.

The District Court set aside the award of the compensation court on the ground the findings of fact by that court did not support the award. The District Court found there was no finding that the plaintiff had established his claim by a preponderance of the evidence or that the injury was in fact caused by the employment. The plaintiff has appealed to this court.

A preliminary question is raised as to the jurisdiction of the District Court. The plaintiff contends the appeal to the District Court should have been dismissed because the defendant failed to serve a copy of the petition on appeal on the adverse party in the manner prescribed by section 48-183, R. R. S. 1943.

The statute provides a copy of the petition on appeal in the District Court shall be served upon the adverse party in the same manner as a summons as provided in sections

48-174 and 48-175, R. R. S. 1943, and return of service shall be made within 5 days. Sections 48-174 and 48-175, R. R. S. 1943, provide that upon commencement of the proceeding, service of summons may be made as in civil causes or by registered or certified mail. In this case the petition on appeal was served on the plaintiff's attorney by regular mail. No proof of service was filed until the hearing in the District Court on plaintiff's motion to dismiss the appeal.

The appeal to the District Court was a continuation of the proceeding commenced in the compensation court. We think the provisions in section 48-183, R. R. S. 1943, regarding the manner of service of the petition on appeal and the proof of service are directory rather than jurisdictional. Here there was timely service in fact on the adverse party and no prejudice resulted from the use of regular mail instead of certified or registered mail. The motion to dismiss was properly overruled.

The award by the single judge of the compensation court found the nature of the plaintiff's duties in his employment required that he "be available continuously" and it was necessary that he live on the premises of the defendant. The award by the full compensation court after trial de novo on rehearing contained these findings: "(1) While it does not appear from the evidence that the plaintiff was required, as a condition of his employment, to live on the defendant's premises, his contract of employment clearly contemplated that he should utilize the defendant's on-premises trailer house as his sleeping and living quarters as an incident to the employment; (2) This arrangement was not without benefit to the defendant employer, as it naturally tended to make the plaintiff available for such care-taking duties as might and occasionally did arise during nighttime hours, such as attending to calving heifers; (3) The activity of sleeping in on-premises sleeping quarters furnished by the employer is not such a personal mission in the context here presented

as to be excluded from the protection of the compensation law; * * *."

The question here is whether the findings of fact by the compensation court on rehearing support the conclusion that the injury to the plaintiff arose out of his employment. In order for the plaintiff to recover, there must be a causal connection between the injury and his employment. Hannon v. J. L. Brandeis & Sons, Inc., 186 Neb. 122, 181 N. W. 2d 253.

In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard. Oline v. Nebraska Nat. Gas Co., 177 Neb. 851, 131 N. W. 2d 410.

The plaintiff was paid $350 per month and furnished board and lodging. No other employee lived on the premises.

There were 100 to 120 head of cattle in the yard at the time of the accident, including 7 to 10 springing Herefords. The defendant testified the plaintiff was not required to live on the premises but was allowed to live at the defendant's house or in the trailer at the yards because the plaintiff had no other place to stay. The defendant admitted the plaintiff was responsible for the care of the cattle, but said that if the cattle needed attention at night, the plaintiff was expected to notify the defendant or the defendant's wife. Apparently, this latter statement was contrary to his testimony at the first hearing. The defendant was away on business frequently and was not at home on the night of the accident.

There was no evidence to indicate the plaintiff was expected to work only fixed hours, and it was a fair inference from the testimony the plaintiff was "on call" while on the premises if his services were needed. There was

a clear benefit to the defendant from having the plaintiff live on the premises and it was reasonably incident to his employment as a caretaker and laborer at the yards.

As we view the record, the findings of fact by the compensation court support the award made on rehearing. The judgment of the District Court is reversed and the cause remanded with directions to reinstate the award of the compensation court.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. WAYNE GOHAM, APPELLANT.
216 N. W. 2d 869

Filed April 11, 1974. No. 39350.

1. **Habeas Corpus: Courts.** In the interest of proper state practice and procedure we initially require a party to file a petition for a writ of habeas corpus in the state trial court.
2. **Statutes.** In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.
3. **Statutes: Legislature.** The intention of the Legislature when ascertained will prevail over the literal sense of the words used and this is especially true when the strict letter of the law would lead to injustice or absurdity.
4. ———: ———. In interpreting a statute the legislative intent may be found from the reason of the enactment.
5. ———: ———. 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.
6. ———: ———. The rationale involved in the rule of construing legislative intent does not mean the court is substituting its judgment for that of the legislative body. Rather, it is attempting to ascertain the legislative intent. It will presume the Legislature intended a sensible, just, and reasonable result rather than the opposite.
7. ———: ———. To construe statutes so as to avoid absurd or

glaringly unjust results, foreign to the legislative purpose, is a traditional and appropriate function of the courts.

8. **Criminal Law: Indians: Retrocession.** The State of Nebraska never intended to and did not abandon jurisdiction over crimes committed on the Omaha Indian Reservation prior to 12:01 a.m., EST, October 25, 1970.

Appeal from the District Court for Thurston County: WALTER G. HUBER, Judge. Affirmed.

Kerrigan, Line & Martin, for appellant.

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

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and BUCKLEY, District Judge.

SPENCER, J.

This appeal is from a denial of post conviction relief. The question involved is the effect of retrocession, if validly accepted, of criminal jurisdiction over Indians on the Omaha Reservation in Thurston County prior to October 25, 1970. The trial court denied relief. We affirm.

Petitioner, who was convicted of kidnapping and rape, appealed his original conviction to this court. On that appeal we held the State had not lost jurisdiction because of retrocession after the filing of the appeal. See State v. Goham (1971), 187 Neb. 34, 187 N. W. 2d 305, cert. den. 404 U. S. 1004. Subsequently, the Court of Appeals for the Eighth Circuit held the State of Nebraska had retroceded jurisdiction over the Omaha Reservation in Thurston County. Omaha Tribe of Nebraska v. Village of Walthill (1972), 460 F. 2d 1327.

Petitioner sought federal habeas corpus. His application was dismissed for failure to exhaust state remedies. Petitioner then sought leave to docket an original action for habeas corpus in this court. That application was denied without opinion April 10, 1972, because in

the interest of proper state practice and procedure we initially require a party to file a petition for a writ of habeas corpus in the state trial court. Petitioner subsequently sought post conviction relief from the District Court for Thurston County. This was denied and petitioner appeals.

The decision of the Court of Appeals for the Eighth Circuit does not have the effect of overruling the decision of this court, which held retrocession had not taken place. So far as Nebraska is concerned, retrocession is not effective until the United States Supreme Court rules otherwise.

This conflict between Nebraska and the lower federal courts on the question of retrocession has created a dilemma which can only be solved by our construction of the Nebraska retrocession resolution, assuming it to have been validly partially accepted. The question of the effect of the resolution on pending cases and crimes committed before acceptance is primarily one of state law. We should decide it in the first instance. For this reason, we undertake to construe the effect of the retrocession resolution in those situations while at the same time adhering to the position that retrocession was not validly accepted.

The question involved, therefore, is the disposition of pending cases on October 25, 1970, at 12:01 a.m., EST. It is petitioner's contention that the State of Nebraska immediately lost jurisdiction of all pending cases involving crimes on the Omaha Reservation. Petitioner's conviction was then pending on appeal in the Supreme Court. He argues his conviction must be set aside and the case dismissed because Nebraska lost jurisdiction.

It is a fundamental rule of construction that in construing statutes this court will if possible try to avoid a construction which leads to absurd, unjust, or unconscionable results. In Keller v. State (1969), 184 Neb.

853, 172 N. W. 2d 782, we held: "In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.

"The intention of the Legislature when ascertained will prevail over the literal sense of the words used and this is especially true when the strict letter of the law would lead to injustice or absurdity. In interpreting a statute the legislative intent may be found from the reason of the enactment.

"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."

The rationale involved in this rule of construction does not mean the court is substituting its judgment for that of the legislative body. Rather, it is attempting to ascertain the legislative intent. It will presume the Legislature intended a sensible, just, and reasonable result rather than the opposite.

Petitioner's construction of the Nebraska retrocession resolution would divest Nebraska courts of all jurisdiction over offenses committed by Indians on the Omaha Reservation before the effective date of retrocession. Under such construction, Nebraska would be powerless to punish petitioner or others similarly situated for any offenses on convictions not final by October 25, 1970. To so hold would permit petitioner and others similarly situated to go free. It would enable them to exploit their crimes with complete impunity.

The 1953 act giving Nebraska jurisdiction, 18 U. S. C. A., section 1162, has been interpreted as making that jurisdiction exclusive. Consequently, there could

be no federal jurisdiction over offenses committed on the Omaha Reservation until October 25, 1970, at 12:01 a.m., EST. Any attempt to apply federal law to punish petitioner for his crimes would be clearly ex post facto and in violation of the federal Constitution.

Paragraph 3 of the legislative resolution provided: "That the Executive Board of the Legislative Council is hereby authorized and directed to take all necessary action to put this resolution into effect, such action to include arrangements with the Department of the Interior and the department's Bureau of Indian Affairs concerning the assumption of law enforcement responsibilities in the areas of Indian country covered by this resolution."

It is evident from the above that the Legislature did not intend to leave Indian country located in Thurston County, Nebraska, as a lawless domain. Rather, retrocession was not to become effective until responsibilities for law enforcement in the area of Indian country had been effectuated. This necessarily would include crimes committed prior to October 25, 1970, and pending cases. These could not be transferred to the federal government, so the only construction to be put upon this paragraph is that jurisdiction was to remain in Nebraska.

Even though the Legislature was dealing with a resolution and not a statute, we assume it may have been relying on section 49-301, R. R. S. 1943, which provides: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute." While this statute is not strictly applicable, it at least points the way to the general intent in similar situations.

To accept petitioner's construction of the statute would mean to equate the word "retrocede" with "aban-

don." In view of the impossibility of transferring jurisdiction over pending cases to the federal court, it is obvious the Legislature did not intend to release those cases in adopting the retrocession resolution.

Previous to the submission of the resolution a committee of the Legislature was appointed to study the problem. The report of that committee contained the following: "The committee recommends returning jurisdiction to the federal government provided the Bureau of Indian Affairs can give assurance that it will assume responsibility for the day-to-day law enforcement duties. The committee believes further study should be made on this point to insure there would not be a vacuum in enforcement if jurisdiction is returned to the federal government."

The legislative study and the resolution itself compels the conclusion the Legislature did not intend to extend a general amnesty over crimes committed previous to 12:01 a.m., EST, October 25, 1970. As Chief Justice Hughes said in Sorrells v. United States (1932), 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249: "To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts."

For the reasons stated, the State of Nebraska never intended to and did not abandon jurisdiction over crimes committed on the Omaha Indian Reservation prior to 12:01 a.m. EST, October 25, 1970, the time of the alleged acceptance of retrocession.

For the reasons given, petitioner's post conviction relief was properly denied and the judgment is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

NASH FINCH COMPANY, A CORPORATION, APPELLANT, V. COUNTY BOARD OF EQUALIZATION, HALL COUNTY, NEBRASKA, APPELLEE.

217 N. W. 2d 170

Filed April 18, 1974. No. 39157.

1. **Taxation: Trial.** The burden of proof is upon a taxpayer to establish by clear and convincing evidence his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.
2. **Taxation: Appeal and Error.** The law imposes the duty of valuing and equalizing of property for taxation purposes upon the county assessor and the county board of equalization. In reviewing the actions of tribunals created by law for ascertaining the valuation and equalization of property for taxation purposes, courts will not usurp the functions of such tribunals. It is only where such assessed valuations are not in accordance with law or it is made to appear that they were made arbitrarily or capriciously, that courts will interfere.
3. **Taxation: Appeal and Error: Evidence.** In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Affirmed.

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

Sam Grimminger, for appellee.

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

WHITE, C. J.

This is an appeal from the decision of a District Court upholding the assessed valuation assigned to certain real estate by the County Board of Equalization of Hall County. The real estate involved, consisting of the south half of Block 16, Kernohan and Decker's Addition to the City of Grand Island, Nebraska, was zoned as residential property. Between 1966 and 1971 the appellant, Nash Finch Company, which leased the north half of the same block and operated a Jack and Jill store on that site, purchased the land in question and proceeded to remove the houses located upon it. On May 1, 1971, the property was rezoned by the city. Basically, the zoning remained residential in character, but under the new classification a conditional use permit could legally be issued to allow parking on the premises. Such a conditional use permit was in fact approved on June 1, 1971, thus, making it possible for Nash Finch to construct facilities to provide parking for patrons of its store. At approximately the same time, the alley in Block 16 was vacated by the city. As a result of these changes in the circumstance and use of the property, a reappraisal of the south half of Block 16 was ordered by the county assessor. Subsequently, Nash Finch received notice that the assessed value of the real estate in question had been increased to $18,294, the actual value having been determined to be $52,270. This increase in valuation was sustained by both the board of equalization and the District Court on successive appeals. Nash Finch appeals, assigning as error essentially that its property has been excessively valued and has not been fairly and proportionately equalized with all other similar property. We affirm the decision and judgment of the District Court.

An exhaustive discussion of the scope of judicial review in this court, the District Court, and before the board of equalization is found in our recent case of

Hastings Building Co. v. Board of Equalization, 190 Neb. 63, 206 N. W. 2d 338. We shall briefly review only those standards significantly pertinent to the determination of the issue of unjust discrimination presented by the appeal in this case. The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Grainger Brothers Co. v. Board of Equalization, 180 Neb. 571, 144 N. W. 2d 161.

In meeting this burden of proof, we have recently affirmed in Hastings Building Co. v. Board of Equalization, *supra,* our basic holding in Newman v. County of Dawson, 167 Neb. 666, 94 N. W. 2d 47, wherein we said: "It has been frequently recognized by this court that absolute or perfect equality and uniformity in taxation cannot be attained. Something more than a difference of opinion must be shown. It must be demonstrated by evidence that the assessment *is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property.* Such a contention must be sustained by evidence that the valuation *is arbitrary or capricious,* or so wholly out of line with actual values as to give rise to an inference that the assessor and county board of equalization have not properly discharged their duties. Mere errors of judgment do not sustain a claim of discrimination. There must be something more, something which in effect *amounts to an intentional violation of the essential principle of practical uniformity.* The law imposes the duty of valuing and equalizing of property for taxation purposes upon the county assessor and the county board of equalization. *In reviewing the actions of tribunals cre-*

ated by law for ascertaining the valuation and equalization of property for taxation purposes, courts will not usurp the functions of such tribunals. It is only where such assessed valuations are not in accordance with law, or it is made to appear that they were made arbitrarily or capriciously, that courts will interfere. The valuation of property is largely a matter of judgment, but mere differences of opinion, honestly entertained, though erroneous, will not warrant the interference of the courts. If uniformity of opinion were required, no assessment could ever be sustained." (Emphasis supplied.)

In Lexington Building Co., Inc. v. Board of Equalization, 186 Neb. 821, 187 N. W. 2d 94, we said as follows: "In an appeal to the county board of equalization or to the district court, and from the district court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by *clear and convincing evidence* that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment." (Emphasis supplied.)

Underlying the above principles in guiding us in the judicial review of tax valuations are the standards set by the statute for the determination of actual valuation. The criteria by which the competence of evidence of value is tested may include, but are not limited to, those set out in section 77-112, R. R. S. 1943, which provides: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less regular annual depreciation; (5) compari-

son with other properties of known or recognized value; (6) market value in the ordinary course of trade; and (7) existing zoning of the property." See, also, Richards v. Board of Equalization, 178 Neb. 537, 134 N. W. 2d 56.

Bearing these principles firmly in mind, we review the evidence to determine if there was error in the proceedings of the board of equalization and in the District Court which resulted in a discriminatory assessment against the appellant Nash Finch Company.

In the District Court, testimony was received from Charles Tillman, the county assessor of Hall County, and from Dennis Ingwerson, who assisted Tillman in reappraising the south half of Block 16. Taken together, their testimony indicates that many factors were considered in reappraising the Nash Finch property. Those factors included the desirability and functional use of, location of, and extant zoning of the real estate in question. It is true, of course, that as of January 1, 1972, the conditions of the use permit had not yet been carried out in order to allow parking on the premises. See § 77-1301, R. R. S. 1943. That fact is not, however, fatal to the case of the board of equalization. We believe that in this case the mere rezoning and issuance of the conditional use permit were sufficient to justify the reappraisal of the property and, when coupled with other factors, could serve to form a reasonable basis for the higher valuation.

The testimony of both Tillman and Ingwerson indicated that special significance was placed upon a comparison of the property in question with property in three adjoining blocks also being used for businesses and for parking in connection therewith. This comparison included a consideration of the purchase price of each of the properties and of the market value of each in the ordinary course of trade.

Safeway paid $225,000 ($3.48 per square foot) for its property when it was purchased in December of 1970.

As a result of reappraisal, the Safeway property was given a unit value of from $1.50 to $2 per square foot. The Safeway property was ultimately given an actual value of $102,300 and an assessed value of $35,806.

First Federal paid $264,000 ($3.57 per square foot) for its property when it was acquired in January of 1971. As a result of reappraisal, the First Federal property was given a unit value of from $1.50 to $2 per square foot. The First Federal property was ultimately given an actual value of $120,650 and an assessed value of $42,228.

Hinky Dinky paid $134,500 for its property when it was purchased in August of 1960. As a result of reappraisal, the Hinky Dinky property was given a unit value of from $1.50 to $2.25 per square foot. As of January 1, 1972, the Hinky Dinky property was given an actual value of $86,125, but that figure was later corrected to $121,770. The previous assessed value of $30,144 was corrected to $42,620.

Tillman testified that in valuing the properties considered he took account of the fact that they all had the same general location and that it was "the best location in the City of Grand Island." He also considered what was paid for the properties. Nash Finch paid a total of $77,750 ($2.23 per square foot) for the south half of Block 16. Tillman testified that in his opinion the property belonging to the Nash Finch had been equalized with similar property in the neighborhood. In his opinion, the south half of Block 16 has an actual value of $52,270 and an assessed value of $18,295. The property had thus been given a unit value of $1.50 per square foot.

For convenience purposes, the following chart shows a breakdown of dollar value per square foot assigned to the properties adjoining Nash Finch which were compared to its property.

SOUTH HALF OF BLOCK 16

34,848 square feet at $1.50	$ 52,272

SAFEWAY

52,272 square feet at $1.50	$ 78,408
8,712 square feet at $2.00	17,424
3,696 square feet at $1.75	6,468
	$102,300

FIRST FEDERAL

52,272 square feet at $1.50	$ 78,408
17,424 square feet at $2.00	34,848
4,224 square feet at $1.75	7,392
	$120,648

HINKY DINKY

56,496 square feet at $1.50	$ 84,744
8,712 square feet at $2.25	19,602
8,712 square feet at $2.00	17,424
	$121,770

In attacking this comparison, Nash Finch points out the disparity in the purchase price of the properties and further emphasizes the fact that most of the property to which the Nash Finch land was compared is zoned commercial, as opposed to the residential zoning of the south half of Block 16. After thorough consideration, we remain unconvinced by the argument. The south half of Block 16 having perhaps a special value *only* to those controlling the north half of the same block, it is entirely possible that Nash Finch experienced a bargain when purchasing the property. Once, however, the south half of the block became related to the north half as an economic unit, the value of the south half would arguably be greater than it would have been had it retained its purely residential character. Ingwerson in particular seemed to emphasize the notion that, regardless of its zoning, the south half of Block 16 had

to be considered in conjunction with the north half of the block, and the business located thereon, for a realistic appraisal. We are not willing to say that, in the valuation of this land, such a consideration was unreasonable or improper. See Loskill v. Board of Equalization, 186 Neb. 707, 185 N. W. 2d 852.

We are compelled to conclude that the evidence before the District Court and the board of equalization established that, in appraising the actual value of the Nash Finch property, ample, competent evidence under the applicable standards was introduced and was considered by the two tribunals. The evidence herein shows at most a difference of opinion as to valuation and a difference of opinion as to the weight of the various factors that are applicable under the statute. It has not been established by clear and convincing evidence that the valuation placed upon the Nash Finch property, when compared with valuations placed on the other similar property in the immediate vicinity, is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty. In the resolution of conflicting opinions as to valuation, we are not convinced that the board of equalization and the District Court were in error in their judgment as to valuation, much less that there was an intentional violation of the essential principle of practical uniformity.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

McCOWN, J., concurring in result.

In this case there was no claim that the property of the taxpayer was valued or assessed for tax purposes in an amount greater than its actual value. In fact, the evidence established beyond question that it was appraised and assessed at substantially less than the amount paid for the land by the taxpayer. The only

basis for the taxpayer's claim for relief was the asserted opinion that three properties of similar nature had been assessed at a smaller percentage of their actual value than the percentage of actual value at which the taxpayer's property was appraised and assessed. Where there is no evidence that the tax value used is in excess of actual value, evidence that one or a few other properties are valued proportionately less has never been sufficient to establish improper valuation. Only clear proof of arbitrary and intentional discrimination between the taxpayer's property and all other property was traditionally sufficient. See Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979.

We have consistently said: "A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property." Newman v. County of Dawson, 167 Neb. 666, 94 N. W. 2d 47. See, also, Hastings Building Co. v. Board of Equalization, 190 Neb. 63, 206 N. W. 2d 338. The evidence here established that the same method and system of valuation was applied to all the properties. Under those circumstances a few isolated instances of under-valuation of other properties are wholly insufficient to establish an arbitrary or discriminatory assessment of taxpayer's property where there is no claim that the tax value exceeds actual value. See, H/K Company v. Board of Equalization, 175 Neb. 268, 121 N. W. 2d 382; Lexington Building Co., Inc. v. Board of Equalization, 186 Neb. 821, 187 N. W. 2d 94.

The decision of the District Court was properly affirmed. Much of the discussion, particularly as to comparisons of valuations between different properties, is inappropriate in the context of this case.

CLINTON, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL CLAY, APPELLANT.

217 N. W. 2d 94

Filed April 18, 1974. No. 39175.

1. **Criminal Law: Guilty Plea.** The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
2. **Criminal Law: Sentences.** A sentence imposed by the trial court in a criminal case will not be disturbed on appeal in the absence of a showing of an abuse of discretion by the District 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 Calvin E. Robinson, for appellee.

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

WHITE, C. J.

This is a criminal case in which the defendant asserts that the sentence of 1 year imposed by the District Court was excessive and an abuse of discretion, and that the District Court erred in accepting the defendant's plea of guilty because it was not intelligently and voluntarily made. We affirm the judgment and sentence of the District Court.

Defendant contends that the plea was not voluntarily and intelligently made. The standard for determining the validity of guilty pleas is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to a defendant. State v. Turner, 186 Neb. 424, 183 N. W. 2d 763 (1971); State v. Simmons, 188 Neb. 365, 196 N. W. 2d 499 (1972);

North Carolina v. Alford, 400 U. S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). The record in this case, including the transcript and the bill of exceptions, shows that at the arraignment the defendant indicated he understood that a plea of not guilty could lead to a jury trial, while a plea of guilty could result in an immediate imposition of sentence. The nature of the penalties for the crime were explained in full and the defendant stated he understood the penalties. He admitted that no threats or promises had been made to obtain the guilty plea and that it was freely and voluntarily made because the defendant considered himself to be guilty. He admitted that he had "started to outrun the cops," and that a chase continued from Scottsbluff, Nebraska, all the way into Wyoming. He admitted, further, that he had driven 90 miles an hour during the chase. The defendant was charged, under the statute, with unlawfully fleeing to avoid arrest. The record further indicates that counsel for the defendant stated he had gone over his rights with the defendant and that he was ready to plead to the crime charged in the information. Under the applicable standards set out above, it is apparent there is no merit to the defendant's contention that his plea was not voluntarily and intelligently made.

The defendant assigns as error the excessiveness of the sentence. This assignment is not argued except a one-sentence statement that the defendant is a young man with no prior felony record. Unless we are to say that the assertion of these two facts automatically requires the placement of the defendant on probation, these statements alone do not support a contention of an abuse of discretion by the District Court in imposing the minimum sentence on the defendant. Moreover, the record indicates that the defendant has pleaded guilty in the District Court for Scotts Bluff County, Nebraska, to the offense of contributing to the delin-

quency of a minor under section 28-477, R. S. Supp., 1972. And it further appears that the District Court revoked a previous suspension of execution of sentence in this case because subsequent to sentencing, the defendant attempted to escape while being accompanied to the county jail. The facts of the offense, as recited by the defendant himself, also indicate a willful, dangerous, and continued attempt to flee to avoid arrest. There is no merit to the contention that the sentence was excessive.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

This court has now approved a sentence of 1 year in the penitentiary for an 18-year-old defendant never before convicted of a felony. His offense? Fleeing in an automobile to avoid arrest for a traffic violation! While the defendant led the officers on a wild chase to escape arrest, the maximum imprisonment for willful reckless driving is 30 days in jail, and for second offense 60 days. Fines and revocation of driver's license are authorized in addition.

The ubiquitous nature of section 60-430.07, R. R. S. 1943, the flight to avoid arrest statute, with its tremendous range of punishments, is glaringly evident. See my dissent in State v. Etchison, 190 Neb. 629, at page 633, 211 N. W. 2d 405, at page 408. That statute carries possible penalties of a fine in any amount up to $500, imprisonment in the county jail for not to exceed 6 months, or imprisonment in the Nebraska Penal and Correctional Complex for not less than 1 year nor more than 3 years, or both such fine and imprisonment. So far as brief research indicates, Nebraska is the only state which makes flight in a motor vehicle to avoid arrest for violating any law a separate and distinct crime of its own, which may range from

a minor misdemeanor to a serious felony at the discretion of the prosecutor and sentencing court.

The dissent in Etchison stated: "It should not be assumed that the Legislature specifically intended to authorize or approve a punishment of 3 years imprisonment in the penitentiary for the crime of fleeing in a motor vehicle in an effort to avoid arrest for a traffic violation." This court has now assumed that the Legislature did intend to authorize a punishment of 1 year in the penitentiary where the flight was to avoid arrest for a traffic violation, and even where the 18-year-old defendant had never before been convicted of a felony. The punishment here not only does not fit the crime, it does not fit the defendant. The penitentiary is a poor place for an 18-year-old to learn respect for law.

The 18-year-old defendant's comment was poignant and painfully close to the mark when he said: "This trial here today wasn't too fair, it just wasn't, getting sent to the penitentiary, I never killed nobody, it was just — gee — over a thing like that."

The judgment should have been reversed and the cause remanded for the entry of a proper sentence. The Legislature should again be reminded of the advisability of a legislative review of section 60-430.07, R. R. S. 1943.

ELAINE L. KOCKROW, APPELLANT, V. DONALD R. KOCKROW, APPELLEE.

217 N. W. 2d 89

Filed April 18, 1974. No. 39212.

1. **Divorce: Infants: Parent and Child.** In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.
2. ———: ———: ———. 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 on appeal unless there is a clear abuse of discretion.

3. ———: ———: ———. The determination of the amount of child support to be allowed, if any, rests in the sound discretion of the trial court. The ultimate criteria under the statute as well as under the former decisions of this court is one of reasonableness. The determination of the court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
4. **Appeal and Error: Trial: Evidence.** In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment.
5. **Divorce: Infants: Parent and Child.** As we interpret our no-fault divorce statute, under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other. In the matter of child support while the father has the primary responsibility to support his children, the trial court should not ignore the ability of the mother. It has the responsibility of adjusting the equities between the parties.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Walter H. Radcliffe of Luedtke, Radcliffe, Gilmore & Evans, for appellant.

Murphy, Pederson & Piccolo, for appellee.

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

SPENCER, J.

Petitioner appeals herein, challenging the award of the custody of Bradley Kockrow to respondent and the sufficiency of the child support for the twin daugh-

ters whose custody was granted to her. The costs of the action, including a $700 fee for the guardian ad litem, were taxed to respondent. Respondent was ordered to pay $75 per month child support, but no allowance was made to petitioner for attorney's fee. We affirm.

The parties were married December 21, 1958. Three children were born to this union, twin daughters now 14 years of age, and a son now 13. Petitioner is a 37-year-old registered nurse, in good health, and gainfully employed with a bright professional future. Respondent is a 43-year-old self-employed mechanic with no other specialized skills.

The petition for divorce was filed December 22, 1971. There was testimony which would indicate that petitioner mentally and physically abused both her husband and the children. There was also evidence that respondent struck petitioner. The son ran away from home because of petitioner's treatment of him. With the consent of his parents he was permitted to live with petitioner's father. After the filing of this action respondent lived at the home of petitioner's father for a short time, then he and his son moved into other quarters.

No purpose would be served herein by detailing the marital problems of the parties. Throughout the 18 months these proceedings were pending before trial respondent encountered difficulty visiting his daughters. He was finally compelled to seek a court order authorizing visitation. Within a short time thereafter he again encountered difficulty and instituted contempt proceedings to secure his visitation rights.

A guardian ad litem was appointed to protect the interests of the minor children. The court interviewed the children out of the presence of the parties but in the presence of the guardian ad litem. After the hearing the custody of one of the twin daughters, Amy, was

awarded to petitioner. The other daughter and the son were placed in respondent's custody. Subsequently, on petitioner's motion the court modified its decree by also awarding her custody of the other daughter. No child support had been allowed to petitioner in the original decree. At the time of its modification transferring the custody of Ann to petitioner, the court ordered respondent to pay child support of $75 per month.

In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Boyles v. Boyles (1974), 191 Neb. 66, 213 N. W. 2d 729.

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 on appeal unless there is a clear abuse of discretion. Broadstone v. Broadstone (1973), 190 Neb. 299, 207 N. W. 2d 682.

The determination of the amount of child support to be allowed, if any, rests in the sound discretion of the trial court. The ultimate criteria under the statute as well as under the former decisions of this court is one of reasonableness. The determination of the court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. See Bliven v. Bliven (1973), 190 Neb. 492, 209 N. W. 2d 168.

The above-cited authorities control the disposition of this appeal. The evidence is conclusive that the best interests and welfare of Bradley Kockrow require that his custody be given to his father, respondent herein. However, we will briefly discuss the issues which petitioner contends constituted an abuse of discretion on the part of the trial court.

Petitioner devotes the major portion of her argument to the alleged erroneous admission of certain evidence.

The contested matters are principally a report by, and testimony of, an independent investigator, a child welfare worker, appointed by the District Court pursuant to section 42-351, R. S. Supp., 1972. The report of the investigator was submitted to the court and filed. Later, upon application of the petitioner, the report was removed from the court file and placed in a separate file in the custody of the clerk of the court for use of the parties and their attorneys only. It was not received in evidence and is not a part of the record herein.

The investigator inspected both homes and contacted a number of persons suggested by both parties. She was called as a witness and permitted to amend her report to the court regarding the custody of Ann Kockrow. The inference from the record is that at first she thought the twin daughters should stay with the petitioner and Bradley should be awarded to the respondent. Subsequent investigation, after talking to the children, caused her to amend her opinion regarding Ann only. The court in the original decree gave the custody of Ann and Bradley to respondent. Subsequently the decree was modified to give the custody of Ann to petitioner.

We are satisfied that the record amply supports the award of the custody of Bradley to respondent. As we view the record, it would have been an abuse of discretion to do otherwise. Consequently, error, if any, in the admission of the testimony of the investigator is harmless. See Pierce v. Fontenelle (1952), 156 Neb. 235, 55 N. W. 2d 658, in which we said: "In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment."

Petitioner complains that the testimony of Bradley

Kockrow as expressed both to the court and the guardian ad litem is not sufficient evidence on which to base a decision relating to his custody. In Bauer v. Bauer (1969), 184 Neb. 777, 172 N. W. 2d 231, we observed: "Particularly with reference to children of tender years, this court has said that a child's statement, while deserving to be considered, should be closely scrutinized, (and) is not controlling in the determination of custody." Obviously, however, petitioner is taking that statement out of context. We did not mean to imply that it should not be considered. Bradley's statement, as summarized by the court, is corroborative of other testimony in the record which compels the conclusion that his custody should be in his father.

Petitioner's contention concerning child support is predicated upon her assumption that because a father is obligated to support his minor children the responsibility is exclusively his. In 1972, the Nebraska Legislature repealed the old divorce laws and enacted the no-fault divorce statute. Under section 42-365, R. S. Supp., 1972, the court is empowered to direct that either party, the husband or the wife, pay alimony to the other. In section 42-364, R. S. Supp., 1972, we find the provision: "When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, * * *."

As we interpret our no-fault divorce statute, under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other. In the matter of child support while the father has the primary responsibility to support his children, the trial court should not ignore the ability of the mother. It has the responsibility of adjusting the equities between the parties.

Pervading all questions concerning rights of the re-

spective parents, the paramount consideration is the best interests and welfare of the children. The determination of custody and fixing of child support rests in the sound discretion of the court and in the absence of an abuse of discretion will not be disturbed.

For the reasons given, the judgment of the trial court is affirmed. A review of the record herein convinces us that the appeal was frivolous. Consequently, no attorney's fee is awarded to the petitioner.

AFFIRMED.

GRACE LAND & CATTLE COMPANY, A CORPORATION, ET AL., APPELLANTS, IMPLEADED WITH WYOMING-NEBRASKA PIPE LINE COMPANY, NOW CHEYENNE PIPE LINE COMPANY, A PARTNERSHIP, APPELLEE, V. TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., A COLORADO CORPORATION, APPELLEE.

217 N. W. 2d 184

Filed April 18, 1974. No. 39214.

1. **Eminent Domain: Appeal and Error: Process: Words and Phrases.** The term "all parties bound by the award" as used in section 76-715.01, R. R. S. 1943, and upon whom notice of appeal must be served refers: (1) In case the condemner is the appealing party, to the condemnee or condemnees from the award in favor of whom the condemner desires to take his appeal; or (2) in case a condemnee is the appealing party, it refers to the condemner. An appealing condemnee need not serve notice of appeal upon other condemnees.
2. **Eminent Domain: Property: Words and Phrases: Venue.** The statutory provision which permits a petition to condemn to be filed in the county court of the county where "some part" of the property is situated has reference to a tract some part of which lies in both counties.

Appeal from the District Court for Garden County: ALFRED J. KORTUM, Judge. Reversed and remanded with directions.

Firmin Q. Feltz, for appellants.

Peetz & Dorwart, for appellee Tri-State G. & T. Assn., Inc.

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

CLINTON, J.

This is a proceeding in eminent domain. It was commenced by the filing of a petition in the county court of Garden County, Nebraska, requesting the appointment of appraisers. The petition described an easement for electrical transmission purposes to be condemned across two parcels of land not contiguous and described as Parcel 27 and Parcel 10.

Parcel 27 consisted of parts of Sections 5 and 6, Township 15 North, Range 42 West of the 6th P.M.; part of Section 31, Township 16 North, Range 42 West of the 6th P.M.; and parts of Sections 36, 25, and 24, Township 16 North, Range 43 West of the 6th P.M., all in Garden County, Nebraska.

Parcel 10 consisted of a part of Section 27, Township 14 North, Range 42 West of the 6th P.M., in Deuel County, Nebraska.

The petition described Grace Land & Cattle Company as the owner of both parcels. Connecticut Mutual Life Insurance Company was described as the mortgagee of Parcel 10. Cheyenne Pipe Line Company was joined as a party having some interest in Parcel 10, but the nature or extent of the interest was not set out in the petition.

The appraisers determined the damages to be $3,655 to Parcel 27 and $1,091.70 to Parcel 10. The return of the appraisers was filed on February 15, 1973, and a copy sent to the Grace Land & Cattle Company on that date. On February 20, 1973, the Grace Land &

Cattle Company and Connecticut Mutual Life Insurance Company filed a notice of appeal, bond, and proof of service of the notice of appeal on the condemner.

A petition on appeal and the transcript were filed in the District Court on February 21, 1973. A proof of service of the notice of appeal on Cheyenne Pipe Line Company on April 9, 1973, was filed in the county court on April 10, 1973. The condemner moved to dismiss the appeal for failure to serve the notice of appeal upon all parties bound by award within 30 days as required by section 76-715.01, R. R. S. 1943. The trial court sustained the motion and dismissed the action. From that order Grace Land & Cattle Company and Connecticut Mutual Life Insurance Company have appealed to this court.

The appellants present a number of contentions as to why the judgment should be reversed. We consider only two. We first discuss the contention that the failure to serve notice on Cheyenne Pipe Line Company within the required 30 days defeated the appeal. What does the term "all parties bound by the award" in section 76-715.01, R. R. S. 1943, mean? It seems clear to us on the basis of (1) the statutory provisions themselves, (2) authorities in point, including prior decisions of this court, and (3) elemental principles of real property law, that where there is more than one condemnee there are necessarily as many awards as there are condemnees. These awards are several as distinguished from joint.

A condemnee who does not appeal is bound by his award as it has the effect of a judgment if unappealed from. State ex rel. Katelman v. Fink, 84 Neb. 185, 120 N. W. 938; Gruntorad v. Hughes Bros., Inc., 161 Neb. 358, 73 N. W. 2d 700. We long ago held that the awards to the various condemnees are several and should be separately determined by the appraisers in their report.

State ex rel. Katelman v. Fink, *supra*. The proceedings in that case were, of course, under a different statute, but it was not materially different insofar as the point we are discussing is concerned. We there said: "The determination of this appeal rests upon the construction to be placed upon said section 7478. If it was the duty of the appraisers to ascertain the amount of the damage that would be sustained by each person having an interest in or a lien upon the land appropriated, it would follow that the report of the appraisers that relator was entitled to $3,000, less $13.52 for general tax unpaid, was the ascertainment of his damage by reason of taking the lot in question, and that, as there was no finding of a lien for the city for special assessments, it was equivalent to a finding that the city had no lien upon the lot." The court then discussed the statutes and previously decided cases and said: "From a consideration of the provisions of the statute above quoted, it would seem clear that it was the intention of the legislature to make it the duty of the appraisers to assess the damages to each and all of those interested in the premises, and to apportion the value of the property appropriated among all those having an interest therein according to their respective interest. If this were not the case, we see no reason for making all persons interested in the lot parties to the proceeding, nor why the right of appeal should be conferred upon other parties than the owners of the fee. From the holdings of the court above referred to, it is apparent that the right of lienors may be determined upon the appeal, and that they may have judgment for the amount of their liens. It would scarcely be contended that such a judgment could be rendered on appeal unless such findings should have been made and reported by the appraisers, for it is elementary that nothing can be heard upon the appeal that could not properly have been determined by the board or court from which

the appeal is taken. Our views are strengthened in this respect by the further fact that the right of appeal is made the exclusive remedy of those interested, and that no other method is provided by the statute for apportioning the value of the property taken among the various persons having an interest in or lien thereon. The respondents have placed the same construction upon the statute, for it appears that in this condemnation proceeding the appraisers in the appraisal of other property did determine and award to different persons having an interest in the property and liens thereon the exact amount of their interest and liens."

An identical result was reached in the case of Omaha Bridge & Terminal Ry. Co. v. Reed, 69 Neb. 514, 96 N. W. 276. We quote from that opinion: "Upon the trial of this case in the district court, it was, in effect, determined that the mortgagees' interest in the land equaled or exceeded the damages assessed by the jury. In other words, the mortgagees, claiming to be owners within the meaning of the statute, presented their claim to the district court for adjudication. They asserted and proved that they were owners, and that the value of their ownership was, at least, equal to the amount named in the verdict. The Omaha Bridge & Terminal Company had been duly summoned; it was in court and had ample opportunity to controvert and disprove the mortgagees' claim. It knew the issue presented for trial was the value of the mortgage lien, and if it was of opinion that the presence of the owner of the fee was necessary for the protection of its rights, it was its privilege to have him brought in. It failed to have him brought in; in effect, it consented to have the issue tried and determined without him; and it must now abide by the result. Chicago, K. & N. R. Co. v. Ellis, 52 Kan. 41; Washburn v. Milwaukee & L. W. R. Co., 59 Wis. 379."

We have recognized the principles enunciated as re-

cently as Jackman v. Tri-State G. & T. Assn., Inc., 181 Neb. 459, 149 N. W. 2d 43. This was a case in which awards were made to the landowner and his tenant. The landowner appealed. The tenant was satisfied and took his money. In determining the question of whether the landlord's appeal took along with him the tenant as an appellee, we said: "Did the appeal of the plaintiffs Jackman bring up the cause to the district court as regards the plaintiff Martin Mahnken? The record in this action reveals that separate awards were made by the appraisers to the owners of the land and to the tenant Martin Mahnken, who found the award satisfactory and did not appeal therefrom. It is apparent that the interest of the plaintiffs Jackman and of the plaintiff Mahnken are not inseparably connected. Where the parties have separate interests, one may appeal without joining the others, the case under such circumstances not being brought up on appeal as to such other parties."

What we have said conforms to the rules generally applicable. We quote from 30 C. J. S., Eminent Domain, § 356, p. 320: "It is not necessary that tenants in common of the premises who appeal name as parties to the appeal those tenants in common who do not appeal. Tenants in common may join in an appeal, but parties having separate interests cannot. Each owner of a separate interest or tract has the right of appeal with reference to such interest, and an appeal by one owner cannot affect the rights of others who are joined with him in the original proceeding. Thus if a mortgagee is a party to the proceedings he has a right of appeal independently of the owner of the fee; and on such appeal the condemnor may bring in the landowner in order that it may be fully protected. A life tenant may appeal from an award to him as owner without joining the owner of the reversion."

Let us now examine the statutory provisions. The

term condemnee is used in the singular throughout Chapter 76, article 7, R. R. S. 1943. Section 76-701, R. R. S. 1943, defines condemnee in the following language: "Condemnee means any person, partnership, corporation, or association, owning or having *an encumbrance on any interest* in property that is sought to be acquired by a condemner, *or in possession of or occupying* any such property." (Emphasis supplied.) Section 76-704, R. R. S. 1943, says: "If any condemnee shall fail to agree with the condemner," then the condemner may file a petition to condemn. It is clear that the language of the statute recognizes the obvious fact that more than one condemnee may have an interest in real estate affected by the proceedings and that these interests are separate and may be different in nature and so are to be severally treated. The very right of condemnation depends upon the failure of the condemner to agree with the condemnee with reference to the acquisition. Even though two or more condemnees may have an interest, if the condemner and one condemnee agree the interests of the other condemnees who do not agree may be acquired by eminent domain.

Other sections of the statute reinforce our conclusions. It is the duty of the appraisers to hear "any party interested therein." § 76-709, R. R. S. 1943. The appraisers "shall assess the damages that the condemnee has sustained." § 76-710, R. R. S. 1943. Section 76-710.01, R. S. Supp., 1972, provides for the payment of obligations of the property on account of obligations it bears to subdivisions of government. It is clear that some condemnees may accept their awards and others may appeal. See, §§ 76-711, 76-715.01, 76-716, 76-717, 76-719.01, R. R. S. 1943.

It is true that section 76-710, R. R. S. 1943, provides: "[W]here title or interest in a single parcel of land is held by several condemnees the transmission of such copy to any one of such owners of interest" is com-

pliance with the requirement that the county judge mail a copy of the award to the condemnees. This is an anomalous provision in the statute but it does not have anything whatever to do with the question of upon whom notices of appeal must be served.

It is, of course, possible that there may be situations where the interests of two or more condemnees are so intertwined that even as between themselves those two or more are proper parties on appeal. Omaha Bridge & Terminal Ry. Co. v. Reed, *supra,* presents such an example.

We hold that the term "parties bound by the award" means the person whose award is being appealed. If the condemner is the appealing party, he must cause the required notices to be served on the condemnee or condemnees from the award in favor of whom he desires to appeal. If a condemnee appeals he need serve only the condemner.

For the foregoing reasons the court erred in dismissing the appeal.

There is another reason why the judgment must be reversed. Cheyenne Pipe Line Company had no interest in Parcel 27, the Garden County land. Parcel 10 was located in Deuel County. No part of Parcel 10 was located in Garden County. If the proceedings were void so far as Parcel 10 was concerned, it is of no importance whether a notice of appeal was served on Cheyenne Pipe Line Company.

Condemnation proceedings are local in nature. We have long recognized that the question of determination of the damages sustained by a landowner because of the taking of a right-of-way across his land is peculiarly of a local nature and should be determined by a jury of the county where the land is situated. The statutory provision which permits a petition to condemn to be filed in the county court of the county where "some part" of the property is situated has ref-

erence to a contiguous tract which extends across the county line. See, 27 Am. Jur. 2d, Eminent Domain, § 382, p. 248; 29A C. J. S., Eminent Domain, § 233, p. 1052; 6 Nichols on Eminent Domain (3d Ed.), § 24.7, pp. 24-215 to 24-220; Toluca, M. & N. Ry. Co. v. Haws, 194 Ill. 92, 62 N. E. 312.

The judgment of the District Court is reversed and the cause remanded. The appeal as to Parcel 27 shall be heard. The original proceedings as to Parcel 10 are patently void and the District Court for Garden County could acquire no jurisdiction. That portion of the appeal was properly dismissed. The remedy as to the tract there involved lies in further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting in part.

I concur in the holding that the proceedings in Garden County were void as to Parcel 10 which was located entirely in Deuel County. I do not agree that Cheyenne Pipe Line Company was not a party "bound by the award."

The petition to condemn furnished no basis upon which the appraisers could make separate awards as to each of the parties interested in Parcel 10. In the event there was no appeal from the award of the appraisers, and the proceedings were otherwise valid, there would be no way in which the award could be divided without further litigation unless the parties to the award were all in agreement.

Where the awards are in fact several, then the authorities cited in the opinion of the court such as the Jackman case are applicable. Where there is in fact a single award to one or more parties it seems to me that each party to the award is a "party bound by the award." In the event of an appeal by any party to such an award, the other parties to that award should be joined in the proceedings in the District Court.

WHITE, C. J., and SPENCER, J., concur in this dissent.

WALTER NEEMAN ET AL., APPELLANTS AND CROSS-APPELLEES, V. NEBRASKA NATURAL RESOURCES COMMISSION ET AL., APPELLEES AND CROSS-APPELLANTS, LOWER PLATTE SOUTH NATURAL RESOURCES DISTRICT ET AL., INTERVENERS-APPELLEES AND CROSS-APPELLEES.

217 N. W. 2d 166

Filed April 18, 1974. No. 39227.

1. **Constitutional Law: Statutes.** The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself. The 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.
2. ———: ———. It is a general rule that a statute must be reasonably clear and definite to be valid. But a statute which is otherwise valid will not be held void or unintelligible and meaningless unless it is so imperfect and deficient in its terms as to render it impossible of execution and enforcement.
3. **Constitutional Law: Boundaries: Legislature.** The fixing of the boundaries of a political subdivision is essentially a legislative matter.
4. **Constitutional Law: Officers: Legislature.** The Legislature may impose additional power and duties on constitutional or statutory officers.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed as modified.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellants.

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

Crosby, Guenzel, Davis, Kessner & Kuester and Leroy W. Orton, for interveners-appellees.

Heard before SPENCER, BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and RONIN and MORAN, District Judges.

BOSLAUGH, J.

This is an action for a declaratory judgment to deter-

mine the validity of legislation relating to natural resources districts. The plaintiffs are the Richardson County Soil and Water Conservation District and two residents and taxpayers within the Wilson Creek Watershed Conservancy District. The defendants are the Nebraska Natural Resources Commission and its executive secretary; the Nebraska Soil and Water Conservation Commission and its executive secretary; the Wilson Creek Watershed Conservancy District; the Attorney General; the Auditor of Public Accounts; and the State of Nebraska. The interveners are the Lower Platte South Natural Resources District; the County of Douglas and its board of commissioners; Ziegler Creek Watershed Conservancy District; Brownell Watershed Conservancy District; Upper Little Nemaha Watershed Conservancy District; and South Branch Watershed Conservancy District.

The trial court found the legislation was valid except as to certain provisions which were severable. The plaintiffs appeal and the defendants cross-appeal.

The principal antecedent of the legislation involved in this case appears to have been the Soil Conservation Districts Law. Enacted in 1937, it was revised extensively in 1959 and amended again in 1963, 1965, and 1967.

L.B. 1357, enacted in 1969, established the Nebraska Soil and Water Conservation Commission and directed the commission to divide the area of the state into natural resources districts. A major purpose of L.B. 1357 was to consolidate and merge existing soil and water conservation districts, watershed conservancy districts, watershed districts, watershed advisory boards, watershed planning boards, and mosquito abatement districts into natural resources districts or natural resources divisions of public power and irrigation districts. The governing boards of such districts were directed to complete the necessary transfers and other arrange-

ments before January 1, 1972, so that the natural resources districts could begin operation on that date.

The plaintiffs contend L.B. 1357 was unconstitutional because it was amendatory of the Soil Conservation District Law and did not contain all sections amended. The Constitution provides that "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." Art. III, § 14, Constitution of Nebraska. The requirement does not apply to an independent act which is complete in itself. State v. Greenburg, 187 Neb. 149, 187 N. W. 2d 751. The 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 existing provisions result in a connected piece of legislation covering the same subject matter.

The plaintiffs argue that L.B. 1357 was not complete in itself because it related to the Soil Conservation Districts Law and did not make sense in the absence of that law. The fact that L.B. 1357 related to other statutes does not necessarily mean it was not independent legislation. The situation is similar to that presented in Bodenstedt v. Rickers, 189 Neb. 407, 203 N. W. 2d 110. There a statute relating to mergers of Class I school districts was held to be independent legislation notwithstanding the fact that other sections of the law defined Class I districts and prescribed the procedure for mergers.

As previously noted, a purpose of L.B. 1357 was to consolidate and merge existing soil and water conservation districts into newly created natural resources districts. Soil and water conservation districts were not abolished upon the effective date of the act but continued to exist while the consolidation and merger process was taking place. Thus, much of the legislation concerning soil and water conservation districts

continued in force and was not amended or repealed by L.B. 1357. The districts organized under the earlier law, as distinguished from the law itself, were to be eliminated through the process of consolidation and merger.

The plaintiffs also contend L.B. 1357 and the other acts involved are so vague and incomprehensible that they are unconstitutional and void. It is a general rule that a statute must be reasonably clear and definite to be valid. Heywood v. Brainard, 181 Neb. 294, 147 N. W. 2d 772. This principle is applied most strictly to statutes which are penal in nature. But a statute which is otherwise valid will not be held void or unintelligible and meaningless unless it is so imperfect and deficient in its terms as to render it impossible of execution and enforcement. If the intent and purpose of the Legislature can be ascertained and the statute is susceptible to a reasonable construction which will support and give it effect, the statute will be held valid.

The plaintiffs have cited many instances of vague and indefinite provisions in the statutes in question. For example, in section 1 of L.B. 1357 (now section 2-3201, R. S. Supp., 1973, as amended), the third sentence indicated the merger of soil and water conservation districts into natural resources districts was mandatory. In 1972 the statute was amended to define a soil and water conservation district as an "other special purpose" district which in the last sentence of section 2-3201 was "encouraged" to merge with a natural resources district. § 2-3201, R. S. Supp., 1972. (The language "soil and water conservation districts" was stricken in 1973 and merger of soil and water conservation districts was again made mandatory. § 2-3201, R. S. Supp., 1973.) We think these ambiguities and uncertainties presented problems of construction and interpretation but the act was not void because of them.

The plaintiffs further contend the statute is invalid

because there was no appeal provided from the action of the Legislature or the commission in establishing the boundaries of the natural resources districts. The plaintiffs argue this was a violation of Article I, section 24, of the Constitution of Nebraska, which guarantees the right of appeal in all civil cases.

The fixing of the boundaries of a political subdivision is essentially a legislative matter. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566. Where that power has been delegated, a judicial inquiry and determination can be made as to whether conditions existed so that the power could be exercised. Williams v. County of Buffalo, 181 Neb. 233, 147 N. W. 2d 776. We find no violation of Article I, section 24, Constitution of Nebraska.

The Nebraska Natural Resources Commission, as established by subsection (3) of section 2-1504, R. S. Supp., 1972, from January 1, 1973, until 1975, consists of 14 members. Three members are officers of the University of Nebraska. The Director of Water Resources is also a member. The trial court held this provision of the law was invalid as to these 4 members. The defendants cross-appeal.

The Director of Water Resources is a state officer. § 81-102, R. R. S. 1943. Membership on the commission is an additional duty of that officer which could be imposed by the Legislature. See 63 Am. Jur. 2d, Public Officers and Employees, § 30, p. 645.

The members of the commission who are officers of the University of Nebraska are not state officers. Martin v. Smith, 239 Wis. 314, 1 N. W. 2d 163, 140 A. L. R. 1063. Their designation by the Legislature as members of the commission was a legislative appointment in violation of Article IV, section 10, Constitution of Nebraska. Wittler v. Baumgartner, 180 Neb. 446, 144 N. W. 2d 62. We agree with the trial court that this

provision of the act as to the 3 members of the commission was severable.

Section 2-1504, R. S. Supp., 1972, also contained a provision authorizing certain appointments to be made by the Governor-elect. (The provision has now been repealed. § 2-1504, R. S. Supp., 1973). The trial court found this provision to be invalid but severable. We think this finding was correct.

The judgment of the District Court is modified to provide that the designation in section 2-1504, R. S. Supp., 1972, of the Director of Water Resources as a member of the commission is valid. As so modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

SPENCER, J., dissenting.

I dissent from the majority opinion herein because I do not believe L.B. 1357 can be held constitutional without unduly straining the bounds of constitutional interpretation.

I would hold the acts challenged in this litigation constitute amendatory legislation which failed to comply with the constitutional requirements relating to the adoption of amendments to statutes.

I would also hold the act is so imperfect and deficient in its terms as to render it impossible of execution and enforcement. As we said in Heywood v. Brainard (1967), 181 Neb. 294, 147 N. W. 2d 772: "It is a fundamental requirement of due process of law that a statute be reasonably clear and definite."

Further, I do not believe that the majority opinion has satisfactorily answered the contention that the act is in violation of Article I, section 24, of the Constitution.

FIRST NATIONAL BANK OF OMAHA, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. FIRST CADCO CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES, IMPLEADED WITH MICRO DATA CORPORATION, INC., AND ROBERT F. LUCAS, ET AL., APPELLANTS AND CROSS-APPELLEES.

217 N. W. 2d 93

Filed April 18, 1974. No. 39247.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Judgment modified and cause remanded with directions.

Robert F. Lucas, pro se.

Robert J. Becker of Swarr, May, Smith & Andersen, for appellee First Nat. Bank of Omaha.

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

MCCOWN, J.

This is an appeal from a judgment entered after further proceedings following the mandate of this court in First Nat. Bank of Omaha v. First Cadco Corp., 189 Neb. 553, 203 N. W. 2d 770.

The particular portion of the mandate with which we are concerned here deals with the proceeds of a fraudulent transfer of real property, formerly owned by Evelyn Lucas and her husband, J. F. Lucas, as joint tenants. The defendant, Robert F. Lucas, was alleged to hold those proceeds under the terms of an undisclosed trust for Evelyn Lucas. The fraudulent transfer and sale was made in the latter portion of 1969, and the total sale proceeds received by J. F. Lucas were $144,000. Our original opinion also found that approximately $38,000 of the sale proceeds were used by J. F. Lucas to pay an indebtedness of his to the Greater Nebraska Corporation. This payment was also in 1969.

Our opinion then stated: "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." Our mandate affirmed the judgment of the District Court "except that the court finds error only in so much of the judgment of the district court dismissing Robert Lucas from the action and in this respect, the cause is reversed and remanded for further proceedings." The trial court then entered judgment on the mandate "that Robert F. Lucas account to and pay over to the plaintiff the sum of $140,000. Such accounting to be made in writing and filed with the court * * *."

After numerous applications, motions, and orders, Robert F. Lucas filed an "Accounting and Motions" purporting to list disbursements from the proceeds of the sale of real estate previously owned in joint tenancy by Evelyn and J. F. Lucas. That portion of the accounting which involved any item of claimed disbursement prior to January 1970, was stricken by the court and permission for Evelyn Lucas to testify in connection with the purported accounting was denied. The record reflects considerable confusion as to the amount of proceeds to be "accounted for" and the extent of accountability. The court then determined that Robert F. Lucas had refused to account properly and entered judgment against the defendant, Robert F. Lucas, in the sum of $144,000, the full amount of the sale proceeds received by J. F. Lucas in the latter part of 1969. This appeal followed.

In our former opinion we did not specify the amount of the sale proceeds in the possession of Robert F. Lucas in 1970, but we did specifically find that approximately $38,000 of the proceeds of the sale had been used by J. F. Lucas in 1969 to pay an indebtedness of his to the Greater Nebraska Corporation. The record now

shows that amount to be $38,903. While the total amount of the sale proceeds was $144,000 initially, the amount of the proceeds in the possession of Robert F. Lucas in 1970, for which he can be held responsible and accountable is $38,903 less. This court required Robert F. Lucas "to account for" those proceeds in the sense of holding him responsible and subject to judgment for them and also to indicate his accountability to disclose the ultimate disposition of those assets in aid of execution of a judgment. The phrase was not used in the sense of a listing of debit and credit items and a balancing of accounts.

The judgment of the District Court is modified and the cause is remanded to the District Court with instructions to enter judgment against Robert F. Lucas in the sum of $105,097.

JUDGMENT MODIFIED AND CAUSE REMANDED WITH INSTRUCTIONS.

R. N. KUESTER, APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLANTS.
217 N. W. 2d 180

Filed April 18, 1974. No. 39258.

1. **Pleadings.** A general demurrer admits all the allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from the facts which are well pleaded.
2. **Injunction: Officers.** It is the general rule that an injunction will not issue to restrain public officers from performing an official act which is not in excess of the authority reposed in them, but that unlawful acts by public officers may in a proper case be restrained.
3. **Injunction: Police Officers and Sheriffs.** It is the general rule that police officers will not be enjoined from performing their proper duties, but that the threatened continued repetition

of illegal acts may be enjoined, where under the circumstances an action for damages is not an adequate remedy. The courts should be slow in issuing injunctions against police officers and an injunction should not be issued on the mere apprehension that the officer will commit an unlawful act.

4. **Waters: Words and Phrases.** The term "any waters within the territorial limits of Nebraska" as used in section 81-815.02 (4), R. R. S. 1943, includes private as well as public waters.
5. **Property: Powers.** The right of an owner to use his property is subject to reasonable regulations, restrictions, and control by the State in the legislative exercise of the police power of the State.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded.

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

Robert E. Paulick and Gerald B. Buechler, for appellee.

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

CLINTON, J.

The plaintiff brought this declaratory judgment action to have sections 81-815.01 to 81-815.20, R. R. S. 1943, commonly referred to as the State Boat Act, declared unconstitutional in their application to certain property owned by him. The trial court in accordance with the prayer of the petition, granted a temporary restraining order preventing the defendant, the Nebraska Game and Parks Commission and Willard R. Barbee, its Secretary, and Fred Salak, a conservation officer of the commission, from enforcing the statutes with reference to the plaintiff's property. The defendants demurred to the plaintiff's petition and moved to have the restraining order dissolved. The court overruled the demurrer. The defendants elected to stand on the demurrer. The trial court then overruled the motion to dissolve the restraining order and modified

it, and ordered the issuance of a permanent injunction which was entered in the following form: "PURSUANT TO THE ORDER OF THE COURT AFORESAID, the Defendants herein, Nebraska Game and Parks Commission, Willard R. Barbee, Secretary of the Defendant Nebraska Game and Parks Commission, and Fred Salak, Conservation Officer for Defendant Nebraska Game and Parks Commission, and each of them, and their successors in office, as well as all other persons purporting to act on their behalf or under their authority, be, and they hereby are, permanently enjoined and restrained from going upon Plaintiff's property in Hall County, Nebraska, commonly known as Kuester's Lake, and legally described as follows:

> "The East one-half of the South-west Quarter of Section 13, Township 11 North, Range 9, West of the 6th P.M., in Hall County, Nebraska,

for the purpose of investigations of, or enforcing the provisions of, the Nebraska State Boat Act, legally described as Sections 81-815.01 through 81-815.20, R. R. S., Neb., Reissue of 1971, as amended, unless such law enforcement officer, or representative of any of the Defendants, at the time of so entering Plaintiff's property, above described, shall have with him, a duly and legally issued search warrant which is in 'in force' and validally issued;". The trial court did not pass upon the constitutionality of the statutes.

On this appeal the plaintiff has abandoned any claim of unconstitutionality of the statutes. The questions on appeal are whether the court erred in overruling the demurrer and authorizing a permanent injunction to issue.

We reverse and remand with directions to dissolve the injunction and to sustain the demurrer.

We examine the allegations of the plaintiff's petition in the light of the principle that a general demurrer admits all the allegations of fact in the pleading to

which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. Nebraska Natural Gas Co. v. City of Lexington, 167 Neb. 413, 93 N. W. 2d 179.

The petition alleges the ownership of the property by the plaintiff and the existence thereon of a lake wholly located within the confines of the property and accessible only over roads owned and controlled by the plaintiff; the existence on the lake shores of 72 dwellings owned by the occupants and built upon sites leased from the plaintiff; the existence thereon of a private club also built on leased land; and that "by virtue of lease agreements between Plaintiff and the individual residence owners or lessees said lessees, and their invitees have access to their lots leased from Plaintiff over the roads owned, maintained and controlled by Plaintiff, such access and permissive use of said roads is subject to regulations imposed by Plaintiff; that the individual members of the Grand Island Saddle Club, by virtue of a lease agreement between Plaintiff and said non-profit club have access to the club premises leased from Plaintiff, over the road constructed, maintained and controlled by Plaintiff, but such permissive use does not go beyond the leased premises of said Grand Island Saddle Club. That approximately eighty-five percent of the total Lake front footage is covered by lease agreements, as hereinbefore set forth." It further alleged: ". . . the only persons permitted by Plaintiff to place a boat upon the waters of Kuester's Lake are those persons who lease residence lots from Plaintiff." That the defendant Salak: ". . . has, in the past, and is threatening to in the future, enforce the provisions of Sections 81-815.01 through 81-815.20,

R. R. S. Nebraska Reissue of 1966, as amended, and also known as the Nebraska State Boat Act on Plaintiff's property, hereinbefore legally described and known as Kuester's Lake. That the enforcement of the provisions of said Act are unconstitutional and void insofar as such enforcement pertains to Plaintiff's Lake property; that continued enforcement of the provisions of the Nebraska Boat Act upon Plaintiff's property will result in the multiplicity of litigations, and will cause Plaintiff and Plaintiff's lessees irreparable harm and damage, and Plaintiff has no adequate remedy at law to protect himself and his lessees therefrom; that Defendants, and each of them, and any and all persons purporting to act on their behalf, or under their authority, should be temporarily restrained from coming upon Plaintiff's Lake property, as hereinbefore legally described for the purpose of investigating or enforcing the provisions of the Nebraska State Boat Act, and should be further restrained temporarily from prosecution of, or giving evidence of violations of the provisions of the Nebraska State Boat Act which occur upon Plaintiff's Lake property, pending the outcome of this litigation . . . ."

There followed a prayer for a temporary restraining order pending determination of the litigation and for the declaration of the unconstitutionality of the State Boat Act. There was no prayer for a permanent injunction.

It is the general rule that an injunction will not issue to restrain public officers from performing an official act which is not in excess of the authority reposed in them, but that unlawful acts by public officers may in a proper case be restrained. 43 C. J. S., Injunctions, § 108, p. 614. It is also the general rule that police officers will not be enjoined from performing their proper duties, but that the threatened continued repeti-

tion of illegal acts may be enjoined, where under the circumstances an action for damages is not an adequate remedy. The courts should be slow in issuing injunctions against police officers and an injunction should not be issued on the mere apprehension that the officer will commit an unlawful act. 43 C. J. S., Injunctions, § 108d, p. 620; Carey v. Iowa Liquor Control Comm., 257 Iowa 245, 132 N. W. 2d 429; Russo v. Miller, 221 Mo. App. 292, 3 S. W. 2d 266; Conte v. Roberts, 58 R. I. 353, 192 A. 814; Belknap v. Leary, 427 F. 2d 496 (2d Cir., 1970).

Implicit in the trial court's order is a finding that the State Boat Act (herein later referred to as the Act), was applicable to the use and operation of boats upon the plaintiff's privately owned lake. This we believe is correct. An examination of the Act shows that it was clearly the legislative intention to apply it to the operation of boats upon private as well as public waters. Section 81-815.02 (4), R. R. S. 1943, defines waters of the state as "any waters within the territorial limits of Nebraska." The purpose of the Act as well as the use of similar language in related legislation indicates rather clearly the intention of the Legislature. §§ 81-815.01, 81-815.15, 81-815.20, 37-516, R. R. S. 1943. See, Caldwell v. Erickson, 61 Utah 265, 213 P. 182; State v. Taylor, 358 Mo. 279, 214 S. W. 2d 34. Any other construction would largely defeat the legislative purposes. The right of an owner to use his property is subject to reasonable regulations, restrictions, and control by the State in the legislative exercise of the police power of the State. Stahla v. Board of Zoning Adjustment, 186 Neb. 219, 182 N. W. 2d 209; State v. Heller, 123 Conn. 492, 196 A. 337.

The duty of conservation and other law enforcement officers of this State to enforce the Act, the Game and Fish Laws, and Game and Park Commission Regulations is prescribed by section 37-603, R. S. Supp., 1972.

Among other things that statute makes it the duty of conservation officers "to serve writs and processes, civil and criminal, when such writs and processes pertain to enforcement duties imposed by law on the Game and Parks Commission." Duties imposed on the Commission include those required by the Act.

An examination of the plaintiff's petition discloses that it does not allege facts from which it can be concluded that the defendants had in the past enforced the Act by illegal means or were threatening to do so in the future. The trial court in its judgment seems to assume that a search warrant would be required to permit entry of conservation officers on the premises and for this reason made the order requiring a search warrant before the defendants could enter the premises to enforce the Act on the plaintiff's property.

When and under what circumstances a warrant might be required to validate an entry, a search, a seizure, or an arrest, we need not consider. We cannot assume that the defendants will act illegally.

It is clear that the injunction prohibited lawful as well as possible unlawful entries upon the premises. Whether a search is unreasonable under the state and federal Constitutions depends upon a variety of circumstances and we cannot make a determination of lawfulness or unlawfulness apart from a concrete set of facts. Suffice it to say that the scope of the injunction is such that it prohibits even lawful enforcement. We could not possibly catalog every situation but we mention just a few abstract examples where a search warrant would obviously not be required. (1) The service on the plaintiff's property of writs and process under section 37-603, R. S. Supp., 1972, for violations of the Act occurring either on the plaintiff's premises or elsewhere. (2) Searches outside the curtilage, 79 C. J. S.. Search and Seizures, § 66 g, p. 834; Stark v. United States, 44 F. 2d 946 (8th Cir.. 1930); Hunsucker v. State. 475

P. 2d 618 (Okla. Cr., 1970); State v. Rinkes, 70 Wash. 2d 854, 425 P. 2d 658. (3) Arrests for violations occurring in the view of the officer. (4) Searches in connection with arrest and warranted by the circumstances surrounding it. (5) Searches where probable cause exists and where exigent circumstances make a warrant unnecessary.

The judgment of the trial court and the injunction issued pursuant thereto are vacated and the cause remanded to the trial court. § 25-854, R. R. S. 1943.

REVERSED AND REMANDED.

J. J. LAPUZZA DOING BUSINESS AS J. J. LAPUZZA CONSTRUCTION COMPANY, ET AL., APPELLEES, V. PROM TOWN HOUSE MOTOR INN, INC., A NEBRASKA CORPORATION, APPELLANT.

217 N. W. 2d 472

Filed April 25, 1974. No. 39113.

1. **Contracts: Evidence: Trial.** If persons to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent.
2. **Fraud: Evidence.** Fraud is never presumed but must be proved by clear and convincing evidence.
3. **Fraud: Mistake: Mechanic's Liens.** Where a claimant, either by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust, either by including items not furnished for the particular building or by failure to give credit for payments made, the law will not aid him in enforcing his lien. On the other hand, if the errors are trifling and immaterial, or if they are readily explainable as the result of mistake, and no element of willfulness appears, regard will be had for the imperfections of human machinery, and the recovery

of a just debt will not be denied where nothing but fair dealing was intended.

4. **Contracts: Mechanic's Liens.** In a cost plus contract the contractor must credit the owner with all discounts and credits unless the contract specifically provides otherwise.
5. **Contracts.** Ambiguities in a contract are construed most strictly against its author.
6. **Contracts: Mechanics Liens.** Under contracts designed as cost plus agreements, the amount owing the builder should be computed on the basis of the amount actually spent for labor, materials, and supplies which go into and become a part of the finished structure, including the amounts paid to subcontractors.
7. **Mechanic's Liens.** The object of the mechanic's lien law being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions.

Appeal from the District Court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed as modified.

No appearance for appellant.

Schmid, Ford, Mooney, Frederick & Caporale, Thomas J. Monaghan, and Young, Kuhn & Liakos, for appellees.

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

SPENCER, J.

Prom Town House Motor Inn, Inc., a Nebraska corporation, appeals from the foreclosure of several mechanic's liens filed as the result of the remodeling of the Prom Town House Motor Inn in Omaha, Nebraska. The record embraces seven large volumes. No purpose will be served by discussing the facts in detail. We affirm as modified.

After several preliminary conferences between representatives of the defendant and J. J. LaPuzza, doing business as J. J. LaPuzza Construction Company, the parties entered into a written construction contract in February 1972. Article 2 of the contract described the

work to be performed as follows: "The Contractor shall perform all the Work required by the Contract Documents for remodeling of certain areas in the Prom-Town House Motor Inn, including generally the areas known and designated as the Piano Bar and the Hawaiian Room, and to make certain modifications and additions to the exterior of the building known as the Administration Building and to the parking lot located West of said building, all in accordance with plans and specifications prepared by Robert Hunter, Architect, and the Owner."

The amount of the contract is specified in Article 5 as follows: "The Owner shall pay the Contractor for the performance of the Work, subject to additions and deductions by Change Order as provided in the Conditions of the Contract, in current funds, an amount equal to the cost of all labor, materials and equipment incorporated in the Work. The Contractor shall not be entitled to reimbursement for any amounts for said overhead, supervision, contract administration, insurance, profit, building permit or other fees or licenses, and all similar expenses. The Contractor shall pay for all such items of expense necessary for the initiation, prosecution and completion of the Work.

"The Owner hereby agrees to pay to the Contractor for profit and general overhead, and for the other expenses to be borne by the Contractor pursuant to this agreement, a sum equal to twenty-five per-cent (25%) of the actual cost of the work."

The contract was prepared in Kansas City for defendant on the instructions of one of its directors by his attorneys. Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it. Podewitz v. Gering Nat. Bank (1960), 171 Neb. 380, 106 N. W. 2d 497.

Work commenced on February 16, 1972. Defendant made a progress payment of $21,665.36 on April 27, 1972,

pursuant to the contract. Subsequently, a conflict arose between LaPuzza and defendant concerning the total cost of the project and defendant refused to make further payments. Mechanic's liens were thereafter filed by LaPuzza and the other plaintiffs herein, who are materialmen or subcontractors.

Defendant denied the allegations of the plaintiffs' petition, contested the validity of their liens, and alleged fraud as a defense against LaPuzza. Additionally, defendant counterclaimed for reformation of the written contract between it and LaPuzza on the grounds of fraud and misrepresentation.

The trial court determined that LaPuzza had a valid and subsisting lien in the amount of $105,143.52. Plaintiff Frazier-Shurkamp, Inc., was adjudged to have a valid and subsisting lien for the sum of $4,763.99. The other plaintiffs were also adjudged to have valid liens, but they were included in the lien of LaPuzza.

Four other liens were filed against the property subsequent to the filing of the petition herein. These parties were not joined in the action, although defendant moved to make them parties more than 7 months after the action was commenced. This motion was denied, but LaPuzza was ordered to pay certain amounts to these four and to indemnify and hold defendant harmless from any claim, demand, liability, or cause of action arising out of or in connection with the filing of said mechanic's liens.

Defendant's first assignment of error is the failure of the trial court to order joinder of the four parties referred to above. Defendant refers to section 25-323, R. R. S. 1943, which reads as follows: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to

be brought in." The liens were not of record at the time of the commencement of the action herein. The motion to make them parties was filed more than 7 months after the commencement of these proceedings. It is difficult to justify the long delay. These lienholders were necessary parties. However, subsequent to the decree LaPuzza paid the claims of the lienholders and those claims are included in his lien. A certificate showing the satisfaction of those liens has been filed herein. The trial court was wrong in refusing to order the joinder of the four parties. On this record, however, under the circumstances herein it is error without prejudice.

Defendant's principal defenses are premised upon its allegation of fraud in the inception of the contract, and fraud in the padding of bills included in the liens. Defendant pled fraud as a defense to the written contract and sought reformation based on that fraud. It sought to introduce evidence bearing on this issue through several of the participants. While the evidence was excluded it is included in the record by virtue of offers of proof. Defendant does not seek to avoid the contract but rather to restrict it to a maximum of $50,000. It is defendant's contention LaPuzza represented the contract would not exceed $50,000 but would not sign a contract for that figure because he could get a better deal with his subcontractors if he did not have a fixed sum.

Defendant is seeking reformation based on fraud in the inception. It premises that fraud on its allegation plaintiffs agreed the cost would not exceed a certain figure. The contract was prepared by defendant's attorneys. Any such agreement should have been included in the terms of the contract if it was to be effective. Defendant is now seeking to reform the contract by parol evidence asserting an agreement which allegedly was made before the contract was signed.

This court has consistently held: "'* * * if persons to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent.'" Parsons Constr. Co. v. Metropolitan Utilities Dist. (1960), 170 Neb. 709, 104 N. W. 2d 272.

Fraud is never presumed but must be proved by clear and convincing evidence. Defendant's evidence is in the record through offers of proof. This testimony was properly excluded in reliance upon the parol evidence rule. It is true that the defense of fraud may be shown by parol, not to contradict or vary but to destroy the legal and binding effect of a written instrument. Paper v. Galbreth (1931), 121 Neb. 454, 237 N. W. 582. Here, however, defendant is attempting to incorporate a restriction in the contract which according to the inferences from his testimony plaintiff LaPuzza would not accept. On this record defendant is bound by the terms of the written contract.

Defendant in its brief lists five instances of alleged fraud or padding of bills. Defendant is urging that where fraud or padding of a bill is shown by the evidence in the claim for a mechanic's lien, such lien will not be enforced by a court of equity. The controlling rule in this jurisdiction is summarized in Central Constr. Co. v. Highsmith (1952), 155 Neb. 113, 50 N. W. 2d 817, as follows: "Where a claimant, either by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust, either by including items not furnished for the particular building or by failure to

give credit for payments made, the law will not aid him in enforcing his lien. On the other hand, if the errors are trifling and immaterial, or if they are readily explainable as the result of mistake, and no element of willfulness appears, regard will be had for the imperfections of human machinery, and the recovery of a just debt will not be denied where nothing but fair dealing was intended."

Defendant's first contention concerns invoices from Anfra Products. The invoices show a total of $2,422.53. The amount actually paid by plaintiffs was $2,094.01. The difference of $328.52 represented a discount from the supplier to the contractor which plaintiff retained.

The second instance involved a bill submitted by subcontractor Larry Pfeifer for various trench work, in the amount of $150. Mr. Pfeifer testified at the trial that he only charged LaPuzza $75 to do the work although he sent him a bill for $150.

The third instance is with respect to the bill of Millard Lumber Company on which LaPuzza was granted a 2 percent early payment discount which was not passed on to the defendant. This amounted to $108.71.

The fourth instance involved the invoices of Laserowitz & Sons Hardware. They consisted of a $57.50 error in the billing and a credit of $125.54 which had been allowed to LaPuzza but had not been credited to the defendant.

The last instance involves the Manzitto Construction Company which submitted invoices totalling $2,223. The records of LaPuzza, however, show that the amount actually paid was $1,823. Plaintiffs' bookkeeper attempted to explain this discrepancy.

The Laserowitz, Millard Lumber, and Anfra items were all known to defendant prior to the trial through discovery or through Mr. LaPuzza's affidavit. Credits for the Laserowitz and Anfra items were conceded by LaPuzza at the trial, and were proved and granted to

defendant by LaPuzza as a part of his case-in-chief. Plaintiffs' right to the Millard Lumber discount was disputed by LaPuzza but was granted to defendant by the trial court. In a cost plus contract the contractor must credit the owner with all discounts and credits unless the contract specifically provides otherwise. See Jensen v. Manthe (1959), 168 Neb. 361, 95 N. W. 2d 699, in which we held: "* * * the owner is entitled to the benefit of any discount or other reduction of cost accruing to the contractor operating under a cost or cost plus agreement." The Pfeifer item is definitely an overcharge and this item of $150 should be disallowed. The Manzitto claim was obviously found by the trial court to be only a partial payment with $400 still due. We feel there should have been more definite proof of the amount due, and disallow this item of $400. However, it is evident these errors were trifling in comparison to the total amount here in controversy. Further, LaPuzza conceded some of the amounts in presenting his case and some explanation was offered for all but the Pfeifer claim. The trial court determined the questioned items were valid but certain adjustments were required. Considering the fact that he observed the witnesses, we cannot say that he was clearly wrong. We affirm his finding on those items with the exception of the two mentioned, which will result in a credit of $550.

Defendant's next assignment of error raises a question as to the interpretation of the contract. The trial court permitted the contractor to recover as costs F.I.C.A. taxes, unemployment insurance, health and welfare insurance, and employer contributions to pension funds. The pertinent provisions of the written contract were set out in the third and fourth paragraphs of this opinion.

The word "said" in the sentence "the contractor shall not be entitled to reimbursement for any amounts for

said overhead * * *," creates an ambiguity in this provision of the contract. The most logical reference by that term is to the general overhead of the contractor mentioned in the last sentence. Ambiguities in a contract are construed most strictly against its author. Podewitz v. Gering Nat. Bank (1960), 171 Neb. 380, 106 N. W. 2d 497. Without specific reference in the contract we consider F.I.C.A. taxes, unemployment insurance, health and welfare insurance, and employer's contributions to pension funds within the ambit of wages and allowable as costs.

Defendant contests the inclusion of profits and overhead of subcontractors as part of plaintiffs' costs. We do not agree with this interpretation of the contract. Without specific agreement to the contrary, the general rule is as set out in Jensen v. Manthe, *supra:* "Under contracts designated as 'cost plus' agreements, the amount owing the builder should be computed on the basis of the amount actually spent for labor, materials, and supplies which go into and become a part of the finished structure, including the amounts paid to subcontractors. Such items are generally understood to include the cost of supervision, the cost of compensation and liability insurance or other insurance which he is required to carry, and the cost of hauling, storage, and usual operating expenses."

Defendant's next assignment of error attacks the lien of Heyden Tile Company in the amount of $4,746. Mr. Claus Heyden was a part owner of Midstates Terrazzo and Tile Company and Heyden Tile Company. Both companies shared offices and both companies do the same type of work. Employees of both firms performed labor on this job. The amount is not disputed. Defendant questions payment to Heyden because employees of Midstate Terrazzo and Tile Company did most of the work. It argues the trial court should have dismissed the Heyden Tile Company claim for a me-

chanic's lien. Claus Heyden had given an oral bid and subsequently submitted a written proposal on a Heyden Tile Company form. There is no evidence in the record to show Heyden Tile divested itself of its interests prior to filing the lien. In Central Constr. Co. v. Highsmith (1952), 155 Neb. 113, 50 N. W. 2d 817, we held: "The object of the mechanics' lien law being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions." While the evidence on this claim was not as satisfactory as it could have been, it is sufficient to sustain the finding of the trial court.

Defendant's eighth assignment of error involves the claim of Frazier-Shurkamp, Inc., for $15,801.21. This covered installation, repair of duct, grill, piping, fans, heating, ventilation, and air-conditioning equipment at the Prom Town House. The trial court found that Frazier-Shurkamp had two contracts, one with LaPuzza and one with Prom Town House. Two liens were declared in Frazier's favor, $10,386.17 for the work done for LaPuzza and $4,763.99 for the work done for Prom Town House. No invoices are attached to the mechanic's lien. Apparently the contract with LaPuzza was for installation while the contract with Prom Town House dealt with repair, and apparently replacement of heating equipment. This latter bill was sent directly to Prom Town House.

Section 52-103, R. S. Supp., 1972, states: "Any person entitled to a lien under section 52-101 shall make an account in writing of the items of labor, skill, machinery, equipment rental, fixtures, or material furnished, * * *." Defendant concedes a claimant can file one mechanic's lien for labor and materials for two contracts, as stated in Grove-Wharton Constr. Co. v. Clarke (1910), 86 Neb. 831, 126 N. W. 651, wherein an owner objected to a contractor filing only one me-

chanic's lien for several contracts. There this court, in upholding the validity of the lien, stated: "All of the contracts were oral, and were referred to in one verified claim for a lien filed in the office of the register of deeds."

The lien filed herein mentions both installation and repair, thus referring to both contracts. The amount involved is obviously more than the repair agreement with Prom Town House, but there is no express reference to either contract. In support of defendant's position the lien contains the words "verbal contract" which is a singular reference. The amount involved is more than the contract with Prom Town House, so defendant might well have assumed that it referred to a contract with LaPuzza. Defendant may not have understood that the contract with LaPuzza was for installation only and not repair. More specifically, however, the reference to the dates (viz: February 24 through May 28, 1972) tends to indicate only one contract was intended to be covered. Two separate contracts cannot be tacked to determine the time within which a lien must be filed.

Grove-Wharton Constr. Co. v. Clarke, *supra*, is distinguishable from the instant case. In that case all three contracts were between the owner and the contractor claiming a lien. Here, one contract was between the owner and Frazier, while the other was between the general contractor and Frazier. Further, in Grove all liens were apparently claimed under a single statute. Here, Frazier was a subcontractor with LaPuzza and a contractor with Prom Town House. We find the trial court was in error in allowing Frazier-Shurkamp, Inc., a lien for $4,763.99 under the LaPuzza mechanic's lien.

Defendant in its ninth assignment of error contends interest on a judgment in a mechanic's lien foreclosure action commences from the date of final judgment. The general conditions of the contract for construction in-

volved herein provided: "7.9.1 Any moneys not paid when due to either party under this Contract shall bear interest at the legal rate in force at the place of the Project." The contract further provided when payment was due: Article 6 provided for progress payments; Article 7 for final payment. Interest should have been computed in strict accordance with the contract.

The court did not abuse its discretion in overruling defendant's motion for a continuance. The case had been pending a sufficient time to have permitted defendant in the exercise of due diligence to prepare the case for trial. We suggest parties may not wait until a trial becomes imminent and then expect to secure additional time in which to prepare their case.

We have discussed the assignments of error we considered material herein. We affirm the judgment as modified. Defendant is allowed credit for $550 covering the Pfeifer claim and the overcharge on the Manzitto claim, and $4,763.99 for the Frazier-Shurkamp, Inc., lien. Interest should be recomputed in accordance with the contract provisions. The cause is remanded to the trial court for recomputation of the interest.

The judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

FRANK R. KREJCI, APPELLEE, V. JUDITH K. KREJCI, APPELLANT.
217 N. W. 2d 470

Filed April 25, 1974. No. 39218.

Contracts: Divorce: Alimony: Evidence: Trial. An antenuptial agreement cannot absolutely limit the amount of an award of alimony, although it should be considered by the court with other evidence on that point.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed as modified.

David Herzog, for appellant.

J. William Gallup, for appellee.

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

SPENCER, J.

This is a divorce action. The appellee, Frank R. Krejci, prayed for dissolution of the marriage, and requested a finding that appellant, Judith K. Krejci, was entitled to no alimony by reason of an antenuptial agreement entered into on March 29, 1969.

The parties were married on April 2, 1969. The petition for dissolution of the marriage was filed by appellee on June 19, 1972. At the time of the hearing, Judith was 37 years of age and Frank was 47. The marriage was a second for Judith and a third for Frank. Both parties had children from prior marriages and there were no children from this marriage.

Both parties affirmed that the marriage was irretrievably broken and the court so found. The evidence offered by the parties indicates that Judith had little personal property and no real estate at the time of the marriage. Frank, on the other hand, was possessed of interests in real estate and personal property of an indicated value in excess of $1,000,000. The evidence indicated that Judith had worked for Frank in his real estate business prior to the marriage, and had access to his books and records. The parties had cohabited together during the 2 years preceding the marriage. Judith had indicated to Frank that she would discontinue the relationship unless the parties were married. He agreed to marriage if she would sign an agreement relinquishing all rights to his property.

On March 28, 1969, Judith accompanied Frank to the office of Venteicher and Hunter, attorneys for Frank.

There she was handed an antenuptial agreement and told in effect that she must sign it or there would be no marriage. The antenuptial agreement presented to her essentially provided that neither Judith nor Frank would acquire any interest in the other's property then owned by either party, and that neither would be permitted to take either by inheritance, by intestate succession, or by exercising an election not to take under a will, except that it was provided Judith would receive $10,000 to be a claim against the estate of Frank.

The attorneys, Venteicher and Hunter, explained the terms and provisions of the antenuptial agreement to Judith. She was urged to obtain an attorney. She did not do so. She took the agreement home and on the next day, March 29th, returned to the office of Venteicher and Hunter, and signed the agreement. The parties then left for Acapulco, Mexico, and were married on April 2, 1969.

The trial court, after hearing the testimony, found: "That the parties entered into an antenuptial agreement prior to marriage, and that it was the intention of the parties, as evidenced by said agreement and the testimony adduced in Court, that respondent (Judith) was not to acquire any interest in the real and personal property of the petitioner acquired either prior to or subsequent to the marriage, but was to receive only support for herself and ten thousand dollars in cash ($10,000) in the event she survived petitioner as his lawful widow; it was further understood that petitioner would acquire no interest in any real or personal property acquired by respondent prior or subsequent to the marriage.

"That respondent should receive nothing from petitioner by virtue of the marriage and should retain only those personal belongings which were hers prior to the marriage or were acquired by her subsequent to the marriage with her own funds or as gifts from petitioner."

It is to be noted the antenuptial agreement herein was totally silent on the subject of division of property in the event of a dissolution of marriage or separation. Counsel for Frank testified this was intentional and he informed the parties that such provision might well be void as against public policy. See Tiernan v. Tiernan (1924), 112 Neb. 707, 201 N. W. 145. In any event, the parties themselves concluded the agreement did not cover divorce or separation.

The court, in effect, considered the antenuptial agreement as controlling and allowed no alimony to the appellant. In White v. White (1924), 112 Neb. 850, 201 N. W. 662, we said that an antenuptial agreement cannot absolutely limit the amount of an award of alimony to the wife upon divorce obtained by the husband for the wife's fault, although it should be considered by the court with other evidence on that point.

A complete and full financial statement was attached to the antenuptial agreement. This statement disclosed the nature and type of the property owned by Frank, its appraised value, the amount of indebtedness thereon, and his net worth. Judith had been his secretary, had access to his records, understood what she was signing, and had the instrument explained to her at the time she was first asked to sign. Judith was urged to obtain an attorney. She did not do so. She took the agreement home, presumably to consult with someone about it. The next day she returned to the office of Frank's attorneys and signed the instrument. She was aware at all times there would be no marriage unless the agreement was signed.

Appellant alleges the court erred in not allowing her to use subpoenas and subpoenas duces tecum for discovery purposes and in not granting her a hearing on her motion for appointment of an auditor and a receiver. Ordinarily, the denial of discovery would be error. At best, it would be harmless error on this

record. For the purposes of the trial, appellee offered to stipulate that his property had increased substantially during the 3 years of the marriage. The evidence was more than ample to sustain a substantial alimony allowance if one were merited.

The trial court was in error in awarding no alimony. Appellant should have been allowed an amount sufficient to permit her to reestablish herself. On the record, however, any allowance made should be minimal when contrasted with appellee's financial worth. The decree of the trial court, insofar as it finds the marriage of the parties is irretrievably broken and the marriage dissolved, is affirmed. Otherwise, the trial court's decree is modified to award the appellant alimony in the sum of $10,000. Counsel for appellant is awarded $750 for services in this court. The judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES RAY, APPELLANT.
217 N. W. 2d 176

Filed April 25, 1974. No. 39225.

Criminal Law: Evidence: Trial: Intent. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

T. Clement Gaughan and Dennis R. Keefe, for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from a conviction for forgery. The assignments of error relate to the sufficiency of the evidence to sustain the conviction and the admission of evidence concerning an earlier crime.

The record shows that on May 16, 1973, the defendant wrote out and cashed a check for $20 drawn on the account of Randra Lou Hopken. The defendant admitted that he had written Miss Hopken's name on the check but claimed she had authorized him to do so. Miss Hopken testified she had not authorized the defendant to sign her name to any check. A book of blank checks on her account had been taken from her apartment by the defendant without her knowledge or consent. The evidence presented a question for the jury and was clearly sufficient to support the finding of guilty.

The State produced evidence the defendant had written three checks on the account of Robert E. Turner with the permission of Turner on March 14, 1973, and had obtained merchandise and cash for the checks. The defendant and Turner had then divided the money received in change from two of the checks. The State was allowed to prove over objection that as a result of the transaction with Turner the defendant had pleaded guilty to issuing an insufficient-fund check with intent to defraud.

An intent to defraud is an element of the crime of forgery. § 28-601, R. S. Supp., 1972. The charge arising out of the Turner check transaction also involved an intent to defraud. It was an offense involving a check drawn on the account of another person with fraudulent intent and had taken place about 60 days previous to the crime charged in this case. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Swiney, 179 Neb. 230, 137 N. W. 2d 808. See,

also, State v. Mayes, 183 Neb. 165, 159 N. W. 2d 203.

In Turpit v. State, 154 Neb. 385, 48 N. W. 2d 83, the following statement was quoted with approval from I Wharton's Criminal Evidence (11th Ed.), § 350, p. 520: " 'Testimony of other similar offenses has been admitted to show intent where there is or may be, from the evidence, an inference of mistake, accident, want of guilty knowledge, lawful purpose or innocent intent. Where an act is equivocal in its nature, and may be criminal or honest according to the intent with which it is done, then other acts of the defendant, and his conduct on other occasions, may be shown in order to disclose the mastering purpose of the alleged criminal act.' "

The evidence concerning the Turner checks including the defendant's guilty plea tended to show fraudulent intent and an absence of mistake, accident, or lawful purpose. It was within the discretion of the District Court to admit the evidence relating to the insufficient-fund check charge.

The judgment is affirmed.

AFFIRMED.

LARRY E. LEWIS, APPELLANT, V. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA ET AL., APPELLEES.
217 N. W. 2d 177

Filed April 25, 1974. No. 39280.

Intoxicating Liquors: Motor Vehicles: Implied Consent Law. A conditional or qualified refusal to take one of the authorized tests to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Nelson, Harding, Marchetti, Leonard & Tate and Alan L. Plessman, for appellant.

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

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

WHITE, C. J.

This is an appeal from a judgment of the District Court affirming an order of the Nebraska State Department of Motor Vehicles revoking the driver's license of defendant for failure to comply with the provisions of the implied consent law. We affirm the judgment and order of the District Court.

A detailed review of the facts is unnecessary. The facts are undisputed, and the defendant concedes that after being stopped on March 18, 1973, at about 10:30 p.m., by two Lincoln police officers while driving his automobile in Lincoln, Nebraska, he refused to take an intoxication test under the implied consent law until he was given permission to speak to a lawyer. He was refused permission, no intoxication test was taken, and the Nebraska State Department of Motor Vehicles revoked his license for a period of 1 year for refusing to take the examination.

The contention of the defendant is that we should reexamine and overrule our opinion in Rusho v. Johns, 186 Neb. 131, 181 N. W. 2d 448 (1970), and subsequent cases holding invalid such a conditional or qualified refusal. In Rusho v. Johns, *supra,* the court said: "(I)t is plain from the record that Rusho refused to take the alcoholic test under the implied consent law until he had talked to his lawyer. This is not a reasonable ground for refusing to take the test. A conditional or qualified refusal to take a test to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act." On November 9, 1973, this court reaffirmed the holdings

in Rusho v. Johns, *supra,* in Wiseman v. Sullivan, 190 Neb. 724, 211 N. W. 2d 906, wherein we said: "We have stated many times that a driver who has been arrested for operating a motor vehicle upon a public street or highway while under the influence of intoxicating liquor is not entitled under either the federal or state Constitutions or the implied consent statute to consult with a lawyer previous to giving a sample of blood, breath, or urine under the implied consent act, or to have a lawyer present during the giving of the sample. Rusho v. Johns, 186 Neb. 131, 181 N. W. 2d 448; Metschke v. Department of Motor Vehicles, 186 Neb. 197, 181 N. W. 2d 843; Doran v. Johns, 186 Neb. 321, 182 N. W. 2d 900. Neither is the right against self-incrimination involved. State v. Manley, 189 Neb. 415, 202 N. W. 2d 831.

"We have also said that a conditional or qualified refusal to take one of the authorized tests to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such a refusal is a refusal to submit to the test within the meaning of the act. Preston v. Johns, 186 Neb. 14, 180 N. W. 2d 135; Rusho v. Johns, *supra.*"

These holdings completely dispose of the defendant's contention. There is neither any constitutional nor statutory basis for such a conditional refusal. We adhere to our recent decisions and holdings which are clear and need no further elaboration.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

MICHAEL D. BAKER, APPELLANT, V. JOHN L. SULLIVAN, DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

217 N. W. 2d 483

Filed April 25, 1974. No. 39320.

Administrative Law: Evidence: Trial: Motor Vehicles. Abstracts of convictions covering void judgments or erroneous or fraudulent records may be challenged at an evidentiary hearing provided for in the District Court on a de novo review of the director's order revoking a driver's license.

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

Cunningham, Blackburn & Von Seggern by William O. Von Seggern, for appellant.

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

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

SPENCER, J.

Plaintiff appeals from the dismissal of his petition to set aside an order of suspension of his motor vehicle operator's license. We reverse.

His operator's license was revoked because plaintiff had allegedly accumulated a total of 12 points within a 2-year period. Included in the 12 points was an alleged offense of illegal passing for which 2 points were assessed. The abstract filed in the Department of Motor Vehicles indicates a judgment on this offense was entered September 5, 1972, and that plaintiff pleaded guilty.

Plaintiff disputes this specific violation. He testified that he appeared pro se in the police court at Grand Island, Nebraska, on September 5, 1972, in response to a ticket for a traffic violation. He thought the ticket said "illegal driving." The police court docket, not in

the space provided but on the margin, indicates that the original ticket might have been for careless driving, but apparently was amended to "illegal passing." He entered a plea of not guilty, but no trial was held. At the request of the police judge, he told the judge what had happened. No witnesses were called in the case. No one was sworn and no evidence was adduced. The judge asked him to pay the costs, which he did.

Exhibit 1-A, which is the docket entry for September 5, 1972, substantiates the plaintiff's testimony. It is unsigned. It does not indicate that a trial was held. It shows that the plaintiff pleaded not guilty. The nature of the offense is not given in the space provided. No witness fees are assessed and there definitely is no judgment entry.

Section 39-794, R. R. S. 1943, provides in part: "Every * * * police judge or court in this state shall make complete entries in the court docket, including the judgment of conviction, of every case in which a person is charged with violation of any provision of Chapter 39, article 7, Chapter 60, articles 4 and 5 or any amendments thereto, or any traffic regulations in city or village ordinances."

It is obvious the docket entry fails entirely to meet the required criteria. It is unsigned. There is no judgment entry. It does not show the date of the alleged violation or who presided over the Grand Island police court on September 5, 1972. Nor does it show who prosecuted the proceedings, what plaintiff was charged with, and which city ordinance he allegedly violated.

We held in Bohlen v. Kissack (1972), 189 Neb. 262, 202 N. W. 2d 171, that abstracts of convictions covering void judgments or erroneous or fraudulent records may be challenged at an evidentiary hearing provided for in the District Court on a de novo review of the director's order revoking a driver's license. At the hearing in the District Court the State adduced no evidence.

The plaintiff's testimony was unchallenged. The trial court was in error in dismissing the plaintiff's petition. The judgment of the District Court is reversed and the cause remanded with directions to dismiss the order of the Director of the Department of Motor Vehicles suspending plaintiff's motor vehicle operator's license.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. PEDRO CANO, APPELLANT.
217 N. W. 2d 480

Filed April 25, 1974. No. 39328.

1. **Criminal Law: Evidence: Witnesses.** In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausability of explanations, or weigh the evidence. Such matters are for the jury.
2. **Criminal Law: Evidence: Witnesses: Trial.** The credibility of the witnesses and the weight of the evidence in a criminal case are for the jury and a verdict will not be set aside on appeal if the evidence sustains some rational theory of guilt.
3. **Criminal Law: Sentences.** 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 on appeal unless there appears to be an abuse of discretion.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

G. Randolph Reed, for appellant.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and Robert G. Avey, for appellee.

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

BRODKEY, J.

The defendant, Pedro Cano, was, after trial by jury,

convicted of the offense of shooting with intent to wound or kill, and was thereafter sentenced to the Nebraska Penal and Correctional Complex for a period of 5 to 8 years. He appeals that conviction and sentence to this court. We affirm.

The shooting involved in this case occurred on the night of June 23, 1973, in the J & F Tavern in Morrill, Nebraska. It appears from the record that earlier that evening the defendant and the victim, one Joe Martinez, had both been in the tavern and had engaged in an altercation which involved the defendant throwing bottles and other objects at Joe Martinez. Shortly thereafter the owner of the tavern drove the defendant, Pedro Cano, to his home, and defendant indicated that he would remain there. However, defendant returned to the tavern shortly thereafter, having provided himself with a gun and shells from his home. Upon arriving at the tavern, the defendant confronted Joe Martinez, and, after a brief exchange of words, shot Martinez several times. The defendant was immediately captured, disarmed, and placed under arrest. Although seriously injured, Martinez survived his wounds. The trial, conviction, and sentence followed. In his appeal, the defendant assigns as error that the evidence is insufficient to support a verdict of guilty and also that the sentence is excessive. We cannot agree.

Eight witnesses testified for the State, of which five were in the tavern at the time of the shooting and were eyewitnesses to all or various parts of what transpired. There is no question from the evidence, and the witnesses so testified, that immediately upon his return to the tavern the defendant pulled out his revolver and fired it at the victim, at least several times. Even the defendant admitted firing the gun at the victim and admitted hitting him, but denied that he had any intent to do so. The defendant, in his testimony, has raised the issue of self-defense, claiming that Martinez, prior to the

shooting, had used certain insulting and opprobrious words toward the defendant, and also that he did not shoot Martinez until it appeared that Martinez was coming toward him. The only evidence supporting the claim of the defendant in this regard was the testimony of the defendant himself. The testimony of the other eyewitnesses, present at the time of the shooting, was to the effect that Martinez did not step toward the defendant nor did he use any opprobrious language toward him; or that, according to some of the witnesses, they did not hear any such language used, or notice any motion on the part of Martinez in moving toward the defendant. Suffice it to say, that both claims of the defendant were matters for the determination of the jury and were determined by it in its verdict. With regard to the question of criminal intent on the part of the defendant, the jury could reasonably conclude that the defendant had the intent necessary to sustain a conviction, and this issue was presented under the instructions of the court. Buckley v. State, 131 Neb. 752, 269 N. W. 892 (1936). Also during the trial the defendant requested that the court instruct the jury on the issue of self-defense, and the court did so instruct the jury. It is clear that the jury could reasonably conclude, as it must have, that the defendant did not act in self-defense. In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Marion, 174 Neb. 698, 119 N. W. 2d 164 (1963); State v. Garza, 187 Neb. 407, 191 N. W. 2d 454 (1971). The credibility of the witnesses and the weight of the evidence in a criminal case are for the jury and a verdict will not be set aside on appeal if the evidence sustains some rational theory of guilt. See, State v. Lewis, 184 Neb. 111, 165 N. W. 2d 569 (1969); State v. Reeder, 183

Neb. 425, 160 N. W. 2d 753 (1968); Sedlacek v. State, 166 Neb. 736, 90 N. W. 2d 340 (1958); Williams v. State, 115 Neb. 277, 212 N. W. 606 (1927).

The defendant also contends that the sentence of 5 to 8 years imposed by the District Court was excessive. The statute under which the defendant was charged, section 28-410, R. S. Supp., 1972, provides for a minimum sentence of 1 year and a maximum sentence of 50 years. Defendant correctly points out that under the law of this state the Supreme Court may reduce a sentence rendered by the District Court and it is the duty of the Supreme Court to render such sentence as may be warranted by the evidence. § 29-2308, R. R. S. 1943; State v. Thunder Hawk, 188 Neb. 294, 196 N. W. 2d 194 (1972); State v. Sturm, 189 Neb. 299, 202 N. W. 2d 381 (1972). The defendant also points out certain elements to be considered by the court in making this determination, as set out in State v. Etchison, 188 Neb. 134, 195 N. W. 2d 498 (1972); A.B.A. Standards Relating to Appellate Review of Sentences (Approved Draft, 1968), § 3.2, Commentary a, b, and c, pp. 51 to 53. The defendant argues in his brief that certain factors involved in this case would require a modification of the sentence imposed, to wit, the allegation of no prior criminal record on the part of the defendant, no predisposition for violence, a lack of prospects that violence will recur, the emotional stability of the defendant, his willingness to work at honest labor and his history of steady employment, his age and family ties, the mentality and education of the defendant, and a positive potential for rehabilitation and reform. There is nothing in the record to substantiate defendant's allegations in this record. The record does reveal, however, that a presentence investigation was ordered by the District Court and the results of that investigation were considered by the trial judge at the time of rendering sentence. However, the record on that investigation is not before this court, although it could have been requested

by defendant. See, Supreme Court Rule 7 h, as amended December 6, 1973; and State v. Richter, *ante* p. 34, 214 N. W. 2d 16 (1973). From the record before us, the only pertinent items revealed by the record would appear to be the fact that the defendant was a married man, had a child, and was a laborer by occupation. We must of necessity, therefore, revert to the well-established rule in this jurisdiction 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 on appeal unless there appears to be an abuse of discretion. State v. Brown, *ante* p. 61, 213 N. W. 2d 712 (1974); State v. McCowin, *ante* p. 31, 213 N. W. 2d 724 (1973); State v. Medina, 189 Neb. 765, 204 N. W. 2d 785 (1973). Under the circumstances it is clear that there was no abuse of discretion on the part of the sentencing court and we affirm that sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAY BROWN, APPELLANT.
217 N. W. 2d 179

Filed April 25, 1974. No. 39347.

Criminal Law: Sentences. A sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

George A. Thompson of Stern, Harris, Feldman, Becker & Thompson, for appellant.

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

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

SPENCER, J.

Defendant pleaded nolo contendere to the unlawful delivery of a controlled substance. He was found guilty and was sentenced to 30 months in the Nebraska Penal and Correctional Complex, with the provision that 70 days credit be allowed for time spent in the county jail. The only issue on appeal is whether the sentence is so excessive as to constitute an abuse of discretion. We affirm.

We have repeatedly said that a sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Haines (1973), 190 Neb. 645, 211 N. W. 2d 414.

We have reviewed the presentence report on the defendant, as well as the sentencing proceedings. We are inclined to agree with the trial judge that in this instance confinement is desirable. In view of the seriousness of the crime, the sentence imposed is in the minimal range.

On the record herein there is no basis for a finding that the trial court abused its discretion. The judgment is affirmed.

AFFIRMED.

IN RE APPLICATION OF E & B RIGGING & TRANSFER, INC. HOWARD N. DAHLSTEN, DOING BUSINESS AS DAHLSTEN TRUCK LINE, ET AL., APPELLEES, V. LLOYD HARRIS, DOING BUSINESS AS HARRIS TRANSFER, ET AL., APPELLANTS.

217 N. W. 2d 813

Filed May 2, 1974. No. 38855.

1. **Carriers: Public Service Commissions.** Where a carrier, holding a certificate of public convenience and necessity for hauling commodities generally or a generic class of commodities over irregular routes, does not perform a portion of such service through

no fault of his own, but is ready, able, and willing to do so, the question of dormancy becomes a question of fact under all the circumstances of the case.

2. ———: ———. Where commission approval of a transfer of authority is requested under section 75-318, R. R. S. 1943, and an issue of dormancy is properly raised, the Nebraska Public Service Commission must determine both the fact of dormancy and on the basis of the evidence whether the public convenience and necessity require the transfer.
3. **Carriers: Public Service Commissions: Constitutional Law.** The power of the Nebraska Public Service Commission to regulate common carriers is derived from Article IV, section 20, of the Constitution of Nebraska. Such powers are plenary and self-executing in the absence of specific legislation on the subject.
4. **Carriers: Public Service Commissions: Constitutional Law: Statutes.** Where the Legislature enacts specific legislation implementing Article IV, section 20, of the Constitution of Nebraska, the Nebraska Public Service Commission is subject to and governed by the provisions of such enactment.
5. **Appeal and Error: Public Service Commissions.** On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
6. **Appeal and Error: Public Service Commissions: Evidence.** The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.
7. **Carriers: Public Service Commissions: Evidence.** "Willful failure to perform a service" and "dormancy" cannot in all cases be equated. The same evidence which might support a finding of willful failure in the case of a regular route authority does not necessarily support such a finding in a case of irregular route authority authorizing carriage of commodities generally or a generic class of commodities where the demand for service is the critical factor and where the evidence shows an ability and willingness to serve.
8. **Carriers: Trial: Public Service Commissions.** The protestant to the transfer of an authority who alleges dormancy has the burden of proving it and the applicant has the burden of showing that despite dormancy the transfer was required by the present and future public convenience and necessity.

Appeal from the Nebraska Public Service Commission. Affirmed.

Peterson, Bowman, Coffman & Larsen, A. J. Swanson, C. Russell Mattson, and Joseph L. Krause, for appellants.

James E. Ryan and Richard A. Knudsen, for appellees.

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

CLINTON, J.

Motion for rehearing was granted in this case and after reargument we conclude that the original opinion, found at 190 Neb. 652, 211 N. W. 2d 714, affirming the order of the Nebraska State Railway Commission, while correct in its result, was founded upon improper rationale. We therefore withdraw the prior opinion and substitute the following.

This is an appeal from an order of the Nebraska Public Service Commission. Rigging made application to purchase a certificate of public convenience and necessity of Harris. Herman and Dahlsten, who are carriers engaged in hauling, among other commodities, bulk cement and limestone, entered protests alleging that the Harris authority was dormant; that the present and future public convenience and necessity does not require the service authorized; that the transfer would result in the rendering of a new and different service not required by the public convenience and necessity; and that granting the transfer was not consistent with the public interest, all contrary to the provisions of section 75-318, R. R. S. 1943.

The operating authority in question had been issued in 1937 under the grandfather provisions and was later reissued in 1959 as follows: "SERVICE AND ROUTE OR TERRITORY AUTHORIZED: Road, dam, bridge and building contractors' tools, machinery, materials, equipment and supplies; houses, railroad cars and build-

ings, structural steel, heavy machinery and such other commodities which because of size, weight or shape require the use of special equipment in either transporting, loading, or unloading; (but not including liquids in bulk in tank vehicles or dry fertilizers in bulk in hopper type vehicles), between all points and places in Nebraska, over irregular routes."

The commission found that Harris had been guilty of a willful violation of the provisions of section 75-313, R. R. S. 1943, and an implementing regulation which provides: "No carrier, without first obtaining Commission approval shall . . . (b) discontinue in any part service authorized . . . under its certificate." The commission "revoked" the portion of the certificate "authorizing the transportation of cement, in bulk and bag, and limestone and limestone products." It then authorized the transfer of the authority with the following restriction: "RESTRICTION: That this certificate is restricted against the transportation of cement, in bulk or bags, limestone and limestone products, in bulk, and liquids, in bulk, in tank vehicles and dry fertilizers, in bulk, in hopper-type vehicles."

The record shows that Rigging desires to purchase the Harris authority because it seeks to compete with the protestants for transportation of cement and limestone. The two protestants, one or two other motor carriers, and the railroads are the only carriers engaged in such transportation. Dahlsten operates pursuant to a specific authorization for limestone products. Herman carries such products pursuant to an authorization for commodities generally. Both have large investments in specialized pneumatic equipped tank trailers which are necessary for the efficient carriage of the products in question. Harris has never, except on one occasion and that in 1966, then using a customer's equipment, hauled cement or limestone in pneumatic trailers. Harris did not actively solicit that business, but was

engaged in what is described as heavy hauling. He owned no specialized equipment for hauling cement and limestone. There is no evidence that he ever refused a request for service for the products in question. Applicant argues there were no requests because a monopoly in the service existed and there was a paucity of business. It is clear that no part of the value of his business is the result of investment in equipment for hauling cement or limestone or the use of his permit for such purposes.

Prior to 1965 the railroads possessed a monopoly over transportation of cement, for paper rates barred competition from motor carriers. The policy was modified in 1965 by the introduction of commodity rates known as "ex-rail rates" on cement. In 1966 the commission established competitive truck rates for cement. Ready Mix, Inc. v. Nebraska Railroads, 181 Neb. 697, 150 N. W. 2d 275 (1967). Herman began hauling cement in 1966. Dahlsten acquired his authority with reference to the products in question in 1970 and began hauling limestone that year. In 1971 despite active promotion there was little business and he had a bad year. Herman testified that the transfer of the certificate for the purposes for which the transferee desired to use it would adversely affect its business.

Applicant urges that a finding of "willful failure" is not supported by the evidence and is arbitrary and unreasonable because where there is a paucity of business and a monopoly exists there can be no willful failure in a case where the authorization is for commodities generally or a specific generic class of commodities, in this instance "road, dam, bridge and building contractors' . . . materials" over irregular routes, where the evidence discloses only a failure to haul one of the products falling in the general category. Applicant relies, as did a dissenting member of the commission, upon the principle that the certificate holders "are re-

quired to show only that they have rendered substantial service in the transportation of a representative number of commodities to a representative number of points within their authorized territory and that they have not abandoned or discontinued service, in whole or in part, either as to commodity or territory." Home Transportation Co., Inc.—Purchase—Clarkson & Clarkson, 93 M.C.C. 509 (1964). Applicant urges therefore that the record demonstrates no willful failure.

The cases cited by the commission and relied upon by us in our original opinion do not, in our judgment, support the proposition that a "willful violation" exists under the evidence in the record. Two of these cases, Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 34 N. W. 2d 363, and Resler v. Nielsen & Petersen, Inc., 154 Neb. 624, 48 N. W. 2d 718, involved regular route authorities. The evidence there showed that the carriers ceased serving the route or a portion of it. The third case, Schmunk v. West Nebraska Express, Inc., 159 Neb. 134, 65 N. W. 2d 386, involved an irregular route authority and the evidence showed an abandonment of all service including disposition of the equipment which made service possible. A fourth case to which attention is called in the opinion, Canning v. McKay, 173 Neb. 103, 112 N. W. 2d 737, supports the position of the applicant. The authority involved authorized the carriage of commodities generally over irregular routes, but within a prescribed area. The evidence there showed that the failure to transport the regulated commodities during the year previous to the filing of the application was due to a paucity of business during the period and not due to any failure on the carrier's part. We there said: "But where, as here, the certificate holder is ready, willing, and able to perform the service authorized by his certificate, and does not perform such service through no fault of his own, the question of dormancy becomes a question

of fact under all the circumstances of the case." We conclude that there is no evidence showing a willful failure under section 75-313, R. R. S. 1943, and that therefore the order of the commission was in this respect arbitrary and unreasonable.

The order of the commission and our prior opinion and other findings of the commission are, however, supportable upon other grounds.

Section 75-318, R. R. S. 1943, defines the conditions for the various methods of transferring operating authority. Insofar as it is necessary to note in connection with the issue at hand, that section provides in part as follows: "Whenever a . . . purchase . . . is proposed, the carrier . . . seeking authority . . . shall present an application . . . ." After provision for notice and hearing, it states: "If, after such hearing, the commission finds that the transaction proposed will be consistent with the public interest and does not unduly restrict competition and that the applicant is fit, willing, and able to properly perform the proposed service, it may enter an order approving . . . such . . . purchase . . . of . . . certificates or permits *or the whole, or any part thereof, upon such terms and conditions as it shall find to be just and reasonable;* Provided, that if any of the certificates or permits proposed to be . . . transferred . . . are dormant the commission may approve . . . transfer . . . *only upon proof of and a finding that such . . . transfer . . . is or will be required by the present and future public convenience and necessity,* in the same manner as provided in section 75-311, and provided further, that if the proposed . . . transfer . . . will permit or *result in a new or different service* or operation as to territorial scope than that which is or may be rendered or engaged in by the respective parties, or, . . . *will tend to enlarge competition over that then existing,* the commission may approve such . . . transfer . . . *only upon the basis of proof* of and a finding that

the proposed . . . transfer . . . *is or will be required by the present and future public convenience and necessity,* in the same manner as provided in section 75-311. Any restrictions, qualifications, or conditions applicable to and contained in a particular certificate of public convenience and necessity or a permit at the time of the issuance thereof or thereafter made a part of such certificate or permit, . . . proposed to be merged, consolidated, transferred, or leased shall not be changed, altered, or removed without the proof required in section 75-311 for certificates and permits." (Emphasis supplied.)

The commission, in addition to its finding on willful failure, also found: (1) "The retention of the certificate of authority to truck limestone and cement could only lead to new competition in these fields of trucking for which there has not been a need in the past or is there shown a present or future public need for the retention of that service in the certificate under attack." (2) That Harris had performed services under the provisions of the certificate with reference to heavy hauling and that that portion was not dormant. (3) That the applicant was fit, willing, and able to perform services under the certificate. (4) That the transfer of the amended certificate will be consistent with the public interest and will not result in a new or different service. The evidence supports these conclusions and in our opinion the quoted sections of the statutes authorized the modification of the authority which is made by the commission previous to authorizing the transfer.

Our review is governed by the following principles: "The power of the Nebraska State Railway Commission to regulate common carriers is derived from Article IV, section 20, of the Constitution. Such powers are plenary and self-executing in the absence of specific legislation on the subject. . . . Where the Legislature enacts specific legislation implementing Article IV, sec-

tion 20, of the Constitution, the Nebraska State Railway Commission is subject to and governed by the provisions of such enactment. . . . On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made." Neuswanger v. Houk, 170 Neb. 670, 104 N. W. 2d 235. "The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska State Railway Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene." Ace Gas, Inc. v. Peake, Inc., 184 Neb. 448, 168 N. W. 2d 373.

We held in Neuswanger v. Houk, *supra,* that the "question of dormancy, in case[s] where an application is made for transfer of operating rights, should be the same as where an order to show cause has been issued based upon that ground." We do not believe, however, that "willful failure" and dormancy can in all cases be equated. The same evidence that might support a finding of willful failure in the case of a regular route authority, for example, as in Union Transfer Co. v. Bee Line Motor Freight, *supra,* and Resler v. Nielsen & Petersen, Inc., *supra,* does not necessarily support such a finding in a case of irregular route authority authorizing carriage of commodities generally or a generic class of commodities where the demand for service is the critical factor and where the evidence shows an ability and willingness to serve. See, Home Transportation Co., Inc., *supra;* Canning v. McKay, *supra.*

Under the posture of this case where the complainants have alleged dormancy, the burden was upon them to establish the whole or partial dormancy of the authority. The burden of proving affirmative allegations is

on the party making them. Moritz v. Transcontinental Bus Lines, Inc., 153 Neb. 206, 43 N. W. 2d 603; 73 C. J. S., Public Utilities, § 53, p. 1120. The burden was then upon the applicant for transfer to show that despite such partial dormancy the transfer was required by the present and future public convenience and necessity. Neuswanger v. Houk, *supra.*

In this case because of the absence of non-competitive rates and the monopoly position of the railroads, Harris had no opportunity until at least 1966 to enter the bulk cement and limestone hauling fields. Others entered the field at or after that time and there was no demand for the service from him. His failure under these circumstances cannot be regarded as a willful failure.

On the other hand, when he sought to transfer his certificate to a carrier who proposed to broaden the scope of service by performing a specialized carriage which Harris had not heretofore performed, even though not by willful failure, the commission was authorized and required under the provisions of section 75-318, R. R. S. 1943, to consider the public convenience and necessity in determining whether the transfer should encompass the entire authority or whether it should place restrictions upon it excluding the specialized services not used by Harris and not required by the present and future public convenience and necessity.

We have heretofore recognized, at least by implication, the authority of the commission to take cognizance of partial dormancy. Ace Gas, Inc. v. Peake, Inc., *supra* (lack of special equipment); Andrews Van Lines, Inc. v. Smith, 187 Neb. 533, 192 N. W. 2d 406 (specialized nature of service may require a different kind and quantum of proof to establish dormancy). We also noted on the first occasion we were called upon to consider section 75-318, R. R. S. 1943, that when the transfer of a certificate will result in a material change in a service previously offered under the certificate, the is-

sue of public convenience and necessity is to be considered by the commission. Caudill v. Lysinger, 161 Neb. 235, 72 N. W. 2d 684.

AFFIRMED.

LOWELL FRIEDRICH, APPELLANT, V. MEDILL ANDERSON ET AL., APPELLEES.
217 N. W. 2d 831

Filed May 2, 1974. No. 39050.

1. **Negligence: Warranty: Strict Liability: Manufacturers.** A manufacturer of goods has a duty to use reasonable care in their design to protect those who will use them from unreasonable risk of harm while they are being used for their intended purpose or for any purpose which could be reasonably expected.
2. **Negligence: Warranty: Strict Liability: Manufacturers: Motor Vehicles.** The subjection of an automobile to accidental collision with another automobile or object while being used for its intended purpose is a use which a manufacturer could reasonably expect.
3. **Manufacturers: Motor Vehicles: Warranty.** An automobile manufacturer is not an insurer that its product is, from a design viewpoint, incapable of producing injury.
4. **Manufacturers: Negligence: Summary Judgments.** Where all the evidence relating to the claimed duty of a manufacturer in the design of a product is before the court and undisputed and is not sufficient that reasonable minds could properly find that a defectively designed product created a foreseeable and unreasonable risk of harm, the court is justified in granting summary judgment in favor of the manufacturer.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Affirmed.

William M. Lamson, Jr., and Robert F. Craig of Kennedy, Holland, DeLacy & Svoboda, and Patrick Rogers of Rogers & Rogers, for appellant.

Deutsch & Hagen, for appellees Anderson et al.

L. J. Tierney and Theodore J. Stouffer of Cassem, Tierney, Adams & Henatsch, for appellees Chrysler Corp. et al.

Heard before SPENCER, SMITH, and CLINTON, JJ., and BRODKEY and HASTINGS, District Judges.

HASTINGS, District Judge.

The question here involves the correctness of the action of the trial court in sustaining the motions for summary judgment of the defendants Chrysler Corporation and Chrysler Motors Corporation, the manufacturer and distributor, respectively, of a certain 1966 Plymouth automobile owned by plaintiff at the time of the accident in question.

Plaintiff was a passenger in his automobile being driven by his wife, when it was struck from the left side by another automobile, throwing him forward and to the left so that his head struck the gearshift lever knob when it was in the low position. He alleged in his second amended petition that the knob was defectively designed, that the "second impact" caused specific injuries to his eye, and that the defendants were liable on the theories of specific negligence, breach of warranty, and strict liability.

Defendants denied all allegations of negligence on their part, although for the purpose of the motions, stipulated with plaintiff that there would be some evidence from which it could be concluded that the knob was defectively designed. In addition, it must be conceded for the same purpose that some of plaintiff's injuries resulted from his eye being in collision with and penetrated by the knob.

The only other facts appeared from depositions of two engineers in the employment of the defendants. Essentially, one could conclude from their testimony that the gearshift lever knob in use at the time plaintiff's auto was built, was approximately ½ inch in diameter; that half way through the 1966 model year the size of the knob was increased to approximately 1 inch in diameter to conform to G. S. A. standards which merely relate

to specifications required of automobiles purchased by the United States government; that there were no official federal standards then or at any time since relating to size or design of such knobs; that the larger the flat surface of the end of the knob, assuming a head-on impact with it rather than one at an angle, the less would be the force of impact per unit of area; that the size and shape of the knob must be counter-balanced against the utility of its use for the purpose intended; and that no records of any injury from gear shift knobs on Chrysler products other than this one were within the records of the defendants or knowledge of these witnesses.

The trial court in sustaining defendants' motions and granting summary judgment in their favor found that "it is conclusively established there was no duty on the part of said defendants at the time of manufacture and sale to design a gear shift lever knob so as to be incapable of producing the injury to this plaintiff or incapable of causing injury in the event of collision with another vehicle."

As stated in Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152: "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. . . . 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. . . . 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. . . . 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."

Assuming the facts established as set forth above, the

precise question before us is the nature or extent of the duty which an automobile manufacturer owes to the users of its products in the event of injury or enhanced injury resulting from a "second impact" or collision of a passenger with the inside of an automobile following an initial external collision. This is a case of first impression in Nebraska. There are two distinct theories, each strenuously urged by the respective parties. Each finds its champion in a federal case, Evans v. General Motors Corp., 359 F. 2d 822 (7th Cir., 1966), supporting defendant's position, and Larsen v. General Motors Corp., 391 F. 2d 495 (8th Cir., 1968), substantiating that of plaintiff. Evans states that such duty is to produce a vehicle which is reasonably fit for its intended use or for the purpose for which it was made and which is free from hidden defects, whereas Larsen insists that a manufacturer, although having no duty to make a product accident-proof or fool-proof, nevertheless, is under a duty to use reasonable care in the design so as to make it safe to the user for its foreseeable use and that its intended use on the streets includes the foreseeable possibility of collision with other automobiles. These two cases have been cited in most "second impact" cases in both state and federal jurisdictions, and have been discussed, analyzed, and criticized in both majority and dissenting opinions. It is therefore necessary to examine them both in some detail.

In Evans, plaintiff's decedent suffered injuries and death while driving a car which was struck in the side by another. Plaintiff there claimed that decedent's injuries were enhanced to the point of causing death because the automobile manufactured by the defendant, was designed with an "X" frame, rather than the supposedly superior perimeter frame being used by a competitor and grounded her action on specific negligence, implied warranty, and strict tort liability. After pretrial conferences, the District Court dismissed the com-

plaint on the ground that it failed to state a claim against defendant upon which relief could be granted. As the two-judge majority stated: "The major question before us is the nature of the duty which an automobile manufacturer owes to users of its product. This presents a question of law for the Court. . . . A manufacturer is not under a duty to make his automobile accident-proof or fool-proof; nor must he render the vehicles 'more' safe where the danger to be avoided is obvious to all. . . . The intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur." Then, in what may have been a "tongue in cheek" remark, but nonetheless an attempt at hyperbolic analogy, the majority goes on to say: "As defendant argues, the defendant also knows that its automobiles may be driven into bodies of water, but it is not suggested that defendant has a duty to equip them with pontoons."

The third member of the Evans court wrote a vigorous and logical dissent. As he states so matter of factly: "The opinion of the court does not state affirmatively what General Motors' duty is. It rejects plaintiff's theory that General Motors, foreseeing the possibility of broadside collisions, had the duty to include side rails in design of the Chevrolet frame, so as to provide reasonable protection against death or injury from broadside collisions; and it inferentially accepts General Motors' theory that its duty was to design its automobile to be reasonably fit for the purpose for which it was made . . . and that that purpose, as a matter of law, cannot contemplate that automobile's participation in a collision. . . . In my view, General Motors' duty was to use such care in designing its automobiles that reasonable protection is given purchasers against death and injury from accident which are expected and foreseeable yet unavoidable by the purchaser despite careful use. See Restate-

ment (Second), Torts § 395. . . . I recognize that safety standards for automobiles would normally be a legislative matter. The United States Senate is now considering the question of federal standards. . . . But the possibility of future adequate legislative standards does not remove the necessity of presently deciding whether plaintiff should or should not have an opportunity to prove the allegations made in the complaint."

The Larsen court, emanating from the district of Minnesota, but involving an accident which occurred in Michigan, specifically rejected the "intended use" theory of Evans, which the trial court had followed in granting summary judgment in favor of the defendant. That case involved a head-on collision in which the plaintiff driver sustained enhanced injuries due to the rearward displacement of a claimed defectively designed steering shaft of the Corvair automobile which he was driving. The court said: "The manufacturer should not be heard to say that it does not intend its product to be involved in any accident when it can easily foresee and when it knows that the probability over the life of its product is high, that it will be involved in some type of injury-producing accident. . . . Where the manufacturer's negligence in design causes an unreasonable risk to be imposed upon the user of its products, the manufacturer should be liable for the injury caused by its failure to exercise reasonable care in the design. These injuries are readily foreseeable as an incident to the normal and expected use of an automobile. . . .Where the injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable. . . . We do agree that under the present state of the art of an automobile manufacturer is under no duty to design an accident-proof or fool-proof vehicle or even one that floats on water, but such manufacturer is under

a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of collision. Collisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable. . . . This duty of reasonable care in design rests on common law negligence that a manufacturer of an article should use reasonable care in the design and manufacture of his product to eliminate any reasonable risk of foreseeable injury."

The Eighth Circuit Court of Appeals reaffirmed its position in a case determining Iowa law without the benefit of a state decision in Passwaters v. General Motors Corp., 454 F. 2d 1270 (8th Cir., 1972), stating: "We think it now settled that a manufacturer does have the responsibility to avoid design in automobiles which can reasonably be foreseen as initially causing or aggravating serious injury to users of the highway when a collision occurs."

The problem is set forth in Dyson v. General Motors Corp., 298 F. Supp. 1064 (E. D. Penn., 1969), as follows: "In essence, the issue is whether the concept of 'intended use' includes foreseeable consequences of unintentional misuse." The court went on to answer that question by reaching the conclusion that a plaintiff who brings himself reasonably within the provisions of Restatement, Torts 2d, section 402A, is entitled to recover even when the case is one of enhanced injury or a "second accident."

The Kansas Supreme Court, although reversing the judgment of the trial court which had entered judgment for the plaintiff on a claimed negligent design of a brake, holding that the evidence did not disclose the vehicle to be unreasonably dangerous, in Garst v. General Motors Corp., 207 Kan. 2, 484 P. 2d 47 (1971), said: "The case at bar does not involve an 'implied warranty of design,' but it does involve negligence in design. On this point the manufacturer has a duty to use reasonable

care in the design of its product so it will be reasonably safe for its intended use, including any emergencies of use which can be reasonably anticipated."

Mickle v. Blackmon, 252 S. C. 202, 166 S. E. 2d 173 (1969), involved an injury to a passenger who was thrown forward and impaled on the gearshift lever, the knob of which shattered on impact. Although reversing a jury verdict for plaintiff because of erroneous instructions, the court there quoted with approval the following language from Spruill v. Boyle-Midway, Inc., 308 F. 2d 79 (4th Cir., 1962): " ' "Intended use" is but a convenient adaptation of the basic test of "reasonable foreseeability" framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability for negligence. . . . However, he must also be expected to anticipate the environment which is normal for the use of his product and . . . he must anticipate the reasonably foreseeable risks of the use of his product in such an environment.' " Continuing, the South Carolina court stated: "The issue for the jury was whether Ford in the design and selection of materials for the gearshift lever assembly negligently created an unreasonable risk of enhanced injury to passengers in a collision situation. . . . The primary issue . . . was whether the collision risk to which she was subjected by the design and composition of the gearshift assembly was unreasonable."

Additional cases from other jurisdictions could be cited, but they would add nothing to the logic perhaps already belabored.

Although never passed on specifically by this court, NJI No. 11.03 contains what seems to be a comprehensive and accurate statement of the law applicable to this situation and is in accord with what we think to be the better reasoned rule relating to "second impact" or enhanced injuries. We therefore hold that a manufacturer of goods has a duty to use reasonable care in the

design of goods to protect those who will use the goods from unreasonable risk of harm while the goods are being used for their intended purpose or any purpose which could be reasonably expected. The subjection of an automobile to accidental collision with another automobile or object while being used for its intended purpose is a use which a manufacturer should reasonably expect.

However, an automobile manufacturer is not an insurer that its product is, from a design viewpoint, incapable of producing injury. Furthermore, in the application of the general rule, whenever a "second impact" or enhanced injury occurs, this should not be an open invitation to a jury to speculate as to the issue of foreseeability or the unreasonableness of the risk of harm. This is no different than in any other tort case in which there is always the preliminary question of law for the court "not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Langemeier, Inc. v. Pendgraft, 178 Neb. 250, 132 N. W. 2d 880.

We are not unmindful of the language in Green v. Village of Terrytown, *supra,* that: " 'A motion for a summary judgment is not a substitute for a demurrer or a motion for a directed verdict.' . . . 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." Of course, the corollary of that rule is that where reasonable minds may not differ as to the conclusion or inference to be drawn from the given set of facts, summary judgment is proper.

All the evidence relating to the claimed duty of the defendants to the plaintiff in the design of the gearshift lever knob is before the court and is undisputed, and in our opinion is not sufficient that reasonable minds

could properly find that the defectively designed product created a foreseeable and unreasonable risk of harm. In other words, there was no substantial competent evidence from which one reasonably could draw an inference of negligence on the part of defendants proximately causing plaintiff's injuries. Accordingly, the action of the trial court in granting summary judgment was correct and is affirmed.

AFFIRMED.

SMITH, J., not participating.

CARL BASS ET AL., APPELLEES, V. BOETEL & CO., A NEBRASKA CORPORATION, ET AL., APPELLANTS.

217 N. W. 2d 804

Filed May 2, 1974. No. 39112.

1. **Forcible Entry and Detainer: Property: Landlord and Tenant.** Self-help, relating to the repossession of real estate has long been contrary to the public policy of Nebraska and is not to be condoned.
2. ———: ———: ———. A landlord otherwise entitled to possession, must, on the refusal of the tenant to surrender the leased premises, resort to the remedy given by law to secure it; otherwise he would be liable in damages for using force or deception to regain possession.
3. **Liens: Foreclosure.** A person having a lien upon the property of another must enforce that lien by proper legal action rather than by force.
4. **Trial: Instructions: Damages.** It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which it should take into consideration in arriving at its verdict, otherwise the jury may be confused and misled.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded.

Cassem, Tierney, Adams & Henatsch and Theodore J. Stouffer, for appellants.

Frank Meares, for appellees.

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

SPENCER, J.

Plaintiffs, dispossessed tenants of business premises at Rockbrook Center in Omaha, Nebraska, sued their landlord and the latter's agent to recover damages. Admitting default in payment of rents, they alleged that defendants, by the use of self-help, removed and detained certain personal property belonging to plaintiffs. A jury returned a verdict of $12,000 for plaintiffs, and defendants appeal. We reverse.

On September 24, 1968, plaintiffs entered into a written lease of the premises with defendants' predecessor in interest. Rent was payable monthly at the rate of $400 for a period of 3 years. On April 20, 1971, the Rockbrook Center area was acquired by defendants. The transaction included an assignment of one-third of the April rent.

Carl Bass, one of the plaintiffs, operated a billiard parlor on the premises. His business was seasonal, greater in the winter than in the summer. In 1970, he was unable to pay rent to defendants' predecessor for a period of 3 months, but was permitted to make up the payments during the following 3 months. At the time of the transfer of the premises to defendants, Bass had not paid the April rent. He paid no rent to defendants. As of June 1, 1971, he was indebted to them for the rent from April 21, 1971. This is the subject of a counterclaim. Defendants were awarded a judgment of $600 against the plaintiffs. No cross-appeal was taken so this judgment is not in controversy.

When Bass attempted to open for business on June 1, 1971, he found defendants had changed the outside locks on the billiard parlor. He went to their office to discuss the matter but was refused a key. He sub-

sequently hired a locksmith, had the locks changed, and went in to resume business. When the locksmith opened the door, the alarm went off and the security patrol showed up and asked for his identification. Shortly thereafter representatives of defendants appeared and told Bass he could no longer occupy the premises. He stayed in the premises a short while and then sought legal advice. When he left he removed his books, money from the cash register, some standing ashtrays, and a case for pool cues from the premises. When he returned to the premises the locks had again been changed, and he could not reenter. Subsequently he learned that the remainder of his equipment, with the exception of the carpeting, had been removed from the premises.

Bass was never given a written notice to quit as required by statute, nor served with legal process. Defendants removed the personal property claimed by Bass from the billiard parlor. They subsequently gave his attorney an inventory list. The property was placed in defendants' warehouse for storage pending the outcome of this litigation. The premises were relet to another tenant.

The pool and snooker tables were subject to a mortgage in favor of the seller, a corporation represented by Al Karschner. A balance of approximately $3,000 remained unpaid on this mortgage. After the lockout defendants permitted Karschner to remove the tables. Bass assented to their sale, in consideration of the discharge of the debt. The mortgagee sold the tables for $5,665, but Bass received nothing from the proceeds of the sale.

Defendants assert they possessed the right to use self-help as a matter of law; the evidence was insufficient to sustain a finding on the facts or amount of damages; erroneous exclusion of the issue of abandonment; and instructional error relating to damages.

The lease asserted ownership of the landlord, de-

fendants' predecessor, in the tenant's fixtures, except movable office fixtures and trade fixtures. In the event of default in payment of rent, the lease provided as follows: "* * * the Lessor may * * * without demand * * * or notice * * * at once declare this lease terminated, and the Lessor may re-enter said premises without any formal notice or demand and hold and enjoy the same thenceforth as if these presents had not been made, * * *."

The lease also provided: "If the Lessee shall not promptly remove all his property * * * whenever the Lessor shall become entitled to * * * possession * * * as herein agreed, the Lessor may, without notice, remove the same * * * in any manner * * *, or if the Lessee shall at any time vacate or abandon said premises, and leave any * * * chattels * * * for a period of ten days after such vacation or abandonment, or after the termination of this lease in any manner * * * then the Lessor shall have the right to sell * * * said * * * chattels * * * without * * * notice to the Lessee, or any notice of sale, all notices required by statute or otherwise being hereby expressly waived, * * *. * * * all * * * chattels, fixtures and other personal property belonging to * * * Lessee, which are, or may be put into the said leased premises during said term, whether exempt or not from sale under execution or attachment * * *, shall at all times be bound with a first lien in favor of * * * Lessor, and shall be chargeable for all rent * * * which * * * lien may be enforced in like manner as a chattel mortgage, or in any other manner afforded by law."

The lease also provided that personal property was at the risk of plaintiffs only that "* * * the Lessor shall not be * * * liable for any damage * * * caused in any * * * manner whatsoever."

Plaintiffs' second amended petition pleaded two causes of action. The first alleged breach of quiet enjoyment

and loss of financial and business standing as well as public ridicule and ignominy as a result of being locked out of the business premises. The second cause of action alleged the wrongful taking and detention of plaintiffs' personal property.

Defendants argue that wrongful eviction and abandonment were issues of law and that by the terms of the lease they were given the right to take possession of the premises and the personal property. The law on forcible entry and detainer has long been otherwise.

In Myers v. Koenig (1877), 5 Neb. 419, this court stated: "One great object of the forcible entry act is to prevent even rightful owners from taking the law into their own hands and attempting to recover by violence, what remedial powers of a court would give them in a peaceful mode."

In Watkins v. Dodson (1955), 159 Neb. 745, 68 N. W. 2d 508, after quoting the above language, this court said: "It was the purpose of the statute relating to forcible entry and detainer to prevent parties to a litigable controversy like the present from taking the law into their own hands. The issue was not ownership or title but 'lawful and peaceable entry.'

"In addition thereto, our statutes, sections 27-1401 to 27-1417, R. R. S. 1943, govern the matter of forcible entry and detainer. Section 27-1404, R. R. S. 1943, provides for the notice to quit and that it shall be served at least 3 days before commencing the action. This notice is a condition precedent to bringing the action of forcible entry and detainer, and is not sufficient in and of itself to permit entry by the person claiming the right of possession to the land. Other steps in conformity with the above-cited statute must be taken to dispossess a person claimed to be unlawfully detaining the premises."

To accept defendants' argument would scuttle our forcible entry and detainer statute. Self-help, relating

to the repossession of real estate, has long been contrary to the public policy of Nebraska and is not to be condoned. The lockout herein was unlawful. The right of a landlord legally entitled to possession to dispossess a tenant without legal process is the subject of an annotation in 6 A. L. R. 3d 177. At page 186, we find the following statement: "An increasing number of jurisdictions uphold what seems to be the modern doctrine that a landlord otherwise entitled to possession must, on the refusal of the tenant to surrender the leased premises, resort to the remedy given by law to secure it; otherwise he would be liable in damages for using force or deception to regain possession."

Plaintiffs were in lawful possession of the premises even though they had failed to make rental payments as specified by the lease. The fact that they were in default gave defendants the right to declare a forfeiture and to recover the leased premises by legal means. Instead, they resorted to self-help and are liable for the consequences.

Plaintiffs premise their argument on the assumption that damages for breach of quiet enjoyment by forcible repossession of the premises was submitted to the jury. This is a portion of the case embraced within the first cause of action, which was withdrawn from the consideration of the jury by the trial court. Plaintiffs have not cross-appealed, so that determination has become final. The above discussion is material herein in that it shows the dispossession was unlawful.

The only issue submitted to the jury was the wrongful taking and detention of plaintiffs' personal property as the result of their being unlawfully and forcibly dispossessed of the leased premises. Defendants' unlawful seizure of the property of plaintiffs could not be justified on the ground that rent was due and owing, as defendants might have proceeded legally to enforce whatever legal or equitable claims they might have had.

Instead, defendants saw fit to wrongfully and unlawfully seize and detain plaintiffs' property. The trial court properly instructed the jury that a person having a lien upon the property of another must enforce that lien by proper legal action rather than by force.

No specific damage instruction was submitted by the court. The jury was merely advised to determine the nature, extent, and amount of the damages sustained by plaintiffs as a result of the forcible taking and detention of their personal property by defendants.

Plaintiffs' second cause of action alleges the value of plaintiffs' personal property and its loss of use to be $14,200. No sufficient evidence was adduced to sustain this figure. Bass testified it cost him $9,000 to resume business after a 1969 fire. There was also testimony that he spent $2,000 for carpeting after the fire, with no explanation as to whether this amount is included in the $9,000 figure. Over objection, Bass was permitted to testify that he estimated his business was worth $15,000. Plaintiffs' second cause of action was not for the value of the business but of the property and the loss of its use. Even if proper, there was no explanation as to how this figure could be justified. It is conceded that the pool tables were repossessed by the mortgagee after plaintiffs were dispossessed. Bass, as specified above, also removed some of the personal property used in the business after the locks were changed on the door.

There were seven pinball machines on the premises, along with a number of other vending machines owned by a billiard supply firm. Plaintiffs were deprived of the use of these machines as the result of defendants' action. Plaintiffs' net income from the machines (their share of the gross income) was $75 to $150 per week. This equipment was removed a short time after the lockout, but the evidence tends to show that in the

absence of the lockout this equipment would not have been repossessed.

Exhibit 1 is an inventory of the property removed from the premises and detained by defendants. Bass concedes this covers all the personal property except the carpeting which is still on the premises and being used by the new tenant. No testimony was adduced as to the market value of the carpeting or the personal property described in exhibit 1 as of the date of its forcible detention. Testimony of the original cost did not establish the fair market value of the property as of June 1, 1971.

As suggested before, there was no damage instruction. It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which it should take into consideration in arriving at its verdict. Otherwise, the jury may be confused and misled. Main v. Sorgenfrei (1962), 174 Neb. 523, 118 N. W. 2d 648.

Defendants moved for a directed verdict at the close of plaintiffs' evidence. This motion was properly denied because, on this record, plaintiffs could clearly have recovered for the loss of revenue from the vending machines. However, the jury returned a verdict for $12,000. It is evident that there was not proper and sufficient evidence in the record to support such an award even if the jury had been properly instructed. This verdict is obviously the result of speculation and conjecture and must be set aside.

Defendants complain of the refusal of the court to submit their defense of abandonment. It is patent that the defense of abandonment is frivolous and the tendered instruction was properly refused.

For the reasons given, the judgment is reversed and

the cause remanded to the District Court for a new trial in conformity with this opinion.

REVERSED AND REMANDED.

CLINTON, J., dissenting.

I dissent. The case should be not only reversed, but also dismissed. The plaintiffs failed to adduce evidence from which the jury could determine the value of the converted property without indulging in speculation and conjecture. Therefore the defendants' motion for a directed verdict should have been granted. The effect of the majority opinion is to allow a new trial to the plaintiffs so that they may remedy their own deficiencies of proof. This constitutes a departure from well-established procedural rules, the substance of which is that a party who fails to obtain a verdict (or against whom a verdict should have been directed) because of failure of proof of some element of his cause of action, including the element of damages, is not entitled to a new trial so that he may have another shot at it.

The cause of action submitted to the jury was one for the conversion of personal property. The pertinent portion of this second cause of action as it appears in the plaintiffs' petition is as follows: "That the defendants continue to hold and detain from plaintiffs the personal property and refuse and have refused to give it up, and have disposed of the same so that the fair and reasonable value of the property taken and converted to the use of defendant, including loss of use to the plaintiffs, is the sum of $14,200.00."

The majority opinion adequately shows that there was no evidence from which the jury could have determined the value of the property converted or the value of its use.

Before discussing the applicable Nebraska law, I wish to set forth the following summary of general principles based upon text authority which are or should be familiar to every judge and lawyer. If evidence is legally

insufficient to prove one of the elements of a cause of action, the verdict should be directed. 88 C. J. S., Trial, § 252, p. 595, § 258, p. 674. The cause should not be remanded for the purpose of a new trial in order to give an opportunity to introduce evidence which should have been offered at the original trial. 5B C. J. S., Appeal & Error, § 1941, p. 486. The ordinary measure of damages for the loss of personal property is the market value of the property at the time and place of the loss. 25 C. J. S., Damages, § 82, p. 904. Or if there is no market, then its actual value. 89 C. J. S., Trover & Conversion, § 98, p. 591. The value of the property should be alleged. 89 C. J. S., Trover & Conversion, § 98, p. 591. If there are special damages they must be pleaded and a proper instruction given with reference thereto. 89 C. J. S., Trover & Conversion, § 156, p. 636. There must be competent evidence of value. 25A C. J. S., Damages, § 157, p. 53. The court must instruct on the elements, measure, and assessment of damages. 25A C. J. S., Damages, § 178, p. 191.

We must bear in mind in this case that the defendants against whom the jury found contend that they were entitled to a directed verdict. The situation is the same therefore as if the plaintiffs-appellees had an unfavorable verdict and appealed because of error and the present appellants were countering with the claim that the error makes no difference because they were entitled to a directed verdict without reference to the claimed error.

The following is the pertinent Nebraska law. In Midlands Transp. Co. v. Apple Lines, Inc., 188 Neb. 435, 197 N. W. 2d 646, we said: "Summarizing these authorities the more precise question before us is not whether there is any competent evidence in the record to show that the damages are capable of mathematically exact measurement, but whether there is sufficient evidence and data to enable the trier of fact, the jury, with a

reasonable degree of certainty and exactness to estimate the actual damages. . . .

"It is true that Apple was prevented from the proper presentation of its case on damages due to the fact that the relevant documents and evidence were lost when fire destroyed the company office building. This explains but obviously does not excuse Apple's failure to sustain its burden of proof on the issue of damages. It is the duty of the district court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture. Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254. To submit the issue of damages in this case to the jury would be to 'leave the jury to rove without guide or compass through the limitless fields of conjecture and speculation.' See McGinnis v. Hardgrove, supra. The determination of the trial court not to submit Apple's cross-petition to the jury is sustained on this ground alone."

Wittenberg v. Mollyneaux, 55 Neb. 429, 75 N. W. 835, was an action for damages for breach of contract not to compete. We there said: "There was not made, however, proof to the requisite degree of certainty, although plaintiff almost succeeded in that effort. It was made to appear that prior to the opening of Shope's hotel plaintiff's was the only hotel in town. The extent of his receipts was shown. It was then shown that the amount of business did not change. This was by proving that the number of travelers entering the town, and other conditions, remained practically the same. Then the receipts of the plaintiff's hotel, after the opening of Shope's, were shown, and there was evidence in addition that the receipts of the two hotels were about the same as plaintiff's receipts had been. But one important element was lacking. There was no proof as to expenses under the first condition. We

may surmise that in such a business certain elements of expense remain constant, but that others must vary according to the volume of business. It is said in the briefs that it was shown that the expense remained the same, but counsel certainly mistake the record. The only evidence relating to expenses is found in plaintiff's testimony, where, in answer to a question as to how his 'trade ran' after Shope had opened the other hotel, he said: 'My trade ran about even with my expenses, about $11 a day. It just took all I could get to make my expenses.' This tends to prove that, after Shope opened, plaintiff's business was not profitable, but for all that appears his expenses before his business was reduced were so much greater than afterwards that the same condition then existed. In the absence of evidence on that point proof of receipts alone would fail to establish the loss of profits to any degree of certainty." Judgment for the plaintiff was reversed.

Neill v. McGinn, 175 Neb. 369, 122 N. W. 2d 65, was an action to recover for damages to an automobile. The jury found for the defendant. The trial court sustained a motion of the plaintiff for a new trial and the defendant appealed. On the issue of proof of damages, we said: "The plaintiff, who first testified, attempted to prove the value of her automobile before the taking and the salvage value thereafter. On direct examination she was permitted to testify, over objections that the questions were irrelevant and immaterial, that she purchased it from Rosen-Novak and paid $2,738 for it and received $150 for the salvage. Over like objection she said she was without transportation facilities for 3 months and paid $100 a month for taxicab services in that period.

"Evidence of the purchase price of the automobile, or the sale price of the salvage, or the expenses of transportation while deprived of its use in no way tended to prove the proper measure of plaintiff's damage in

this cause. In Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130, this court held: 'In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. The injured party is not permitted to recover in addition thereto damages for loss of use.' It is obvious that neither the purchase price nor the amount received as salvage was material to show the reasonable market value of the automobile before and after the injury." We reversed and ordered judgment entered on the verdict for the defendant.

Section 25-1315.03, R. R. S. 1943, reads in part as follows: "The Supreme Court on appeal from an order granting a new trial, or upon a review of an order denying a new trial in the action in which such motion was made, *or on appeal from the judgment,* may order and direct judgment to be entered in favor of the party who was entitled to such judgment." (Emphasis supplied.)

In Wax v. Co-Operative Refinery Assn., 154 Neb. 42, 46 N. W. 2d 769, the question before the court on appeal was the sufficiency of evidence to prove proximate cause. The plaintiff had a verdict below. The defendant had moved to dismiss for insufficiency of the evidence. The court denied and submitted the case to the jury. We determined the evidence was insufficient to establish proximate cause, and said: "It is true that a motion for directed verdict was not made but a motion for dismissal was made on the ground that the evidence did not sustain a cause of action. This brings the case within section 25-1315.02, R. R. S. 1943.

"A motion to dismiss on the ground that the evidence does not sustain a cause of action for all practical purposes is the same as a motion for directed verdict and this court has uniformly so treated it. Meyer

v. Platt, 137 Neb. 714, 291 N. W. 86; Robinson v. Central Neb. Public Power & Irrigation District, 146 Neb. 534, 20 N. W. 2d 509; Fentress v. Co-Operative Refinery Assn., supra; Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491; Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607.

"We conclude under this reasoning that the motion to dismiss should have been sustained the same as if a motion for a directed verdict had been made agreeable to the terms of section 25-1315.02, R. R. S. 1943.

"It follows that the court did not err in setting aside the verdict but it did err in granting the defendant a new trial.

"To the extent of the error the order of the district court is reversed. It is otherwise affirmed.

"Pursuant therefore to section 25-1315.03, R. R. S. 1943, which provides in part as follows: 'The Supreme Court on appeal from an order granting a new trial, or upon a review of an order denying a new trial in the action in which such motion was made, or on appeal from the judgment, may order and direct judgment to be entered in favor of the party who was entitled to such judgment,' this cause is remanded with directions to render judgment notwithstanding the verdict in favor of the defendant."

In Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254, we said: "Restatement, Torts, § 912, p. 574, states: 'A person to whom another has tortiously caused harm is entitled to compensatory damages therefor if, but only if, he establishes by proof the extent of such harm and the amount of money representing adequate compensation with such certainty as the nature of the tort and the circumstances permit.' In Comment a appears the following: 'Where a person seeks to recover damages for a particular harm which he claims has resulted to his person or to a tangible thing belonging to him, he has the burden of proving that the other has invaded

a legally protected interest of his, that he has suffered such harm and that the act of the other was a legal cause of such harm. Thus where a person has been wounded by another and subsequently blood poisoning develops in any portion of his body, he has the burden of showing that it is more probable than not that the initial wrongful contact was a substantial factor in producing it. * * * In all of such cases the recovery of damages for a particular harm is dependent upon proof that such harm occurred as the result of the tortious conduct and normally the plaintiff can recover damages therefor only by proving this with the same degree of certainty as that required in proving the existence of the cause of action.' See, also, Wylie v. Czapla, 168 Neb. 646, 97 N. W. 2d 255; 15 Am. Jur., Damages, § 329, p. 768.

"The district court is required to refrain from submitting to a jury the matter of damages and to decide the case as a matter of law if the evidence of claimant fails to establish that he has sustained an injury or fails to establish the extent of the injury he claims was inflicted upon him so that a jury cannot determine damages except by indulging in speculation and conjecture."

In Laurinat v. Giery, 157 Neb. 681, 61 N. W. 2d 251, we held that there was a failure of proof of negligence. We said: "The trial court erred in overruling defendant's motion for an instructed verdict at the close of plaintiff's case and in denying a judgment notwithstanding the verdict. Pursuant to section 25-1315.03, R. R. S. 1943, the judgment of the district court is reversed and the cause remanded with directions to enter judgment for the defendant. Yanney v. Nemer, 154 Neb. 188, 47 N. W. 2d 368."

Patrick v. Union Central Life Ins. Co., 150 Neb. 201, 33 N. W. 2d 537, was an action on a life insurance policy. The basis of the action was the presumption of death of the insured arising from an absence for a

period of 7 years. The defendant moved for a directed verdict. It was denied. The jury verdict for the plaintiff beneficiary was rendered. The defendant moved for judgment notwithstanding the verdict. This motion was sustained. The plaintiff appealed. We reversed and ordered judgment entered on the verdict.

This court has on some occasions on apparent inadvertence failed to follow the principles cited. Such cases are Wylie v. Czapla, 168 Neb. 646, 97 N. W. 2d 255; Patrick v. City of Bellevue, 164 Neb. 196, 82 N. W. 2d 274. The error of those cases should not be perpetuated and affirmed.

Failure to prove damages by competent evidence should be treated the same as any other failure of proof. It seems clear to me there was no proof of the market value of the property, or its actual value, or the value of its use, and that the verdict could only be the result of conjecture or acceptance of evidence not competent for the purpose.

I would reverse and dismiss.

NEWTON, J., dissenting.

I respectfully dissent. Under existing Nebraska law, a landlord cannot evict a tenant by force or artifice even though the landlord is entitled to possession. See, Anderson v. Carlson, 86 Neb. 126, 125 N. W. 157; Miller v. Maust, 128 Neb. 453, 259 N. W. 181; Barnes v. Davitt, 160 Neb. 595, 71 N. W. 2d 107. These are all cases in forcible entry and detainer where the only issue was the right of possession. In such cases damages were not an issue. Furthermore, in none of these cases was a lease involved which contained a provision for reentry on breach. These cases represent an exercise in futility. In each instance the tenant, who wrongfully held possession in the first place, was returned to possession. This simply meant that the landlord would have to bring a second action in forcible entry and detainer to obtain possession from a defaulting tenant or tres-

passer. I believe it inadvisable to extend our rule to cases where the lease contract authorizes reentry on breach or termination of the lease. I favor following the weight of authority as outlined in Annotation, 6 A. L. R. 3d 194.

The right of a landlord to reenter for default in payment of rent or a wrongful holding over should be permitted where the lease provides for reentry and it can be accomplished without violence. This is similar to the right of a conditional sale vendor to take possession of the security on default by peaceful means. See § 9-503, U. C. C.

How can a rule such as is advocated in the majority opinion be justified? It is said that it prevents violence and therefore is required by public policy. This is untrue as the rule I have proposed, like that dealing with the repossession of a conditional sales contract security interest, authorizes only peaceful repossession. Contractual rights should not be nullified without good reason.

On the question of whether a party not entitled to possession of realty who is ejected by force or artifice may recover damages, there is a split in the authorities. See Annotation, 6 A. L. R. 3d 210 and 214. There is not a single Nebraska case permitting such recovery. The decisions seem to indicate approval of Ish v. Marsh, 1 Neb. (Unoff.) 864, 96 N. W. 58, which approved an instruction that one not entitled to possession cannot recover damages when forcibly ejected except in the event due care was not used in removing his property.

Shutt v. Lockner, 77 Neb. 397, 109 N. W. 383, holds that a tenant wrongfully evicted may recover the rental value of the property for the unexpired term, less the amount of rent reserved by the lease. To the same effect is Jarman v. Sexton, 130 Neb. 453, 264 N. W. 305, but adds that in a proper case special damages may be awarded. Kenney v. Braun, 113 Neb. 12, 201 N. W.

641, follows the same rule and permits recovery of profits lost from the operation of a theatre. The same rules are followed in Dinkel v. Hagedorn, 156 Neb. 419, 56 N. W. 2d 464. In none of these cases was the party evicted wrongfully in possession as a trespasser or defaulting tenant.

In the absence of a willful destruction of the evicted party's property or a physical assault, I would deny recovery. This is particularly true in cases where the lease provides that the landlord shall have a lien on the tenant's property on the demised premises to secure accrued rentals. In 49 Am. Jur. 2d, Landlord and Tenant, § 677, p. 642, it is stated: "It is competent for the parties to a lease to stipulate that the landlord shall have a lien on the crops or the personal property of the tenant which may be brought upon the leased premises, which, even if invalid at common law, will be given effect in equity."

BOSLAUGH, J., concurring.

With respect to the matter of self-help relating to the repossession of real estate, the following statement from the opinion of Mr. Justice Marshall in Pernell v. Southall Realty, decided April 24, 1974 (42 Law Week 4595), seems appropriate: "Some delay, of course, is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home."

ALICE TOMAN, APPELLANT, V. CREIGHTON MEMORIAL ST. JOSEPHS HOSPITAL, INC., A CORPORATION, AND WILBUR A. MUEHLIG, M. D., APPELLEES.

217 N. W. 2d 484

Filed May 2, 1974. No. 39234.

1. **Physicians and Surgeons: Malpractice: Limitations of Actions.** In a malpractice action against a physician, the statute of limitations does not commence to run until the time the act of malpractice with resulting injury was, or by the use of reasonable diligence could have been, discovered.
2. ———: ———: ———. A patient who has an unexpected result from surgery has used reasonable diligence within the meaning of the discovery rule where she does not discover an act of alleged malpractice and resulting injury during the post-operative period because of the surgeon's repeated assurances of recovery combined with repeated recommendations for therapy to aid in that recovery.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

Daniel G. Dolan of Lathrop, Albrecht & Dolan, for appellant.

Kennedy, Holland, DeLacy & Svoboda, for appellee Creighton Memorial St. Josephs Hospital, Inc.

Theodore J. Stouffer and John B. Henley of Cassem, Tierney, Adams & Henatsch, for appellee Muehlig.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, NEWTON, and CLINTON, JJ., and COLWELL and WARREN, District Judges.

WARREN, District Judge.

This is a malpractice suit in which plaintiff Alice Toman filed her original petition on August 27, 1969. The defendant Wilbur A. Muehlig, M. D., pleaded the 2-year statute of limitations, section 25-208, R. S. Supp., 1972, and requested a separate trial on that issue as provided for in section 25-221, R. S. Supp., 1972. The trial court

found "that plaintiff discovered the alleged malpractice or negligent conduct in June of 1967, immediately following her surgery and that again on July 15, 1967, plaintiff was advised by defendant of his lack of knowledge concerning the cause of her disability," and dismissed plaintiff's cause of action against Dr. Muehlig on the grounds that it was barred by the statute of limitations.

The facts relevant to the statute of limitations issue are not in serious dispute. The evidence establishes that plaintiff had for some years suffered from spasmodic torticollis, a unilateral contraction of the neck muscles which forced her head to the left and caused severe pain. On June 19, 1967, the defendant performed an anterior cervical rhizotomy, which was a surgical sectioning of the nerve roots in the area of the spinal cord in order to innervate the neck muscles that were in spasm and to give relief from the pain and spasms.

On June 9, 1967, plaintiff had been examined by the defendant, the diagnosis of spasmodic torticollis was made, and surgery was recommended. Plaintiff returned with her husband on June 14, 1967, for a further discussion. Because of the close questions involved in determining when plaintiff's cause of action accrued and the statute of limitations commenced to run we reproduce the medical notes of defendant in their entirety for the period commencing June 14, 1967, until the last contact on February 19, 1968. They read as follows:

"June 14, 1967: Surgery for the patient's torticollis was discussed with her including the nature of the procedure consisting of laminectomy and section of the upper ventral cervical roots and the probable necessity for a second minor procedure on the right sternocleidomastoid muscle. She was told that she could expect considerable improvement but there might be some residual movement and that her pain should be considerably improved also. She was told that atrophy of the cervical muscles would occur. She wants to go ahead with the surgery.

June 19, 1967: Cervical laminectomy was done today, sectioning the first three ventral roots on the right and also the right first dorsal root (which was present). The same was done on the left plus the 4th ventral root. Patient's condition remained good throughout.

June 20, 1967: Since surgery patient has had weakness of both upper extremities which is slight on the right and marked on the left. It is improving. Otherwise condition good. No residual neck spasms.

June 24, 1967: Patient is to be followed by Dr. McKinney in my absence. Left triceps action is improved and grip is slowly improving but there seems to be little movement of the left biceps or at the left shoulder.

July 1, 1967: Patient's left arm is only slightly improved in the past week. She has been up and around and while she has been a little weak generally her gait is improving and she is feeling better generally. Sutures were removed yesterday. Some reaction around them but wound appears to be healing satisfactorily.

July 3, 1967: Patient was dismissed from the hospital today. Left arm improving slightly and slowly. Is able to walk alone now and can hold her head up without the brace. Wound is healing well. Asked to come to the office for recheck in ten days to two weeks.

Given prescription for Darvon Compound 65, 24 caps, sig one q four hours p.r.n. pain. Patient has been having some low back pain probably from staying in bed a good deal and she has had some trouble with this before. Also prescription for Nembutal gr. 1 ½, 12 such caps, sig one at bedtime if necessary for sleep.

July 18, 1967: Patient seems to be getting along satisfactorily. Left arm is considerably improved except for abduction at the shoulder and flexion at the elbow, both of which are very weak. Other movements are somewhat weak but better. Her torticollis seems to be well controlled. Holds her head up satisfactorily and gait is good although she complains of being a little unsteady.

Patient has various complaints such as trouble moving her bowels and a feeling of tightness in her abdominal muscles on the left. Also complains of some pains, especially in her neck muscles.

Patient was reassured and it was recommended that she continue to exercise and let her husband continue to use physiotherapy on her left arm. Is to return for recheck in two weeks.

August 14, 1967: Patient continues to have little movement actively of the left shoulder and very little left biceps function. Extension of the elbow and left hand function is fairly good. Complains that she has a good deal of pain in her neck and arms. Her head has a tendency to go forward when she is up walking although does fairly well with it.

A few days ago the patient was swinging a weight with her left arm vigorously and suddenly had pain medial to her right scapula and in the upper thoracic region associated with a good deal of swelling. The swelling has gone down and the pain has improved but it is still bothering her some. At this time for a short time she had difficulty in using her right arm as well as increased difficulty with her left arm. These have apparently gone back to about the way they were. States that her gait is a little unsteady.

There is still a little swelling over the lower part of the operative area but there does not appear to be any bony displacement. X-rays of the cervical spine considered but it was decided to postpone these in view of her improvement. Is to continue on physiotherapy and it was suggested that she use her neck brace as little as possible. She occasionally takes a Darvon Compound capsule but not very often.

Asked to return in about six weeks.

September 1, 1967: Patient has been having an itching sensation and some discomfort in the right sternocleidomastoid region and occasionally some difficulty in swal-

lowing. She was reassurred. Her neck pain has apparrently been much improved and her general appearance is better. She still has practically no strength in her left biceps but her left grip seems a little better and also triceps function. It was recommended that she try to increase her activities. She is no longer wearing her neck brace and seems to get along satisfactorily. No spasms of the neck muscles.

February 19, 1968: Patient has many complaints of pains all over, especially in her neck and in her left arm. Her husband has to massage her frequently in the evening. Patient is rather depressed.

Muscle function in the left biceps is definitely returning and she is able to flex her left arm to a limited degree against the weight of her forearm and she is also able to abduct her left shoulder with moderate strength. Abduction of the left shoulder is of good strength, triceps has good strength and the grip is good. She does not have definite turning of her head although at times there is apparently spasm of the right sternocleidomastoid muscle.

Patient was reassured and given a prescription for Librium, 10 mgs., 50 such caps, sig. one t.i.d. with meals. It was recommended that she continue to work with flexing of the left arm to increase its strength as well as movements of the left shoulder."

Plaintiff alleges that defendant was negligent in damaging the cervical spinal cord, leaving her with permanent severe weakness of the left arm and fingers.

Defendant contends that there was no continuing course of negligent treatment and that the statute of limitations started to run when plaintiff knew that the surgery caused an injury even though the plaintiff was without technical knowledge said conduct might constitute negligence and without knowledge of the full consequences of the injury.

Defendant relies on plaintiff's testimony that her left arm was "completely dead" and "not moveable" when

she awoke after surgery on June 19, 1967; that she realized while hospitalized this was not an expected result; and her statement that at her first office visit following her discharge from the hospital on July 18, 1967, Dr. Muehlig was surprised at the difficulty she was having with her arm and said he didn't know what caused it.

Plaintiff testified that Dr. Muehlig told her before the operation she would have a numbness of the head, and a weak neck, but it would eventually get strong and all right; that on waking from surgery she could not move either of her arms; that she thought it would come back and be all right; that her right arm regained its strength eventually and her left arm improved some, but that she cannot now raise it; that she is unable to hold her head up and needs assistance walking; that when she saw Dr. Muehlig on June 20, June 24, July 1, July 3, and July 18, 1967, he told her to continue to exercise and have her husband use physiotherapy on her left arm, and on July 18, 1967, Dr. Muehlig told her to return in 2 weeks; that on August 14, 1967, defendant told her to continue on physiotherapy and return in 6 weeks; that on office visits on September 1, 1967, and February 19, 1968, Dr. Muehlig told her to continue to work with flexing of her left arm to increase strength as well as movements of the left shoulder; that she did not return to Dr. Muehlig, but attempted physical therapy for some time, to no avail; that at no time between July 1967, and February 1968, did Dr. Muehlig tell her there was anything permanently wrong, but instead reassured her and advised her to continue physiotherapy; that she subsequently consulted two different medical doctors, and a physical therapist who worked with her for several months, but her condition remained the same; and that finally on March 16, 1972, she was examined by a Dr. Lawrence Kaplan, in New York City, who advised her that her present condition was permanent.

Dr. Muehlig's testimony regarding the September 1, 1967, office call is especially illuminating:

"Q. When did you next see her? A. September 1st, '67. Q. What occurred on that visit? A. * * * Her neck pain at that time was much better, she looked better generally, the left biceps was still very, very weak. The left grip was a little better yet. The extension of the elbow was present. She wasn't wearing her neck brace at that time. She hadn't had any spasms of her neck muscles; that is, in any of the abnormal movements. So basically she was doing quite well, except her arm had changed a little. Q. Well, did you feel that you had obtained a suitable result? A. Except for the arm I thought so. Q. How did you account for that? A. I couldn't understand it. I just had no explanation and I told them that."

Defendant in effect asks the court to require a patient with an unexpectedly weak left arm following surgery to "understand it" and arrive at an "explanation," prior to the time the defendant surgeon himself could understand or explain the unexpected result. Such is not the purpose of the statute of limitations nor of the underlying policy of protecting practitioners from stale demands.

This court has said: "* * * 'Silence on the part of the physician for the statutory period should not destroy the rights of the patient.' The principle becomes even more compelling where affirmative representations as to a cure replace silence." Acker v. Sorensen, 183 Neb. 866, 165 N. W. 2d 74 (1969). Here, we have more than mere silence. On September 1, 1967, defendant's notes state: "She was reassured." At her last visit on February 19, 1968, "Patient was reassured." While the record is devoid of any explanation of what assurances were given, we can readily infer from the whole record that the patient was assured and reassured by defendant that the post-operative weakness of the left arm would disappear with the passage of time and the recommended therapy. Plaintiff was entitled to rely on these assurances and to

reasonably believe during that period that she would not suffer any permanent loss of the use of her left arm.

"Malpractice" has been defined by the court as the treatment of a case by a surgeon or physician in a manner contrary to accepted rules and with injurious results to the patient; hence, any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties. Post-operative treatment and advice by the physician to the patient are an interwoven and essential part of the physician-patient relationship. Stacey v. Pantano, 177 Neb. 694, 131 N. W. 2d 163 (1964).

This court has long adhered to the discovery rule first adopted in Spath v. Morrow, 174 Neb. 38, 115 N. W. 2d 581 (1962), which is not restricted to presence of foreign objects, Stacey v. Pantano, *supra*, and which is intended to apply broadly. Acker v. Sorensen, *supra*.

That discovery rule is: In a malpractice action against a physician, the statute of limitations does not commence to run until the time the act of malpractice with resulting injury was, or by the use of reasonable diligence could have been discovered. Acker v. Sorensen, *supra*.

We continue to adhere to that rule.

However, in applying the discovery rule to these facts, we must construe the phrase "with resulting injury" in the light of a 7½-month course of post-operative care, advice, and reassurance as evidenced by the defendant's own personal office notes. There is no evidence of actual discovery of permanence of injury by plaintiff during that period of time. The question is whether plaintiff could have, with the use of reasonable diligence, discovered the alleged act of malpractice and the resulting injury. The presence of an unexpected result after surgery should not be tantamount to discovery of the negligent act and the resultant injury, where the surgeon himself repeatedly reassures the patient that she is improving and recovering from the unexpected result, prescribes a course

of therapy outside the office to aid in recovery, keeps the patient returning, and fails during that post-operative period to either determine or advise the patient that the unexpected result (weakness of the left arm) is a permanent condition from which she will not recover.

Under the circumstances, we cannot hold that the statute of limitations began to run until the plaintiff could have discovered by the use of reasonable diligence that her resulting injury was permanent, as contrasted with a temporary post-operative injury.

A patient who has an unexpected result from surgery has used reasonable diligence within the meaning of the discovery rule where she does not discover an act of alleged malpractice and resulting injury during the post-operative period because of the surgeon's repeated assurances of recovery combined with repeated recommendations for therapy to aid in that recovery.

We hold that the clear weight of the evidence is that the statute of limitations did not begin to run until sometime after the last of defendant's assurances and recommendations for post-operative strengthening exercises and therapy on February 19, 1968. It follows that the plaintiff's cause of action had not been barred by the 2-year statute of limitations on August 27, 1969, and the action of the trial court was erroneous in dismissing plaintiff's petition as against the defendant Wilbur A. Muehlig, M. D.

The judgment is therefore reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. GARY SEGER, APPELLANT.
217 N. W. 2d 828

Filed May 9, 1974. No. 39063.

1. **Criminal Law: Appeal and Error: New Trial.** In criminal cases alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal.
2. ———: ———: ———. Alleged errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon.
3. **Criminal Law: Evidence: New Trial.** New evidence tendered in support of a motion for a new trial on the grounds of newly discovered evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict.
4. ———: ———: ———. A new trial will not be granted for newly discovered evidence which, when produced, would merely impeach or discredit a witness.

Appeal from the District Court for Holt County: WILLIAM C. SMITH, JR., Judge. Affirmed.

John W. DeCamp, James M. Kelley, and Kelley & Thorough, for appellant.

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

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

WHITE, C. J.

The State of Nebraska separately prosecuted Danny Atkinson, Gary Ogden, and Gary Seger, the defendant, for the offense of having carnal knowledge of a female child under age 15. The prosecutions arose out of the same incident. See, State v. Atkinson, 190 Neb. 473, 209 N. W. 2d 154 (1973); State v. Atkinson, *ante* p. 9, 213 N. W. 2d 351 (1973); State v. Ogden, *ante* p. 7, 213 N. W. 2d 349 (1973). The jury found Seger guilty and he was later sentenced to 5 years probation. This appeal follows.

Seger assigns as error: (1) The denial of his pretrial motion for dismissal based upon failure to commence trial within 6 months from the filing of the information; and (2) the denial of his motion for new trial based upon newly discovered evidence. We affirm the judgment of the District Court.

The facts surrounding the incident can be found in State v. Atkinson, 190 Neb. 473, 209 N. W. 2d 154 (1973), and need not be set forth here. The information was filed on May 30, 1972. The trial commenced December 18, 1972, and the jury returned a verdict against the defendant on December 21, 1972. A motion for new trial based upon newly discovered evidence was filed on January 22, 1973. This motion was overruled March 8, 1973. Seger was sentenced on March 8, 1973. The notice of intention to prosecute an appeal is dated March 24, 1973.

Seger assigns as error the overruling of his motion for dismissal based upon failure to commence trial within 6 months from the filing of the information. See, § 29-1207, R. S. Supp., 1972. No motion for new trial relating to this issue under section 29-2101, R. R. S. 1943, was ever filed. Section 29-2103, R. R. S. 1943, provides that a motion for new trial, except for newly discovered evidence, must be filed within 10 days after the verdict is rendered unless unavoidably prevented. Alleged errors occurring during the case must be pointed out to the trial judge by a motion for new trial. In Luster v. State, 142 Neb. 253, 5 N. W. 2d 705 (1942), this court said as follows: "And we are committed to the rule that in criminal cases alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal." In Hall v. State, 109 Neb. 273, 190 N. W. 898 (1922), we said: "Alleged errors not brought to the attention of the trial court in any way in a motion for new trial are not entitled to be considered or reviewed by this court."

We have repeatedly held that such errors must be pointed out to the trial court in a motion for new trial and *a ruling obtained thereon.* Kennedy v. State, 170 Neb. 193, 101 N. W. 2d 853 (1960). We have consistently held that alleged error not asserted in a motion for new trial will not be considered on appeal. State v. Stanosheck, 186 Neb. 17, 180 N. W. 2d 226 (1970); State v. Haile, 185 Neb. 421, 176 N. W. 2d 232 (1970). This is not a case where any issue was presented as to an interpretation of the contents of a motion for new trial. As we have pointed out, no motion for new trial under section 29-2101, R. R. S. 1943, was ever filed, and no final order was ever entered with reference to the error assigned herein. The issue, therefore, is not presented to us for a decision and will not be considered.

Seger next assigns as error the overruling of the motion for new trial based upon newly discovered evidence. A motion for new trial based upon newly discovered evidence must be made within a reasonable time after discovery of new evidence and within 3 years of the date of the verdict. § 29-2103, R. R. S. 1943. Such a motion is the exclusive exception to the general rule that a motion for new trial must be filed within 10 days of the verdict. This motion raises only the issue of newly discovered evidence. We proceed to the merits.

The defendant contends that a polygraph examination given to the prosecutrix shortly after the rape occurred is newly discovered evidence. Defendant's counsel contends: (1) Although he had knowledge that a polygraph examination had been administered to the prosecutrix, he did not know a written report existed; and (2) he was told the examination showed that the defendant had raped the prosecutrix and that the prosecutrix had told the truth during the examination. Counsel for Seger did not remember if he had asked the county attorney for the report. No pretrial discovery

of the written report was attempted under section 29-1912 (1) (e), R. S. Supp., 1972. Neither was an attempt made to subpoena the polygraph examiner prior to the trial.

The county attorney testified he had never studied the report in detail. He notified counsel for Seger that a polygraph examination had been administered and that there was a problem with penetration. The county attorney contends he never denied anyone an opportunity to see the report and that the report was not newly discovered evidence.

The statute, section 29-2103, R. R. S. 1943, specifically provides that where: "* * * it shall be made to appear * * * the defendant * * * has discovered new evidence material to his defense which he could not with reasonable diligence have discovered." The newly discovered evidence must be competent, material, credible, and which might have changed result of trial and which by the exercise of due diligence could not have been discovered and produced at the trial. Duffey v. State, 124 Neb. 23, 245 N. W. 1 (1932). The evidence in this case shows that defense counsel was notified of the report; that no discovery of the written report was attempted; and that there was no attempt made to subpoena the polygraph examiner prior to trial. It is clear that the polygraph report was not newly discovered evidence and that the defendant could have secured it on request. For this reason alone, the contention of the defendant must be rejected.

Moreover, new evidence tendered in support of a motion for a new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Wycoff, 180 Neb. 799, 146 N. W. 2d 69 (1966); State v. Evans, 187 Neb. 474, 192 N. W. 2d 145 (1971). Here the other damning evidence against the defendant and his companions was insurmountable. Additionally, the

diagnosis of the polygraph examiner would have been inadmissible. Defendant's counsel points out that the prosecutrix' answers in the report indicate the problem of penetration and other inconsistencies with her trial testimony. The penetration problem was admitted by the county attorney to defense counsel prior to trial and at trial there was vigorous cross-examination on this issue by defense counsel. The defendant has not shown new evidence of such a nature as to probably change the verdict. As to other alleged inconsistencies, we have always held that a new trial will not be granted for newly discovered evidence which, when produced, would merely impeach or discredit a witness. State v. Wycoff, *supra;* State v. Evans, *supra.* This is especially true in the present case where the prosecutrix, a female child of the age of 14 years, 5 months, was a member of a special education class in the eighth grade at the time of the offense. As we have previously stated in reviewing a conviction arising out of the same incident: "The report and testimony of the polygraphic operator disclosed that the child was somewhat confused, but the confusion was not germane to the prosecution * * *." State v. Atkinson, *ante* p. 9, 213 N. W. 2d 351 (1973). 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 abuse of discretion is shown, its determination will not be disturbed. State v. Evans, *supra;* State v. Wycoff, *supra.*

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I dissent. Defendant at trial was represented by different counsel than on this appeal. Trial counsel failed to preserve for appeal the error in the trial court's denial of the motion of defendant for absolute discharge because of failure to commence trial within 6 months

from the filing of the information as required by section 29-1207, R. S. Supp., 1972. The record clearly demonstrates that such failure resulted wholly from the mistake of the prosecutor in computation of the time and consequent misinformation given the trial court. None of the statutory reasons extending the 6-month period exist. See State v. Alvarez, 189 Neb. 281, 202 N. W. 2d 604.

The inexcusable failure of trial counsel to preserve the error by motion for new trial should shock the conscience of this court. A clear violation of the Sixth Amendment to the Constitution of the United States has occurred. I would note this unassigned error, vacate the judgment of conviction, and direct absolute discharge of the defendant.

McCOWN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM BLAND, APPELLANT.
217 N. W. 2d 840

Filed May 9, 1974. No. 39236.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

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

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

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

CLINTON, J.

The defendant was charged under the provisions of section 28-401, R. R. S. 1943, with having killed John R. Wisotzkey while in the perpretation of a robbery.

He was found guilty by a jury and punishment fixed at life imprisonment. The court imposed sentence in accordance with the verdict.

This is a companion case to State v. Montgomery, *ante* p. 470, 215 N. W. 2d 881; and State v. Dittrich, *ante* p. 475, 215 N. W. 2d 637.

The issue on this appeal is the sufficiency of the evidence to sustain the conviction in that it is claimed there is no evidence that the defendant had any intention to rob Wisotzkey. The evidence clearly supports a finding that the defendant aided and abetted the assault by the persons who committed the actual robbery. The issue raised on this appeal is essentially the same as the one disposed of in State v. Montgomery, *supra,* although raised in a slightly different context in that no attack is made upon instructions as such. This case is governed by our holding in State v. Montgomery, *supra.* Such difference as there is in the evidence in the two cases is not material on the point raised.

AFFIRMED.

ELENA SICIUNAS, APPELLEE, V. CHECKER CAB COMPANY, INC., A CORPORATION, APPELLANT.
217 N. W. 2d 824

Filed May 9, 1974. No. 39252.

1. **Carriers: Negligence.** Common carriers are required to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged for the safety of their passengers and they are liable for the slightest negligence causing injury.
2. **Trial: Instructions: Damages.** Loss of past earnings is a separate and distinct element of damage from loss or impairment of future earning capacity, and an instruction which in a proper case submits both elements of damage is not erroneous on the ground that the instruction permits duplicate recovery.
3. **Trial: Evidence: Witnesses.** The admission of a prior consistent statement after a witness has been impeached with a prior inconsistent statement is largely a matter within the discretion of

the trial court, and absent an abuse of that discretion will not be disturbed on appeal.

4. **Damages: Verdicts.** The amount of a verdict of a jury will not be disturbed on appeal unless it has been shown to be so excessive that it is the result of passion or prejudice.

Appeal from the District Court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Gross, Welch, Vinardi, Kauffman & Day and William J. Dunn, for appellant.

Warren C. Schrempp and Richard J. Dinsmore of Schrempp, Bruckner & Dinsmore, for appellee.

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

C. THOMAS WHITE, District Judge.

This is a personal injury action. The plaintiff sued in the District Court for medical expenses, pain, disability, and loss of wages and earning capacity, alleged to have resulted from an incident which occurred while she was a paying passenger in the defendant's cab. The cause was tried to a jury, resulting in a verdict for the plaintiff of $19,230.70. Motions for judgment notwithstanding the verdict or for a new trial were overruled. Defendant Checker Cab Company appeals.

Defendant's assignment of error relates to three areas: Admission of certain evidence on cross-examination of defendant's witness, errors in instructions, and failure to set aside the verdict on the ground of excessiveness.

The age of plaintiff, Elena Siciunas, on the date of the injury, August 10, 1971, was 56 years. She is a naturalized citizen of the United States, having emigrated from Lithuania in 1950. She was widowed in 1945. She and her deceased husband are the parents of four children. At the date of the accident, plaintiff was employed by Coffee Time, Inc., which concern

operates the employees' cafeteria at Wilson Packing Company at 27th and Y Streets in Omaha. Her hours of work were from 5:30 a.m. to 2 p.m. The plaintiff had a standing order for a Checker Cab to pick her up at 5 a.m. On the date of the injury the cab appeared at her home at 5333 South 33rd Street in Omaha, at 4:30 a.m. The plaintiff dressed hurriedly and entered the cab. The normal or most direct route to the Wilson Plant from her home was east on S Street to 30th Street. The evidence shows 30th Street is a protected one with stop signs on both the west and east sides thereof. The route is then south on 30th Street to Y Street and east on Y Street to 27th Street.

According to the plaintiff, the defendant's driver did not stop at the stop sign on S Street and did not turn south, but continued across the intersection to a distance on the opposite side of the intersection where he halted after the plaintiff's screams of pain. The evidence shows that 30th Street at this intersection has a substantial crown in the middle of the street and relatively sharp dips to facilitate surface drainage on 30th Street. The plaintiff testified that as the cab was crossing, "A big noise. I jumped to the ceiling. I grabbed the seat." The driver in response to plaintiff's question said, "I think I hit the curb." The driver took plaintiff to work and later that morning plaintiff entered Archbishop Bergan Mercy Hospital where it was discovered that she had suffered a recent compression fracture of the first lumbar vertebra.

The defendant's driver testified by deposition that after picking up the plaintiff he proceeded to coast to the stop sign, intending to stop. That prior to the point where he anticipated stopping, there was a slight jolt in the steering wheel, and the plaintiff complained of a pain in her back. The driver then stopped at the stop sign and by reason of a car behind him, pulled across the street and stopped to render assistance to

the plaintiff. Later the driver returned to the scene and found a rock in the area where he felt the jolt. It was the driver's belief that it was the rock that he struck. He denies any significant speed or that he failed to stop at the stop sign, and denies that he told plaintiff that he had struck a curb.

Common carriers are required to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged for the safety of their passengers and they are liable for the slightest negligence causing injury. Pruitt v. Lincoln City Lines, 147 Neb. 204, 22 N. W. 2d 651; Fielding v. Publix Cars, Inc., 133 Neb. 818, 277 N. W. 331.

Defendant complains of instructions relating to speed at the time of the incident, alleged failure to stop at a stop sign, the city and state laws relating to speed and the stop sign regulations, all of which instructions are in proper form and supported by evidence justifying their submission. The assignment is without merit.

The defendant objects to instructions in which the court submitted to the jury the plaintiff's loss of wages to date, and the value of the loss or diminution to earn in the future as well as the standard instruction relating to the computation of future damages.

The defendant's attack is twofold, first the damage instruction allowed duplicate recovery, and the evidence did not justify the submission of the element of loss of earning capacity.

The instruction complained of stated that the jury should consider: "The value of the working time, wages, and salaries lost to date due to her inability or her diminished ability to work, and the value of the loss or diminution of the power to earn in the future." It is to be observed that the instructions complained of by the defendant as allowing duplicate recovery are taken verbatim from NJI No. 4.06 and NJI No. 4.07. It is well established that loss of earnings

and loss of earning capacity are separate and distinct.

Loss of past earnings is an item of special damage and must be specifically pleaded and proved. And impairment of earning capacity is an item of general damage and proof may be had under general allegations of injury and damage. Baylor v. Tyrrell, 177 Neb. 812, 131 N. W. 2d 393.

Assuming that there was proper evidence for the submission of the latter issue (which defendant disputes), the instruction was in proper form and no duplication of recovery as the defendant suggests.

The defendant further complains that there was not sufficient evidence to justify the submission of loss of earning capacity, specifically pointing to the testimony of plaintiff's physician, Dr. Werner Jensen, that the plaintiff had "minimal permanent" disability as the result of the accident. We disagree.

The plaintiff was a cafeteria employee, and obviously not a highly paid one. She was possessed of no particular skills, and spoke only broken English. Her livelihood required that she be able to perform the tasks of the occupation she was engaged in, which required her to be able to stand on her feet for prolonged periods, to lift and carry objects, to walk about, and on occasion to extend her arms above her head and shoulders; each of these physical tasks were shown to have been limited or impaired as the result of the accident. A person employed in a sedentary occupation would probably not be entitled to the submission of this issue, but this is not that case. We must deal, and the tortfeasor must be responsible in damages to the persons injured, as they are. The degree of disability which would justify the submission of this issue is largely dependent on the facts of each case. In this case the court properly submitted that issue.

Defendant also assigns as error the trial court's ruling allowing the plaintiff to introduce in evidence the com-

plete statement of the plaintiff taken at Archbishop Bergan Mercy Hospital by a representative of the defendant Cab Company. The plaintiff on direct examination testified that she thought it was the first time she had ridden with the cab driver. Defendant on cross-examination properly called the plaintiff's attention to the statement and to her answer in the statement, "I think I saw him once . . ." and answered, "It may have been true," but "I don't remember him . . . seeing now."

The defendant's investigator Vloch was called by defendant and testified to the question and answer. The plaintiff requested the trial court to require of defendant the statement and the court ordered defendant to produce it. The court then permitted the plaintiff's attorney to elicit the plaintiff's answers to the remainder of the questions in the statement.

The defendant carefully elicited from the witness the facts relating to the taking of the statement, but then elicited only the desired question and answer, and contends that admitting the entire statement into evidence violates the rule on strict cross-examination. The area covered by defendant was the entire circumstance of the statement and not merely one question and one answer. Having opened the subject, it is precluded from objecting to the plaintiff's further inquiry.

In addition, we have held that the admission of prior consistent statements, after a witness has been impeached with a prior inconsistent statement, is largely a matter within the discretion of the trial court. Anderson v. Evans, 168 Neb. 373, 96 N. W. 2d 44. We find no abuse of discretion.

The verdict of a jury will not be disturbed on appeal on the ground that it is excessive unless it is shown that it was the result of passion or prejudice. Stewart v. Ritz Cab Co., 185 Neb. 692, 178 N. W. 2d 577.

The plaintiff's loss of earnings and medical expenses

were $1,473.95. She had a life expectancy of 17.51 years at the time of trial.

The verdict has not been shown to be so excessive that it appears to be the result of passion or prejudice. Therefore, we will not disturb it on appeal.

No error appearing, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RUCHELL WHITE, APPELLANT.
217 N. W. 2d 916

Filed May 9, 1974. No. 39264.

1. **Criminal Law: Trial: Instructions: New Trial.** There is reversible error if the record affirmatively shows that defendant has been prejudiced by private communication between the trial court and jurors, and a new trial should be granted where the record is silent as to a possibility of prejudice, although reversal is not required if the record affirmatively shows communication had no tendency to influence the verdict.
2. **Criminal Law: Statutes: Sentences: Time.** When a legislative act, adopted after one has been convicted and sentenced for a crime but while the cause is still pending on a motion for new trial or on appeal, serves to mitigate the sentence imposed, this court will either amend the sentence to conform to the legislative intent or will remand the cause to the District Court for resentencing in conformity with the statute.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed in part, and in part reversed and remanded for resentencing.

Alfred A. Feidler of Feidler & Feidler, 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, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ.

NEWTON, J.

Defendant was convicted of possessing heroin with the intent to distribute or deliver it. On appeal he urges three propositions: Insufficiency of the evidence, error in giving an instruction in his absence, and an erroneous sentence. The judgment of conviction is affirmed and the cause remanded for resentencing.

The police entered a place referred to as the "Crap House" where defendant and others were gambling with dice on a large table. On entry one officer saw the defendant take a box from underneath his coat and deposit it under the table. A box containing 86 small packets or bundles of heroin and cocaine was found under the table together with a carton of cigarettes. The officer testified it was the box he saw defendant place on the floor. The defendant's fingerprints were found on the box. There was evidence that the quantity of drugs found exceeded any amount that a user would have on hand and defendant denied he was a user or addict. The evidence is sufficient to sustain the jury's finding that defendant was in possession of the drugs and that the large quantity meant it was held for distribution.

The court instructed in part as follows: "To 'distribute, deliver, or dispense' shall mean the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." After retiring, the jury inquired what was meant by "whether or not there is an agency relationship." In the absence of the defendant and his attorney, the court instructed the jury to disregard that portion of the instruction. Under the evidence, that part of the instruction was surplusage as there was no question of agency raised. Although the giving of the instruction in the absence of the defendant was error, it was harmless error. There is reversible error if the record affirmatively shows that

defendant has been prejudiced by private communication between the trial court and jurors, and a new trial should be granted where the record is silent as to a possibility of prejudice, although reversal is not required if the record affirmatively shows communication had no tendency to influence the verdict. State v. Register, 253 Iowa 495, 112 N. W. 2d 648. See, also, State v. Schifsky, 243 Minn. 533, 69 N. W. 2d 89; Scott v. State, 113 Neb. 657, 204 N. W. 381; Quinton v. State, 112 Neb. 684, 200 N. W. 881.

Defendant was convicted under section 28-4,125 (2) (a), R. S. Supp., 1972, and sentenced to a term of 5 years. The statute was amended providing a possibly lighter sentence for a first offense. See section 28-4,125 (2) (a), R. S. Supp., 1973. "When a legislative act, adopted after one has been convicted and sentenced for a crime but while the cause is still pending on a motion for new trial or on appeal, serves to mitigate the sentence imposed, this court will either amend the sentence to conform to the legislative intent or will remand the cause to the District Court for resentencing in conformity with the statute." State v. Waldrop, *ante* p. 434, 215 N. W. 2d 633.

The judgment of conviction is affirmed but the cause is remanded to the District Court for resentencing.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR RESENTENCING.

THE DANISH VENNERFORNING AND OLD PEOPLES HOME, A NEBRASKA CORPORATION, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.
217 N. W. 2d 819

Filed May 9, 1974. No. 39265.

1. **Eminent Domain: Damages.** In a condemnation proceeding an owner receives full compensation for all damages sustained and the measure of those damages is the actual legal rights acquired

by the condemner and not the use actually made of the land by the condemner.

2. ———: ———. A condemner must take the rights he appropriates unconditionally by his petition of taking and he must pay full compensation to the condemnee for what he takes or is entitled to take by his petition of taking.

3. ———: ———. An unaccepted promise by a condemner to do something in the future cannot affect the character or the extent of the rights acquired or the amount of damages to be recovered as just compensation.

4. **Eminent Domain: Highways: Streets.** An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway or street.

5. **Eminent Domain: Damages.** Where land has been taken or damaged for public use and the work completed without just compensation being first made, and continued possession is necessary and proper for such public use, the owner is not entitled to injunctive relief but is limited to an action for damages for the property taken or damaged.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Judgment vacated and cause remanded.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., Gary R. Welch, and Royce N. Harper, for appellant.

Harry J. Farnham, Patrick F. Moylan, and Harry H. Foulks, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, McCOWN, NEWTON, and CLINTON, JJ., and FLORY, District Judge.

McCOWN, J.

The plaintiff filed its petition against the State Department of Roads to require the department to provide reasonable and convenient access to plaintiff's property; to replace access destroyed by highway construction; and to recover damages. The District Court entered a partial summary judgment ordering the defendant to

restore access to plaintiff's property as nearly as possible to its location and condition prior to the construction, and retained jurisdiction for the determination of damages sustained because of the denial of access until the completion of the restoration of the access ordered. The defendant has appealed.

The plaintiff, The Danish Vennerforning and Old Peoples Home, a Nebraska corporation, owns approximately 21 acres of land in Omaha, Nebraska, on which it operates a recreation hall and maintains a park. The only access to and from plaintiff's property prior to the matters involved here was on North Ridge Drive, an east-west street, which abuts plaintiff's property for several hundred feet along the south side. The westerly portion of North Ridge Drive was a deadend and there was no access on the west or north. A private road on plaintiff's property extended from the area of the clubhouse in the westerly portion of plaintiff's property to the southeasterly corner, where it left plaintiff's property and entered North Ridge Drive. From that point, the access route was east on North Ridge Drive to 30th Street, a north-south arterial.

The defendant, Department of Roads, was in the process of constructing an interchange for the interstate highway system which involved relocation and reconstruction of several streets north and east of the plaintiff's property. The construction of relocated 30th Street would close North Ridge Drive east of plaintiff's property.

On January 19, 1970, the Department of Roads filed a condemnation action against the plaintiff in which the State sought to acquire an easement for cut and fill purposes covering 125,664 square feet, largely in the north portion of plaintiff's property. The condemnation petition did not seek to acquire any access rights and specifically provided that upon completion of the interstate project "all rights, interests and use of the

above described easement area shall be returned to the owner * * *."

A condemnation hearing was held on February 16, 1970, by the appraisers to determine the award to plaintiff for the temporary construction easement being condemned. At that hearing the Department of Roads set out a plan for access to plaintiff's property through the construction of an access road from plaintiff's property at approximately the location of the existing access road onto North Ridge Drive, and thence south across North Ridge Drive and down to Howell Street, the next east-west street to the south of North Ridge Drive. The appraisers, before making any return of the award for the temporary construction easement, required the Department of Roads to file an affidavit that the department would, in fact, build such an access road, and such an affidavit, with supporting plans, was executed and filed by the Department of Roads.

On February 20, 1970, the appraisers made their award in the condemnation action to the plaintiff in the sum of $2,500. The affidavit of the Department of Roads agreeing to construct the access road was attached to the award. The plaintiff did not consent or agree to the building of the access road proposed. The plaintiff withdrew the $2,500 condemnation award from the county court on March 17, 1970, and no appeal was filed in that proceeding. Construction commenced thereafter and in August 1970, in the process of construction, the defendant completely destroyed North Ridge Drive east of plaintiff's former point of access.

The action here was commenced on July 21, 1971. On September 16, 1971, the plaintiff applied for a restraining order and temporary injunction against further construction and at that time the construction was almost completed, with only incidental finishing remaining to be done.

On July 26, 1973, the District Court granted the plain-

tiff's motion for partial summary judgment and ordered the defendant to restore plaintiff's access by way of North Ridge Drive to relocated 30th Street so that said access would be as near as may be to the former access destroyed by the defendant. The District Court also retained jurisdiction for further proceedings to be had with respect to damages sustained by reason of denial of access until the completion of the restoration as ordered. This appeal by defendant followed.

The defendant contends that it acquired the right to destroy and change access to the plaintiff's property by virtue of the condemnation proceeding and since there was no appeal from that proceeding, the plaintiff is now foreclosed from seeking further relief.

Plaintiff contends that the Department of Roads acquired only a temporary construction easement for cut and fill purposes by virtue of the condemnation proceeding, and that because of section 39-1329, R. R. S. 1943, right of reasonable egress and ingress may not be denied without consent, except by condemnation, and that it is therefore entitled to the order requiring the defendant to restore the original access, as well as to damages until restoration is completed.

The only interest sought to be acquired by the defendant in the condemnation proceeding was an easement for cut and fill purposes and that easement right was to expire after construction was completed. The petition did not seek to acquire any access rights owned by the plaintiff as an abutting owner on North Ridge Drive or any street or highway. The law is well settled in this jurisdiction that in a condemnation proceeding an owner receives full compensation for all damages sustained and the measure of those damages is the actual legal rights acquired by the condemner and not the use actually made of the land by the condemner. A condemner must take the rights he appropriates unconditionally by his petition of taking and he must

pay full compensation to the condemnee for what he takes or is entitled to take by his petition of taking. Richardson v. Big Indian Creek Watershed Conservancy Dist., 181 Neb. 776, 151 N. W. 2d 283.

Although it is clear that the defendant did not acquire any access rights of the plaintiff under its petition for condemnation, defendant contends that because it agreed to build the new access road, and the appraisers took that agreement into consideration, the condemnation action should be treated as though it included access rights. On that score it must be pointed out that the evidence establishes that plaintiff did not consent to or accept that proposal. The offer and commitment amounted to a promissory stipulation. As this court said in reference to a somewhat similar unaccepted promissory stipulation in a condemnation case: "'An unaccepted promise to do something in the future cannot affect the character or the extent of the rights acquired or the amount of damages to be recovered as just compensation.'" Blobaum v. State, 179 Neb. 304, 137 N. W. 2d 855.

An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway or street. W.E.W. Truck Lines, Inc. v. State, 178 Neb. 218, 132 N. W. 2d 782. Whether the right of access to an existing street has been destroyed or materially impaired is a question of fact which must be determined upon the particular facts in each case. The fact that plaintiff's right of access was impaired has been determined by the trial court, but the extent and effect of the impairment and the amount of resulting damage to plaintiff's property have not been determined.

The District Court determined that section 39-1329, R. R. S. 1943, required defendant to restore the access involved here. That section provides in part: "The

right of reasonable convenient egress and ingress from lands or lots, abutting on an existing highway, street, or road, may not be denied except with the consent of the owners of such lands or lots, or with the condemnation of such right of access to and from such abutting lands or lots."

Here the new access road built by the defendant provided egress and ingress although there was an issue as to whether it was reasonably convenient. In addition, there is no dispute but that the Department of Roads had the authority to condemn the access rights involved here and believed it had done so. The critical issue is whether injunctive relief requiring affirmative action was justified under the facts here.

To enter an injunction against the Department of Roads which not only enjoined it from further illegal action but also required it to destroy work already completed and reconstruct the access road to its original location and condition was unwarranted under the circumstances here. A plaintiff should not be permitted to stand by and allow the State to complete the act of taking or damaging his property and then compel the State to undo all the work which has been done and restore the property to its original condition simply because the condemnation proceeding conducted by the State did not effectively extend to the exact property taken or damaged. Sound public policy would require the rejection of such a result. Where land has been taken or damaged for public use and the work completed without just compensation being first made, and continued possession is necessary and proper for such public use, the owner is not entitled to injunctive relief but is limited to an action for damages for the property taken or damaged. See Los Angeles Athletic Club v. City of Long Beach, 128 Cal. App. 427, 17 P. 2d 1061.

The partial summary judgment of the District Court is vacated and the cause is remanded to the District

Court for trial to determine the factual issue of the amount of damages to plaintiff's property resulting from the taking or damaging of access rights by the State of Nebraska, Department of Roads.

JUDGMENT VACATED AND CAUSE REMANDED.

LARRY W. COFFEY, APPELLANT, V. JOHN SULLIVAN, DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.
217 N. W. 2d 918

Filed May 9, 1974. No. 39271.

Motor Vehicles: Statutes: Licenses and Permits. The offense of failing to carry an operator's license when operating a motor vehicle on the public highways is a traffic violation for which two points are to be assessed under section 39-7,128, R. R. S. 1943.

Appeal from the District Court for Lancaster County. DALE E. FAHRNBRUCH, Judge. Affirmed.

Richard Scott and Bauer, Galter, Scott & Geier, for appellant.

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

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

McCOWN, J.

Plaintiff appeals from the judgment of the District Court affirming the order of the Director of the Department of Motor Vehicles revoking the plaintiff's motor vehicle operator's license under the point system.

On June 29, 1973, the plaintiff pleaded guilty to the offense of "no valid Nebraska motorcycle operator's license on person." Two points were assessed for that violation, which brought his point total to 12, and his license was revoked.

Plaintiff contends that a violation of section 60-413, R. S. Supp., 1972, which requires that an operator's license "shall at all times be carried by the licensee when operating a motor vehicle on the public highways of this state" is not an offense within the context of section 39-7,128, R. R. S. 1943.

Section 39-7,128, R. R. S. 1943, establishes a point system dealing with traffic violations. The first eleven subsections of the statute designate the number of points to be assessed for various specific violations and subsection (12) then provides: "All other traffic violations involving the operation of motor vehicles by the operator, for which reports to the Department of Motor Vehicles are required under sections 39-794 and 39-795, not including parking violations, muffler violations, or overloading of trucks—2 points."

A violation of section 60-413, R. S. Supp., 1972, is a violation for which a report to the Department of Motor Vehicles is required under section 39-794, R. S. Supp., 1973. The language of the statutes is controlling. By referring to "all other traffic violations" for which reports are required, except parking, muffler, and truck overloading violations, we think the Legislature intended to include the offense of failing to carry an operator's license when operating a motor vehicle. See Wilson v. Johns, 184 Neb. 545, 169 N. W. 2d 434.

The judgment of the District Court is affirmed.

AFFIRMED.

LEE G. PEERY, APPELLANT, V. WILLIAM R. PEERY, APPELLEE.
217 N. W. 2d 837

Filed May 9, 1974. No. 39276.

Divorce: Alimony: Parent and Child. The determination of alimony, division of property, and child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless there is a clear abuse of discretion by the trial court, or it is clearly against the weight of the evidence.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed as modified.

James R. Welsh of Riedman & Welsh, for appellant.

Hal Bauer of Bauer, Galter, Scott & Geier, for appellee.

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

WHITE, C. J.

This is an appeal by the plaintiff wife from a decree of marriage dissolution. The only questions presented are the division of the parties' property, the amount of alimony, and the child support award. We affirm the judgment and decree of the District Court as hereinafter modified.

At the time of the trial, the plaintiff was 38 years of age, and the defendant was 36 years of age. They were married in 1961 in Grand Island, Nebraska. They lived in Grand Island until May 1962; then they moved to St. Louis, Missouri, for 2 weeks and to Omaha, Nebraska, for about 6 months. Lincoln, Nebraska, became their home in January 1963. The plaintiff had a daughter by a previous marriage, Deborah, who was 17 years of age at the time of the trial. Deborah was in the custody of the juvenile court and was living in a foster home. The parties had one son, Michael, age 9. The plaintiff was born and raised in Germany. She attended high school there; German high school is 2 years longer than American high school. She also attended business school for 6 months before the marriage and for a relatively short time thereafter was employed as a bookkeeper. The plaintiff's health appears generally to be good. She has had some difficulty with her back, and has had a hernia operation and there is a possibility of another such operation.

Each party has personal debts of around $600. In 1967, with a downpayment of $10,000 the parties pur-

chased a home at 3810 Prescott Avenue in Lincoln, Nebraska. Around $3,500 of this downpayment was derived from the sale of property of the defendant in Grand Island, Nebraska, which was owned by him prior to the marriage. A real estate firm appraised the house in the sum of $42,500. The defendant estimates its value at $45,000. The plaintiff testified that the house was worth between $35,000 and $38,000. There was approximately $14,000 due on the mortgage at the time of the trial. The defendant's gross income, derived from the position as a sales manager, was approximately $19,000 annually during the 5 years preceding the dissolution of the marriage. But the testimony is undisputed that he has received a demotion and will lose income of between $8,500 and $9,000 per year. It also appears that this income is derived from commissions, and in his job he must travel extensively, for which he is not reimbursed by his employer. His present expenses include $42 monthly for rent and $100 for car expense. It also appears that the loss of his managerial commissions from his demotion may be compensated to some extent by the fact that he will have more time to sell direct insurance. He does not have a fixed established executive or managerial position, and his job as commission salesman is burdened with the usual uncertainties involved in sales work and changes in general economic conditions.

The District Court entered a modified decree in which the plaintiff was given possession of the home property until the minor child of the parties reaches majority, is married, self-supporting, or dies. The decree requires the plaintiff to occupy the home property until one of these conditions happens and *then* the property is ordered sold, and the proceeds therefrom divided equally between the parties. In addition thereto, the plaintiff is to be given credit for her payments on the mortgage loan to the extent that such mortgage balance is reduced from and after the date of the decree. The plaintiff was awarded the household furniture and furnishings in the home, valued

at $2,500 to $5,000. She was given the 1966 Ford Mustang automobile. She was also awarded alimony in the sum of $225 per month continuing for a period of 5 years, or until the plaintiff dies or remarries. The total amount of alimony she will reasonably receive is $13,500. She was awarded child support in the sum of $125 per month. In addition to these amounts the defendant was required to maintain in full force and effect an accident group insurance policy, which also insures the minor child of the parties until the child reached majority, is married, self-supporting, or dies. He is required to pay the first $1,000 of orthodontic expense for the parties' minor child. He is required and ordered to maintain in full force and effect a life insurance policy on his own life for the face amount of $25,000 which names the 9-year-old boy as primary and exclusive beneficiary until such child reaches majority, is married, self-supporting, or dies. The defendant received from the decree some minor personal property consisting of a rug, a trunk, a horseshoe, and some tools, and his 1967 Lincoln Continental automobile which he uses in the course of his business. As set out above, he is also to receive one-half of the equity of the house when it is sold.

It is apparent, without discussion of the pertinent authorities concerning the usual division of property, that the plaintiff has been awarded over one-half of the vested interests and value of the property existing at the time of the dissolution of the marriage. In addition, the plaintiff has been awarded alimony in the sum of $13,500, together with child support in the sum of $125 per month. We have said many times that the rule for determining alimony or division of property in an action of this nature is not susceptible to the application of any mathematical formula. We have recently reaffirmed this court's position that the determination of alimony, division of property, and child support rests in the sound discretion of the court and will not be disturbed on appeal unless there is a clear abuse of discretion, or it is clearly against

the weight of the evidence. Person v. Person, 189 Neb. 329, 202 N. W. 2d 629; Prell v. Prell, 181 Neb. 504, 149 N. W. 2d 104; Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430; Johnson v. Johnson, 177 Neb. 445, 129 N. W. 2d 262.

Considering all the circumstances, including the relative uncertainty of the defendant's future income, the likelihood of the plaintiff becoming at least partially self-supporting, their ages, the duration of the marriage, and the proportionate burdens placed on the future lives of each party, we cannot say that the District Court abused its discretion in entering the awards that it did or that such decree was against the weight of the evidence. Manifestly, the total award, including the alimony and child support, imposes a substantial burden upon the defendant beyond the award of over one-half of the accumulated property, part of which was contributed to by the assets of the defendant prior to the marriage. As in most marriage dissolutions, neither party will be able to enjoy the same standard of living and the physical comforts and luxuries to which they had been accustomed during the marriage relationship. We come to the conclusion that the judgment and decree of the District Court as to the division of property, alimony, and child support should be generally affirmed.

It is undisputed that the parties had purchased and were living in and enjoying a home with a value of around $40,000. The decree of the District Court, in effect, requires the plaintiff to live in this home and to make the mortgage payments during the minority of her child. It is quite apparent that this requirement of maintaining this residence with the expenses incident thereto is quite probably too onerous for the plaintiff to maintain. The plaintiff, obviously, will be able to marshal her future assets to accommodate her needs with the restriction removed requiring her to live in a house probably beyond her needs. The decree of the District Court is modified to provide that upon application of the plaintiff and approval of the court the property shall be sold and the

proceeds divided equally with the plaintiff being given credit for payments on the mortgage loan to the extent that such mortgage balance is reduced by payments made by her after the date of the decree.

As so modified, the judgment of the District Court is correct and is affirmed.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., concurring.

I would modify the decree to require sale of the residence property which the court finds is probably beyond the needs of the plaintiff. In all other respects I concur fully in the opinion of the court.

GEORGE T. QUALLEY, APPELLANT, V. CHRYSLER CREDIT CORPORATION, APPELLEE.
217 N. W. 2d 914

Filed May 9, 1974. No. 39303.

1. **Forum: Courts.** The doctrine of forum non conveniens refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum.
2. ———: ———. Whether a suit should be entertained or dismissed under the rule of forum non conveniens depends largely upon the facts of the particular case and rests in the sound discretion of the trial court. Factors which relate to the public interest and the welfare of the court are to be considered together with factors which relate to the convenience of the parties.
3. ———: ———. An action should not be dismissed under the rule of forum non conveniens unless an alternative forum is still available to the plaintiff.
4. ———: ———. To the extent that Herrmann v. Franklin Ice Cream Co., 114 Neb. 468, 208 N. W. 141, implies that the doctrine of forum non conveniens is not recognized in Nebraska, it is overruled.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

William Alexander, George T. Qualley, P. C., and Thomas A. Vakulskas, for appellant.

Pilcher, Howard & Dustin, for appellee.

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

BOSLAUGH, J.

This is an action for damages arising out of the repossession and sale by the defendant of an automobile owned by the plaintiff. The trial court sustained the motion of the defendant to dismiss on the ground of forum non conveniens. The plaintiff appeals.

The plaintiff is a resident of Sioux City, Iowa. On October 31, 1967, the plaintiff purchased a 1968 Dodge automobile on an installment contract from Sioux City Dodge, Inc. The contract was later assigned to the defendant, a foreign corporation licensed to do business in Nebraska.

On October 16, 1970, and again on October 17, 1970, a representative of the defendant demanded payment of an installment that became due September 30, 1970. The installment payment was not made, and without further notice to the plaintiff, the automobile was repossessed on the night of October 17, 1970. The plaintiff alleged the seizure was illegal under the law of Iowa because it was made without notice or an opportunity to be heard.

The plaintiff contends the doctrine of forum non conveniens is not recognized in Nebraska, or, if recognized, was erroneously applied in this case.

The doctrine of forum non conveniens, although used infrequently until recent years, is generally considered to be of common law origin. It refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum. Whether a suit should be entertained or dismissed under this rule depends largely upon the facts of the particular case and rests in the sound discretion of the trial court.

The plaintiff relies upon Herrmann v. Franklin Ice

Cream Co., 114 Neb. 468, 208 N. W. 141, in support of his contention that forum non conveniens is not recognized in Nebraska. In the Herrmann case this court held the District Court had no discretion to decline jurisdiction in an action by a nonresident arising out of an accident which had occurred in Missouri. The opinion was grounded primarily upon Article IV, section 2, of the Constitution of the United States, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The United States Supreme Court has since held that a nondiscriminatory application of the doctrine of forum non conveniens does not violate the privileges and immunities clause. Missouri ex rel. Southern Ry. Co. v. Mayfield, 340 U. S. 1, 71 S. Ct. 1, 95 L. Ed. 3. See, also, Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055. To the extent the Herrmann case implies forum non conveniens is not recognized in Nebraska, it is overruled.

The rule is applied most often in cases involving a foreign tort where the parties are nonresidents. Here the plaintiff is a resident of Iowa and the defendant is a foreign corporation. The repossession which was the basis for the action occurred in Iowa. In addition to factors which relate to the convenience of the parties, factors which relate to the public interest and the welfare of the court are to be considered.

The parties agree the law of Iowa is applicable to this case, and it appears there may be considerable difficulty in ascertaining what the applicable law is in order to decide the case correctly. Furthermore, the plaintiff claims punitive damages which are not recognized in Nebraska. These factors weigh heavily in support of the determination by the trial court that this action should be tried and determined by an Iowa court.

The matter of the statute of limitations remains to be considered. In the District Court the plaintiff claimed the action was barred by the Iowa statute. After the

hearing on the motion, the defendant filed a written waiver as follows: "Defendant expressly waives the defense of the bar of the Iowa statute of limitations with respect to any refiling of this action in Iowa within the remaining time that the action could have been brought in Nebraska under Nebraska's 4-year statute of limitations." This was a recognized method of assuring that an alternate forum was still available to the plaintiff. See, 20 Am. Jur. 2d, Courts, § 174, p. 513; Conklin v. Towne, 204 Iowa 916, 216 N. W. 264.

The record shows no abuse of discretion by the trial court. The judgment of the District Court is affirmed.

AFFIRMED.

THOMAS J. GORHAM, TRUSTEE, APPELLANT, V. JOHN F. KENNEDY COLLEGE, INC., APPELLEE.
217 N. W. 2d 919

Filed May 9, 1974. No. 39307.

Contracts: Cancellation of Instruments: Bills and Notes. The holder of an instrument may, even without consideration, discharge any party by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged.

Appeal from the District Court for Saunders County: JOHN D. ZEILINGER, Judge. Reversed and remanded.

Richard A. Vestecka, Thomas J. Gorham, and Dennis C. Tegtmeier, for appellant.

Richard E. Weaver, for appellee.

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

NEWTON, J.

This is an action on several promissory notes executed by defendant and delivered to Grant G. Fiedler for a valuable consideration. They were assigned to plain-

tiff after maturity. The execution and delivery of the notes is conceded. The sole defense is that the notes were discharged by a written renunciation signed by the payee and delivered to defendant. Judgment was entered for the defendant. We reverse.

The sole question presented is the legal effect of the alleged renunciation which is as follows: "I will surrender my notes in the amount of $8,500.00 to John F. Kennedy College. Grant G. Fiedler, RFD 1, Ceresco, Nebr."

Section 3-605, U. C. C., provides: "(1) The holder of an instrument may even without consideration discharge any party * * *

"(b) by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged."

By renunciation is meant the abandonment of a right. See Black's Law Dictionary (Deluxe 4th Ed.), p. 1462. The words "I will" in the sense here used connote future action. See Webster's Third New International Dictionary. The language used does not indicate an outright renunciation of the payee's rights under the notes as of the time the instrument was executed. Rather, it appears to have reference to the second clause of section 3-605 (1) (b), U. C. C., regarding discharge by surrender of the notes. Viewed in this light the instrument is simply a promise, made without consideration, to surrender the notes at some time in the future. The promise is not enforceable and without an actual surrender of the notes they have not been discharged.

The judgment of the District Court is reversed and, since under the pleadings and the evidence the sole issue presented is the issue of law here determined, the District Court is directed to enter judgment for the plaintiff.

REVERSED AND REMANDED.

BOSLAUGH, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. EDDIE ADDISON, APPELLANT.
217 N. W. 2d 468

Filed May 9, 1974. No. 39309.

1. **Criminal Law: Forgery: Trial: Evidence.** In a prosecution for uttering and publishing a forged instrument, knowing it to be forged, a conviction cannot be sustained without proof of the forgery.
2. ———: ———: ———: ———. To sustain a conviction for forgery it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Reversed and remanded.

Albert T. Reddish, for appellant.

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

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

McCOWN, J.

The defendant, Eddie Addison, was found guilty by a jury of uttering a forged instrument. He was sentenced to 1 to 4 years in the Nebraska Penal and Correctional Complex and this appeal followed.

On March 25, 1973, an attendant at a service station in Hemingford, Nebraska, delivered some $7 or $8 worth of gas and oil to a car in the station. Inside the service station a passenger from the car went through the motions of endorsing a check, and then gave it to the attendant and received the change in cash. The check was drawn on the Bank of Hemingford, Nebraska; dated March 25, 1973; in the amount of $50; made out to Eddie Addison, as payee; and signed "John Manning" as maker. It was identified on the front as being for labor and was endorsed by "Eddie Addison."

The service station attendant identified the defendant as the individual who had given him the check.

John Manning, a rancher, testified that the signature on the check was not his signature. He also testified that he had never banked at the Bank of Hemingford, but did his banking at the Guardian State Bank in Alliance, Nebraska. Manning also testified that he did not know of anyone else in the area named John Manning, although he knew there were others with the name of Manning. The sheriff testified that he did not know anyone named John Manning living in the area, other than the witness.

A handwriting expert who examined the check, together with exemplars of writing known to be the defendant's writing, testified that in his opinion the defendant wrote "the payee name of Eddie Addison appearing on the top line of the check, and the endorsement."

The defendant, a 48-year-old Indian, testified that he had never seen the check before; had not been in Hemingford, Nebraska, in March 1973; and that he was in jail on the Pine Ridge Indian Reservation in South Dakota on March 25, 1973.

No witness testified that the check was ever presented to any bank nor that payment had ever been refused by the Bank of Hemingford on which it was drawn. The check carries a stamp endorsement of the service station. No officer or employee of the Bank of Hemingford testified. There was no evidence that the bank had no account in the name of a John Manning, nor did any witness testify that the signature on the check was not authorized.

The defendant moved for a directed verdict, and the motion was overruled. The jury found the defendant guilty.

The defendant contends that a conviction for uttering a forged instrument cannot be sustained without proof

of the forgery, and that it is not sufficient proof of forgery to show that the signature is not that of the party whose name is used, but it must be affirmatively shown that the signing was made without his authority. The defendant also contends that the statute requires evidence that the defendant knew the instrument was forged and proof of intent to damage or defraud.

The case of Crawford v. State, 164 Neb. 231, 82 N. W. 2d 1, is controlling. There this court held that in a prosecution for uttering and publishing a forged instrument, knowing it to be forged, a conviction cannot be sustained without proof of the forgery. We also held that to sustain a conviction for forgery it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority.

In this case, not only was the proof of the forgery deficient in failing to establish that the signature on the check was signed without authority, but the State's evidence established that the defendant did not personally sign the check but wrote only the name of payee and endorser. The evidence failed to establish that the check was ever presented for payment or that payment was refused for any reason, or even that the check was not "true and genuine." Under such circumstances the State failed to prove the essential elements of forgery, and likewise failed to prove that the defendant knew the check was forged, or uttered it with the intent to defraud.

If it were to be contended that the drawer is or might be a fictitious person, testimony of a proper officer of the bank that the drawer has no account and is unknown to the bank would have constituted prima facie evidence. See State v. Morgan, 182 Neb. 639, 156 N. W. 2d 799. The burden of proving that a specific

crime has been committed is not fulfilled by evidence that a crime probably occurred.

The evidence here was insufficient to sustain a conviction for uttering a forged instrument. Defendant's motion for directed verdict should have been sustained. In view of our holding, it is unnecessary to discuss the defendant's other assignments of error.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

HERNAN CORTES, SPECIAL ADMINISTRATOR OF THE ESTATE OF DAVID CORTES, DECEASED, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

218 N. W. 2d 214

Filed May 16, 1974. No. 39193.

1. **Torts: Negligence.** On an appeal to this court of an action under the State Tort Claims Act the findings of the trial court will not be disturbed unless clearly wrong.
2. **Torts: Negligence: Parks and Public Grounds.** A patron of a public park using an area of the park open to the public where such use is in conformity with valid park regulations is generally a licensee and the possessor of the park owes to him the duty to warn of traps and concealed hazards.
3. **Torts: Negligence: Waters: Words and Phrases.** A body of water, natural or artificial, does not constitute a concealed, dangerous condition.

Appeal from the District Court for Cass County: RONALD E. REAGAN, Judge. Affirmed.

Donald B. Fiedler of Fiedler & Fiedler, for appellant.

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

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

CLINTON, J.

This is an action brought against the State of Nebraska

under the State Tort Claims Act, sections 81-8,209 to 81-8,235, R. R. S. 1943, because of the death by drowning of David Cortes, age 15. The drowning occurred on August 13, 1970, in lake No. 2 at the Louisville State Recreation Area in Cass County, Nebraska. This is an area operated by the Nebraska Game and Parks Commission.

The principal claim of negligence relied upon by the plaintiff and the only one argued in this court is the alleged failure of the State to adequately warn by posting of signs or otherwise of an alleged dangerous and concealed condition in the lake at the site where the drowning occurred. The trial court made findings of fact which included: (1) The State was not required to post a no swimming sign at the beach in question. (2) The negligence, if any, of the defendant was not the proximate cause of the accident. (3) Contributory negligence of the plaintiff was sufficient to bar recovery. We affirm.

The evidence would permit the court to find the following as fact. David, accompanied by his father and the plaintiff, Hernan Cortes-Dias, his uncle, an Air Force Master Sergeant stationed at Offutt Air Force Base, together with other members of the families, went to the area for the purpose of picnicking. Near the entrance to the area and immediately adjacent to the road by which the parties made entrance was a sign "Swimming in Designated Areas Only." This sign was noticed by the plaintiff as the party entered. There is no evidence as to whether it was seen by David or his father. The park was crowded and the group first went to a beach area where the largest crowd of people were. There they found no empty table.

At this beach were located two bathhouses and between them a 4′ x 4′ sign reading: "SWIMMING permitted at this beach only. No glass, fires, or pets permitted. BEACH closed at 8:30 p.m." The swimming

area at this beach was marked by buoys. They observed neither the bathhouses nor the sign.

The group then went back to a beach which they had passed earlier. There was a smaller crowd of people wading in the water. There were no signs of any kind on the beach. Across the road from this beach was a vacant table. They ate their lunch and played ball. About 4 p.m. the plaintiff and David entered the water. David was using an inflated inner tube which his father had filled for him. The tube had not been taken with them for the specific purpose of using in the water and was used merely because of its availability. Neither David nor the plaintiff was a competent swimmer. David could "stay afloat," his father thought, as a consequence of some lessons he had taken at the "Y". David, while in the water, was seated in the inflated inner tube with his arms and legs over the side and his buttocks in the hole made by the tube. The plaintiff was grasping the tube with his hands and paddling with his feet, apparently pushing it ahead of him. The two went out beyond the waders a distance of 5 to 10 feet. David asked the plaintiff how deep the water was. The plaintiff lowered his body to try to touch bottom. He could not. They panicked. The tube capsized. David fell out and sank. The water was very deep. No one could bring him up.

The beach at which the drowning occurred had, since about 1964, a sign placed upon it which read: "No Swimming in This Area." It was the only such sign maintained by the commisison in any of the areas operated by it. The reason for the sign was that the beach was attractive, the water was shallow near shore and dropped off rapidly to a depth of 20 to 35 feet. This particular sign, together with many others in the park, had been vandalized and removed many times. The sign was removed by someone either the day of or within a few days previous to August 13, 1970. Someone who

found the removed sign took it to the person charged with the maintenance of the area. There it had remained and had not been replaced up to the time of the drowning. The Cortes party had no notice of the previous placement of this sign. The evidence shows that persons using the park and lake for swimming did not confine themselves to the designated area. Efforts were made to have the people observe the rules but without much success. The evidence shows a rather discouraging amount of lawlessness by park users in the form of vandalism and disregard of park regulations.

On an appeal to this court of an action under the State Tort Claims Act the findings of the trial court will not be disturbed unless clearly wrong. Craig v. Gage County, 190 Neb. 320, 208 N. W. 2d 82. The above case was decided under the Political Subdivision Tort Claims Act, however, the same principles are applicable under the State Tort Claims Act. That Act provides for liability on the part of the State under the same circumstances under which a private person would be liable, sections 81-8,210(4) and 81-8,215, R. R. S. 1943, but makes certain exceptions which are not applicable here. See § 81-8,219, R. R. S. 1943.

Both parties assert that David, while using the park, was a licensee. We accept the proposition that the term is properly applicable to persons using areas of the park open to the public and where the particular use is in conformity with valid governing regulations. Lindelow v. Peter Kiewit Sons', Inc., 174 Neb. 1, 115 N. W. 2d 776, is persuasive. Because of views we take on other issues we need not decide whether because David was using a portion of the park not open to swimming he lost his status as a licensee. Neither need we consider whether a status of invitee might exist under other circumstances such as where a designated swimming area is being so used for that purpose, or where a mem-

ber of the public pays a fee for the use of a swimming area and its facilities.

In Lindelow v. Peter Kiewit Sons', Inc., *supra*, an employer maintained a recreation lake and park for the use of its employees under rules similar to those usually in effect in public parks. An employee lawfully using the lake for swimming was held to be a licensee and the duty of the possessor-employer was held to be only to give notice of traps or concealed conditions. In that case the employee dove from a diving board and struck bottom. The employer was held not liable. The evidence showed the employee was familiar with the lake and with the fact that its depth and the position of the platform and diving board varied as the lake rose and fell.

A patron of a public park using an area of the park open to the public where such use is in conformity with valid park regulations is generally a licensee and the possessor of the park owes to him the duty to warn of traps and concealed hazards.

A body of water, natural or artificial, is generally held not to constitute a concealed, dangerous condition. Anderson v. Valley Feed Yards, Inc., 175 Neb. 719, 123 N. W. 2d 839. "The reason for this rule is that such places do not ordinarily create a condition of unnatural, concealed, or special danger, or involve an unreasonable risk of death or serious harm; the possible hazard of use is generally appreciated even by children . . . ." 65 C. J. S., Negligence, § 63(100), p. 850. Mere depth of water as such is not a hazard to a person of adequate swimming ability. The depth of a body of water may be unknown to the user, but the general nature of the potential hazard is not. It can be stated as a matter of fact that the public recognizes that bodies of water vary in depth and that sharp changes in the bottom may be expected. This is especially true in public parks since they are usually used for a multiplicity of

purposes, including boating, water skiing, fishing, and scuba diving. Deep water is essential for some of these purposes. Often these uses are secondary to some other use.

The trial court correctly found that the State was not required to post a "No Swimming" sign at the beach in question. What we have said also covers the finding of the trial court of contributory negligence on the part of David proximately causing his death. We add the comment that the use of flotation devices such as inner tubes and air mattresses, especially by persons whose ability to swim is inadequate or absent, is generally recognized as unusually dangerous because the devices are unstable and enable the user easily and inadvertently to reach areas which require skill beyond his ability or endurance.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM EDWARD CORTEZ, APPELLANT.
218 N. W. 2d 217

Filed May 16, 1974. No. 39238.

1. **Criminal Law: Insane Persons: Trial.** The doubt referred to in the requirement that a hearing on the competency of a defendant to stand trial is required when a reasonable doubt as to this issue is raised refers to a doubt arising in the mind of the trial judge.
2. ———: ———: ———. 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.
3. **Criminal Law: Post Conviction: Attorneys at Law.** For post conviction relief on the ground of ineffective assistance of counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Lawrence R. Brodkey, for appellant.

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

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

WHITE, C. J.

This is a post conviction proceeding. The defendant was charged and jury convicted of burglary and sentenced on November 6, 1970, to a term of 7 to 8 years in the Nebraska Penal and Correctional Complex. After a full evidentiary hearing, the District Court denied the defendant post conviction relief on the asserted grounds of mental incompetency to stand trial and denial of effective assistance of counsel by failure to raise the issue of incompetency to stand trial and to complete medical testing. We affirm the judgment of the District Court denying post conviction relief.

At the jury trial, the defendant attempted to prove temporary insanity during the commission of the burglary. The defendant was caught in the act of committing the crime, and this was the only possible defense available. Before trial and arraignment, defense counsel had a psychiatrist visit with the defendant for 1 hour on July 23, 1970. The defendant told the psychiatrist that he had been subject to blackouts since 1953; that these blackouts often occurred after he had been drinking; and that he had been drinking the night of the burglary and could not remember anything prior to or after the burglary until the next day. The psychiatrist gave his opinion to defense counsel that the defendant had some type of convulsive disorder that made him an epileptic equivalent. The psychiatrist suggested tests be given to the defendant. Four days later, on July 27, 1970, defense counsel made a motion to postpone arraignment to allow for tests to be taken at the county hospital. The motion was granted. These tests were never taken.

Defendant's contention is that this motion to delay arraignment should have raised a reasonable doubt in the mind of the trial judge as to defendant's mental competency to stand trial. Defendant contends that the trial court should have held a hearing, sua sponte, because the motion to delay arraignment for testing raised a reasonable doubt as to the defendant's competency to stand trial.

In State v. Anderson, 186 Neb. 435, 183 N. W. 2d 766 (1971), we stated that the adoption of section 29-1823, R. S. Supp., 1969, referring to delay in the trial of one mentally incompetent, does not change the common law rule that when a person becomes insane after the commission of the offense charged, and before judgment is pronounced, such person's fitness to proceed presents a question to be resolved by the court, in the exercise of sound discretion.

Nebraska case law indicates the means to be employed in resolving the question of sanity is discretionary with the court. If at any time while criminal proceedings are pending facts are brought to the attention of the court, either from its own observation or from suggestion of counsel, which raise a doubt as to the sanity of the defendant, the question should be settled before further steps are taken. However, although a hearing on the issue is sometimes said to be obligatory, if a reasonable doubt is raised, the doubt referred to is a doubt arising in the mind of the trial judge, as distinguished from uncertainty in the mind of any other person. State v. Anderson, *supra;* State v. Boston, 187 Neb. 388, 191 N. W. 2d 452 (1971); State v. Crenshaw, 189 Neb. 780, 205 N. W. 2d 517 (1973).

The court did not abuse its discretion in not holding a sua sponte hearing on the mental competency of the defendant to stand trial. There was never any reasonable doubt as to the defendant's competence to stand trial. The defense of temporary insanity at the time

of commission of the crime was being investigated by defense counsel, and the testing could either further substantiate or completely disprove this theory. The trial judge therefore granted the motion for further testing to determine if the alleged temporary blackouts would be substantiated by medical testing. The alleged temporary blackout at the time of the burglary due to a convulsive disorder had no relation to the competency of the defendant to stand trial.

Of significance is the fact that defendant was represented by the public defender throughout the trial and at no time prior to this post conviction proceeding did counsel or defendant allege incompetence of the defendant to stand trial. The evidence negates any contention that the defendant was in fact incompetent to stand trial. During the 1 hour visit with the psychiatrist, the psychiatrist noted that the defendant was not suffering from any convulsive disorder at that time. The warden of the Douglas County jail testified that during the 3 months of confinement prior to trial, the defendant never asked for medical assistance and no other inmate ever notified the warden that the defendant was in need of medical assistance. The record shows that the defendant had the ability to understand his right not to testify and voluntarily did not testify.

The public defender testified that during all his conversations with the defendant he was completely lucid, understood what was being discussed, and responded well. And finally, and of great importance, the defendant himself admitted that he knew what was going on at the trial: "Q. Well, there's no question that you knew what was going on at trial, is there? A. No, I understood everything that was going on at the trial." Thus, there is a total lack of any evidence which would support the defendant's post conviction contention that he was incapable of understanding the nature and object of the proceedings against him, unable to compre-

hend his own condition in reference to such proceedings, or to make a rational defense.

The defendant complains that he was afforded ineffective assistance of counsel caused by defense counsel's failure to have testing completed at the county hospital. However, the public defender already had the favorable testimony of a psychiatrist that in his opinion the defendant was suffering from a convulsive disorder which could subject him to temporary blackouts when he would not know the difference between right and wrong. The medical tests could have totally disproved this theory and discredited this testimony. The defense counsel's strategy was clearly to rely on the favorable testimony of the psychiatrist, and not complete the testing, thus avoiding the possibility that the testing would disprove the only defense available. The rule is well established in this jurisdiction for post conviction relief on the ground of ineffective assistance of counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Moss, 185 Neb. 536, 177 N. W. 2d 284 (1970); State v. Mason, 187 Neb. 675, 193 N. W. 2d 576 (1972). Here defense counsel competently presented the defendant's only defense, objected to testimony and the introduction of certain evidence, and adequately represented the defendant. There is no merit to this contention.

The judgment of the District Court is correct and is affirmed.

AFFIRMED.

MARGUERITE GUILL AND FERN ANSON, GUARDIANS OF THE PERSON AND ESTATE OF TERESA MURPHY, APPELLEES, V. LEO A. WOLPERT, APPELLANT.

MARGUERITE GUILL AND FERN ANSON, GUARDIANS OF THE PERSON AND ESTATE OF TERESA MURPHY, APPELLEES AND CROSS-APPELLANTS, V. ST. JOSEPH'S CATHOLIC CHURCH, LYONS, NEBRASKA, APPELLANT AND CROSS-APPELLEE.

218 N. W. 2d 224

Filed May 16, 1974. Nos. 39262, 39284.

1. **Deeds: Evidence: Undue Influence.** A case of undue influence is made out, in case of a deed, where it is shown by clear and satisfactory evidence (1) that the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.
2. ———: ———: ———. The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor.
3. **Deeds: Trial: Evidence: Undue Influence.** The one attacking an instrument on the ground that its execution was procured by undue influence has the burden resting on him to establish that fact. However, the circumstances under which it was made, the condition of the grantor at the time, and the injustice to her and her heirs, if it is upheld, may be such as to cast upon the grantee the burden of going forward with the evidence to show that it is not tainted with undue influence but is the deliberate and bona fide act of the grantor.
4. **Deeds: Trial: Undue Influence.** It is impossible to lay down any hard and fast rule as to when a presumption of undue influence arises. The rule must, of necessity, be applied according to the particular facts and circumstances of each case in which the question arises. Generally, it may be said that if the facts and circumstances show such confidential, fiduciary, or trust relationship that it would be inequitable to sustain the deed in question, then such presumption arises, and the burden of going forward with the evidence rests upon the grantee to show the bona fides thereof.
5. **Deeds: Trial: Gifts: Undue Influence.** Where the validity of an alleged gift between persons occupying a confidential relationship is attacked, the burden of proving that a confidential relationship existed between the parties rests on the one attacking the gift.
6. **Deeds: Trial: Evidence: Undue Influence.** Generally speaking,

any presumption of undue influence may be rebutted by competent and sufficient evidence.

7. ———: ———: ———: ———. The mere existence of a confidential relationship between grantor and grantee does not of itself show undue influence where the deed is made by the grantor with full knowledge of its nature and effect, and because of the deliberate desire of the grantor.

8. ———: ———: ———: ———. The court, in determining whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only to determine whether it was the voluntary act of the grantor. The fact that the grantor has others who were so related to him who were proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance.

Appeals from the District Court for Burt County: WALTER G. HUBER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Leo M. Williams and Deutsch & Hagen, for appellants.

Moodie & Moodie, Fay H. Pollock, and Jewell, Otte, Gatz, Magnuson & Collins, for appellees.

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

CLINTON, J.

The controversy which gives rise to these causes may be described as a sequel to the one decided in Anson v. Murphy, 149 Neb. 716, 32 N. W. 2d 271. These are two actions by the guardians of Teresa Murphy to set aside three deeds, the execution and delivery of which were allegedly procured by the exercise of undue influence by Leo A. Wolpert, Pastor of St. Joseph's Catholic Church, Lyons, Nebraska. Teresa Murphy, who was born in about 1880 or 1882, is grantor in each of the deeds. Each deed reserves to Teresa a life estate and conveys to George A. Carruthers a life estate commencing with the death of the grantor. One of the deeds executed on March 20, 1962, conveys a remainder in-

terest to Leo A. Wolpert, the defendant in No. 39262. A second deed executed the same date and a third executed May 17, 1962, convey remainder interests to St. Joseph's Cathodic Church, Lyons, Nebraska, the defendant in No. 39284. Each deed conveys a separate tract of land. The grantee, George A. Carruthers, a nephew of Teresa, died in 1968 and is not a party to this action. The two guardians, Marguerite Guill and Fern Anson, are nieces of Teresa and, together with Timothy Crawford, are her next of kin. Hereafter we will refer to the persons involved, except Teresa, by their surnames, and the corporate defendant as the church. At the time of trial Teresa was incapable of testifying and neither side sought to elicit her testimony. The two actions are consolidated on appeal and pursuant to stipulation were tried on the same record in the trial court.

The court set aside and vacated the deed of March 20, 1962, which conveyed the remainder interest to Wolpert. It found valid the other deed of March 20, 1962, which conveyed the remainder interest to the church, and quieted in the church its remainder interest. It set aside and vacated the deed of May 17, 1962, wherein the church was conveyed a remainder interest. Wolpert and the church have appealed from the decree setting aside the two deeds. The plaintiffs have cross-appealed from the order finding the deed of March 20, 1962, to the church valid. The contending parties seem to agree that the seemingly conflicting determinations of the trial court are irreconcilable.

We, on trial de novo, find for the defendants on their appeals and against the plaintiffs on their cross-appeal. The evidence, except for opinions expressed by witnesses, is for the most part undisputed. The plaintiffs and the defendants contend on the inferences to be drawn and to a considerable extent on the rules of law to be applied.

The result which we have reached is based upon the

entire record. We set forth such of the evidence as is deemed sufficient to present the positions of the parties. However, we do not specifically note each bit of evidence on which the plaintiffs found on argument.

Teresa is the survivor of the nine children of William and Catherine Murphy. Five of the children, including Teresa, never married. The unmarried children, after the death of their parents, had lived together on the land described in the deed to Wolpert. One of the married sisters was the mother of Carruthers. His mother died and he was raised from infancy to manhood by the unmarried children, including Teresa. In 1946 the controversies resolved by Anson v. Murphy, *supra,* arose. Thereafter Teresa was estranged from the plaintiffs Guill and Anson and from Crawford, all of whom were children of married sisters of Teresa. Although the plaintiffs and Crawford lived near Teresa and previously were friendly, there was, after the 1946 litigation, no visiting and, according to the plaintiffs, Teresa usually refused even to say hello to them when they passed on the street. Teresa was not estranged from Carruthers who visited Teresa regularly until shortly before his death on November 28, 1968.

The evidence is undisputed that Teresa was intelligent, managed her own affairs until 1969, was strong-minded, and in the words of the plaintiff Anson, even "bullheaded." Her first pronounced mental and physical deterioration commenced with the death of Carruthers at which time she was a resident at a rest home in Onawa, Iowa. The plaintiffs at that time personally conveyed to Teresa word of Carruthers' illness and his subsequent death, and accompanied Teresa to prayer services for Carruthers. These events were apparently the first break in the estrangement. Later the plaintiffs handled Teresa's affairs pursuant to a power of attorney and when her mental condition worsened were appointed guardians on September 23, 1969. Under

authorization of the county court, they brought the present actions.

A tape recording of a conversation between Teresa and Wolpert in 1962 indicates that Teresa and the unmarried brothers and sisters, her coowners, had discussed rather vague plans for the ultimate disposition of the property here involved to the support of Carruthers and to the Catholic Church and for the purposes of masses to be said for the members of the family after all had died.

Wolpert, born in 1916 and a native of Bloomfield, Nebraska, became Pastor of the church in 1954. He became acquainted with Teresa about a year and a half later. She was a member of his parish. Except for a period of illness in 1962, to which we will make reference later, and until 1968, Teresa resided alone on the farm during the warmer months and spent the winters with friends in Omaha and with neighbors on a nearby farm.

The evidence shows that Wolpert visited Teresa in her home about once a month in the warm months, sometimes alone and sometimes in the company of his housekeeper. There were also group picnics at the farm, usually involving nuns who were in Lyons teaching. Wolpert on two occasions took Teresa to Omaha to begin her winter sojourn with her friends, the Heinzmans or the Staleys. Wolpert acknowledges that Teresa had trust and confidence in him. The record supports the conclusion that she had affection for him and that he treated her with consideration. She, over the years of their acquaintance, requested the saying of masses and paid stipends totaling about $300. The evidence is sufficient to support a finding of a confidential relationship and an opportunity to exercise influence.

In February 1962 when Teresa was paying a social call at the farm home of neighbors she became ill. Doctor Wolpert, a brother of defendant Wolpert and

who had been Teresa's doctor since 1957, was called. She was hospitalized in Onawa. The diagnosis was "cerebral vascular spasm with temporary aphasia." She remained in the hospital from February 4th to the 7th and at the end of that period had recovered complete use of her extremities and her speech. She was then at her request discharged to the Elmwood Rest Home. Wolpert visited her immediately following her hospitalization and thereafter periodically in the rest home. On March 30, 1962, she asked to go home "because she felt the worst of the winter was over, and she could get along for herself."

In July 1959, the year in which her last surviving sister died, Teresa had made a will under the terms of which she bequeathed to her nephew, Carruthers, a life estate in all her real estate, which will provided that upon his death: "I give, devise and bequeath any and all real estate owned by me at the time of my death to my good friend and Pastor, Leo A. Wolpert, to have and to hold unto him, his heirs and assigns forever." This will bequeathed her household goods, personal effects, heirlooms, and family items to Carruthers. By this will all the rest of her estate was left to Wolpert who was named executor. The will was prepared by Mr. Dea, an attorney at West Point. It was executed in his office and witnessed by Teresa's friends from Omaha, William and Edith Heinzman, and by one Mary Jean Strehle. Dea testified that it was prepared in accordance with instructions previously given to him by Teresa and that she read it herself before executing it. He testified the Heinzmans were not present during the conference on the will. Neither was Wolpert. Wolpert, however, had accompanied Teresa and the Heinzmans to Dea's office on the day of its execution. Dea testified that Wolpert was probably in the waiting room during that time. It appears from the later taped conversation previously mentioned that at some time Teresa

informed Wolpert of the will, but the time is not disclosed. That conversation also discloses that at some time Teresa had mentioned to him in at least general terms the family plans.

In March of 1962 while Teresa was still at the Elmwood Rest Home, Dea received the following letter from her:

"Onawa, Iowa
"March 2, 1962

"Dear Mr. Dea:
"I have been worried about my Will being sure of taking care of George Carruthers and then giving my property to the Catholic Church and Father Wolpert as stated in my Will. Will you please come to the Onawa Rest Elmwood Rest Home and bring the necessary Deeds to allow me to do the same with them as I have with my Will.

"Sincerely,
"Teresa Murphy"

It appears from the evidence that Wolpert had some advance knowledge that Teresa was planning some different disposition of her property because he had sent to Dea a note asking that he check the accuracy of descriptions of the Murphy real estate. This note indicated Wolpert knew a request to Dea from Teresa should be "in Monday's mail." Both Dea and Wolpert testified that Wolpert had discussed Teresa's affairs with Dea on two or three occasions. The testimony does not disclose the exact area of discussion. Apparently either for tactical reasons or because of their varying theories of what the law required of them, or for both such reasons, neither side attempted to develop this subject. The same reasons apparently account for failure to elicit details of conversations between Wolpert and Teresa.

Dea testified that Teresa came to the office prior to the preparation of the deeds of March 20, 1962, and

that they were prepared in accordance with directions she then gave which differed from the disposition made in the 1959 will. Dea does not recall who brought her to the office on that occasion, but it was usually the Heinzmans. A Mrs. Beard, with whom Teresa stayed for about a month in 1962 after she left the rest home, stated the Heinzmans provided transportation to take Teresa to a lawyer in West Point during that time. Later Dea took the deeds which he had prepared to Teresa at the rest home in Onawa. There the deeds were explained to Teresa. Teresa executed the deeds before two witnesses who were employees of the rest home and acknowledged them before a notary public who came to the rest home at Dea's request. Wolpert was not present at the execution of these deeds nor was any representative of the church. Dea testified that Teresa instructed him to record the deeds which he did. Later, pursuant to her instructions, he delivered them to Wolpert.

With reference to the deed of May 17, 1962, he testified that he had a conference with Teresa in his office before that deed was prepared. The record does not clearly show why this deed was not prepared with the others. It does not appear to have been through oversight. He drafted the deed in accordance with the instructions that Teresa gave him. Later he met Teresa at the bank in Lyons where the deed was executed. That meeting had been arranged between Dea and Teresa by telephone. The deed was witnessed by Dea and acknowledged before Lawrence Youngman, a notary public and an employee of the bank. On this occasion Teresa came to the meeting at the bank by herself. Dea testified the deed was explained to Teresa before it was signed. Again he was told by her to record the deed which he did. He believes that he delivered the recorded deed to Wolpert.

As to the reason given by Teresa for making the

gifts, Dea testified: "She told me that she had had in the past, problems of a lawsuit with her next of kin involving this property, and that she definitely didn't want it to go to them, except for her nephew George Carruthers. There apparently had been family problems in the Murphy family, and she was very definite in telling me that she did not want the property to go to these relatives."

On April 4, 1962, Dea notified Teresa by letter that the deeds of March 20, 1962, had been recorded. She responded on April 29, 1962, by letter advising him to keep the deeds and she would have Wolpert pick them up. On May 28, 1962, Dea mailed to Teresa a copy of the third deed which had been recorded and billed her for services and expense. She remitted payment with a letter of thanks.

On July 9, 1962, the plaintiff Guill and her brother, Tim Crawford, having learned of the recording of the deeds, wrote to the Archbishop of the Omaha Diocese a letter which is in part as follows: ". . . while at this rest home something must have happened which caused her to make out deeds to most of the land which rightfully belonged to 4 legal heirs, 2 nieces and 2 nephews, Fern Anson, Marguerite Crawford, George Carruthers and Tim Crawford, who were not consulted when this took place. . . . It was always intended that this property should be passed down to the legal heirs after the lifetime use by the Uncles and Aunts who were all single, of which there is one living, Teresa Murphy. . . . We the heirs knowing her condition the past several years let her go her own way until she started to dispose of the above mentioned property, now we feel that some action must be taken." The Bishop responded, indicating that he had not previously heard of the matter, and suggested that they take the matter up directly with their aunt. This was by letter dated July 24, 1962. Apparently on the same day the

Bishop received the communication from Guill and Crawford, one of his assistants wrote a letter to Wolpert asking to be filled in on the matter and followed on July 24, 1962, with copies of the deeds.

As a consequence of these communications from the Bishop, Wolpert, on receipt of the letter of July 24, 1962, went to Teresa's home, informed her of the communications, and made the tape recording of the conversation.

The records in the office of the county judge of Burt County indicate that on August 28, 1962, Teresa withdrew from the custody of the judge a will deposited on July 13, 1959.

On August 31, 1962, Dea, following a conversation with Wolpert of which he made Teresa aware, made arrangements to see Teresa.

On September 5, 1962, in Dea's office, Teresa executed another will in which she gave all her property except her real estate to Carruthers. This will appointed Dea executor. It also recited: "I have previously conveyed my real estate, which conveyances I do ratify and confirm." This will was witnessed by the Heinzmans and Wilma Gentrup. The preparation of this will and its execution probably occurred during the office visit by Teresa. Wolpert was not present, nor was any representative of the church.

On August 21, 1967, Teresa sent to Wolpert a letter postmarked Decatur, Nebraska, the body of which is typed (all other communications from Teresa were in her own handwriting). However, the envelope was addressed in her own handwriting, and the letter was as follows: "Some of my relatives are objecting to me because I deeded my land to you and the Church. They seem to think they have a right to it, and will fight you in court after my death.

"I am writing you this letter to let you know I have not changed my mind, and I want you and St. Joseph's Church to have the land after George and I are gone.

"I do not want my relatives to have this land because

I had to fight them in court to keep it, and had to buy some of it. The land deeded to the Church is for the parish needs, and that deeded to you is to make sure my family, George and I will receive Masses and prayers." At the same time and presumably in the same envelope was a handwritten letter as follows: "Just a line to ask that everything be done just as I asked to have in my will and here are the names of those I want the Masses for the dead." Then followed a list of the deceased relatives and a request by Teresa that her own name and that of Carruthers be added after their deaths.

The theory of the plaintiffs is that although Teresa was strong-willed, she was easily influenced by kindness and by agreeing with her. The plaintiff Guill testified: "Well, she was very headstrong, strong-willed, she had to have her own way. In other words, if she couldn't pitch, she wouldn't play. . . . Well, she was easily influenced. All you had to do was agree with her that she was right and everybody else was wrong and pat her and she was easily influenced." This witness was unable either on direct or cross-examination to give any example of an instance where any person was able by such methods to accomplish his or her purposes with Teresa. The witness advanced a theory that monthly gifts of $25 to Carruthers were accomplished by such means. The witness also attributed to such influences the fact that Carruthers and Teresa's friend, Mrs. Staley, were named as coowners of bank accounts with her. The record makes it clear that there was no foundation for any of these opinions. The plaintiff Anson gave similar conclusionary testimony.

John Blodig, M.D., a practicing psychiatrist and an assistant clinical professor at the Creighton University School of Medicine, was called by the plaintiffs as an expert witness. He listened to the tape recording of the conversation between Teresa and Wolpert. He testified as to persuasive techniques he believed were used by Wolpert, and: "My opinion is that yes, this lady

could be influenced and just as any person could be. There is no person who is beyond influence so she could be. . . . Q. . . . was [she] a person who could be influenced to a significant degree by the type of conversation presented by the recording . . . between Teresa Murphy and Father Wolpert? . . . (A.) Yes. . . . No. I did not mean to imply that in any way she was being overpowered. The term I'm using is influenced. . . . Q. Would you say that you are using it in the sense that Teresa Murphy was—her will was overpowered by reason of this influence? A. No."

We now turn to the tape recording. We can set forth only the general nature of the conversation, together with some illustrative excerpts. Two witnesses brought to Teresa's home by Wolpert were present. The conversation began informally about some old furniture in the room. Wolpert then informed Teresa of the inquiries he had from the Bishop's representative. The following excerpts are illustrative. The explanatory matter in brackets we have inserted.

"FATHER WOLPERT: —which I have here now [referring to the copies of the deeds which he had brought with him]. It does not appear that Teresa actually examined the deeds on that occasion.] And the good Msgr. said, —well, I explained then to him what had happened.

"MISS MURPHY: Yes.

"FATHER WOLPERT: —that a number of years ago, and I don't know how long ago, you made a Will and in this Will you were disposing of your estate in favor of the Church over at West Point, or over at Lyons—

"MISS MURPHY: Uh-huh.

"FATHER WOLPERT: —and occasionally you would mention this to me, and then on occasion you also mentioned to me that you were not sure you had everything in the Will exactly the way you wanted it.

"MISS MURPHY: No, surely.

"FATHER WOLPERT: And so—at one point then you made the decision that you would like to dispose of it to make sure it would get where it belonged and that you would be taken care of and that George would be taken care of—

"MISS MURPHY: Yes, that's what I want.

"FATHER WOLPERT: —and that is the reason for these deeds. . . . [Reading from the Bishop's letter to Guill et al.] 'Your letter has given me my first knowledge of this matter and it does not appear to me that your Archbishop can be concerned with the way Teresa Murphy disposes of her property. If you are not satisfied I think you should take the matter up with her—'

"MISS MURPHY: I wish they would. . . . [Later the letter from Guill and Crawford was read in part.]

"FATHER WOLPERT: All right. Well, now, it's dated July 19, 1962, 'Archbishop Gerald T. Bergan, 2507 Cass Street, Omaha, Nebraska. Dear Archbishop Bergan: After ninety days hesitation and with deep regret, we feel that we must bring our problem to your attention. We sought legal advice on this matter and were advised to first contact you to show you our problem and save undesirable comments. The problem is this: Our Aunt Teresa Murphy, who is eighty-one years old and infirm, —'

"MISS MURPHY: I am not eighty-one, thank you.

"FATHER WOLPERT: How about infirm? (Laughing)

"MISS MURPHY: Fine. (Laughing)

"FATHER WOLPERT: '—suffered a stroke on the 4th day of February, 1962, was taken to the Onawa, Iowa Hospital and a short time later was transferred to a rest home in Onawa in which Dr. P. L. Wolpert has an interest, and while at this rest home something must have happened which caused her to make out deeds to most of the land, which rightfully belonged to four legal heirs, two nieces and two nephews—'

"MISS MURPHY: How did it rightfully belong to

them when it was a Supreme Court decision that it was mine? Ha.

"FATHER WOLPERT: Well, she mentions then who they are, 'Fern Anson, Marguerite Crawford, George Carruthers and Tim Crawford.'

"MISS MURPHY: Uh-huh.

"FATHER WOLPERT: '—who were not consulted when this took place.'

"MISS MURPHY: Oh dear (laughing). After putting $11,000 down the drain on a lawsuit, I think I bought it, as well as having it given to me. . . .

"FATHER WOLPERT: Well, so they go on: 'The land, 160 acres, was deeded to Father Leo A. Wolpert of the Lyons, Nebraska parish, and one 160 acres to the St. Joseph Catholic Church of Lyons and later another 80 acres was deeded the same way.'

"MISS MURPHY: That I bought and paid for.

"FATHER WOLPERT: 'This aunt is a single lady and all of our mothers were her sisters. It was always intended that this property should pass down to the legal heirs after the life time use—'

"MISS MURPHY: No, there never was said a word—I'm sorry before God. There was never a word mentioned only of George Carruthers for this till he died. That was really the way, and then it was to go for Masses for the dead after we're all gone. That's why I—no, I—you know the Church as I said, don't say Masses. It's the Priest. Go on, Father, excuse me.

"FATHER WOLPERT: Well, so I'll repeat what she said: 'It was always intended—'

"MISS MURPHY: No.

"FATHER WOLPERT: '—that this property should be passed on to the legal heirs after the lifetime use by the uncles and aunts.'

"MISS MURPHY: How was she going to prove that?" The balance of the letter was read, interrupted by various interjections by Teresa similar in vein, includ-

ing references to the 1946 litigation, and a conversation with her lawyer at that time:

"MISS MURPHY: Yes, he wanted me to. He said, 'Teresa, I know you don't want to go to court,' and I said, 'No, I have never had to and I don't want to.' But, I said, 'I can if I have to.' 'Well,' he said, 'Let's put on a labor bill.' He said, 'This whole thing wouldn't pay for it after 45 years.' I said, 'Oh no,' I said, 'if they can take it from me legally they can have it.' 'But,' I said, 'I'm not charging anybody for what I've done.' He said, 'All right, Teresa. That's all right.'

"FATHER WOLPERT: So in other words, you went to court—

"MISS MURPHY: You know, I wouldn't have to give anybody a nickel. Babe [Carruthers' nickname] nor anybody else. Only they said to give this—that was a verbal contract with the two brothers and the sister, and Mary first said she'd like it to go to Father Flanagan's for Masses and George and Bryan said, 'No,' that they were becoming self-supporting and leave it so it would be—the Masses would be in Lyons. Because I know when I'm gone, I might be a poor Catholic, but there won't be no more Masses. You know people."

Later there were references to what was apparently the execution of the 1959 will.

"MISS MURPHY: You know you and Mr. and Mrs. Heinzman and I went down to Mr. Dea's. Isn't it five or six years ago? . . .

"FATHER WOLPERT: So you haven't changed your mind one bit for at least 5 or 6 years? [The actual elapse of time was about 3 years.]

"MISS MURPHY: Not one bit. But I never would either. No. I never would. If they want a court fight, they can have it. I'm ready."

Plaintiffs point out the discrepancy between the 1959 will and the deed dispositions as evidence of confusion on the part of Teresa.

Later the conversation turned to a conversation that Teresa apparently had with her brother, George Murphy, during his lifetime. This led to further discussion about the interest Carruthers took by the deed. Carruthers, of course, was still living at the time of this conversation. "MISS MURPHY: Oh, no, no. It was life estate and that's the same. He has that till he dies."

The principal position of the plaintiffs is that because of the confidential relationship existing between Wolpert as Pastor and Teresa as parishioner, a presumption arises that the deeds were procured as the result of undue influence and are therefore presumptively invalid; that the burden was upon the defendant Wolpert to produce evidence to overcome that burden and that he has not done so. Plaintiffs also take the position that Teresa did not know the nature and effect of the deeds; that the making of the deeds was improvident and without an opportunity for independent advice; and that these things, together with the presumption of undue influence, require the deeds be set aside.

The defendants argue that any presumption which may have arisen has been clearly overcome by (1) evidence of a long-standing plan for disposition of the property which involved Carruthers, the Catholic Church, and its priests; (2) the family estrangement which eliminates the plaintiffs and Crawford as natural objects of Teresa's bounty; (3) independent evidence such as the statements of Teresa in the taped conversation and her later letter of August 21, 1967; and (4) evidence that Teresa did know the nature and effect of the deeds and that it was her voluntary and knowing act. The plaintiffs counter with the argument that the subsequent acts are the continuing result of undue influence. They argue that Dea was doing Wolpert's bidding rather than Teresa's. We find that the evidence does not support that conclusion.

The following principles are applicable: "A case

of undue influence is made out, in the case of a deed, where it is shown by clear and satisfactory evidence (1) that the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. . . . The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor." Eggert v. Schroeder, 158 Neb. 65, 62 N. W. 2d 266. See, also, Blochowitz v. Blochowitz, 122 Neb. 385, 240 N. W. 586, 82 A. L. R. 949.

"The one attacking an instrument on the ground that its execution was procured by undue influence has the burden resting on him to establish that fact. However, the circumstances under which it was made, the condition of the grantor at the time, and the injustice to her and her heirs, if it is upheld, may be such as to cast upon the grantee the burden of going forward with the evidence to show that it is not tainted with undue influence but is the deliberate and bona fide act of the grantor." Conry v. Langdon, 181 Neb. 53, 146 N. W. 2d 782.

"It is impossible to lay down any hard and fast rule in cases of this kind as to when a presumption of undue influence arises. The rule must, of necessity, be applied according to the particular facts and circumstances of each case in which the question arises. Generally, it may be said that if the facts and circumstances show such confidential, fiduciary, or trust relationship that it would be inequitable to sustain the deed in question, then such presumption arises, and the burden of going forward with the evidence rests upon the grantee to show the bona fides thereof. Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645." Cunningham v. Quinlan, 178 Neb. 687, 134 N. W. 2d 822. See, also, Gaeth v. Newman, 188 Neb. 756, 199 N. W. 2d 396.

"Where the validity of an alleged gift between persons occupying a confidential relationship is attacked, the

burden of proving that a confidential relationship existed between the parties rests on the one attacking the gift. . . . Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence. . . . The mere existence of a confidential relationship between grantor and grantee does not of itself show undue influence . . . where the deed is made by the grantor with full knowledge of its nature and effect, and because of the deliberate desire of the grantor." Gaeth v. Newman, *supra*.

The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only to determine whether it was the voluntary act of the grantor. The fact that the grantor has others who were so related to him who were proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance. See Broeker v. Day, 124 Neb. 316, 246 N. W. 490.

It is clear from the evidence we have set forth that a confidential relationship within the meaning of our previous holdings did exist between Wolpert and Teresa. It is acknowledged that she reposed trust and confidence in him. Although details are lacking, she did at some point and to some degree discuss with him the disposition of her property. These circumstances placed upon the defendants the burden of going forward (although not changing the burden of proof) with evidence to show that the conveyances were the deliberate acts of the grantor. We conclude that the defendants have carried the burden cast upon them by the foregoing rule and that the deeds were not the result of undue influence.

The following considerations are persuasive: (1) A purpose to benefit the Catholic Church and to assure the saying of masses for the deceased members of the family, after making provision for the security of Carruthers during his lifetime, had its origin in the minds of Teresa and her unmarried brothers and sisters long

before Wolpert was known to Teresa. (2) The evidence clearly supports the position that Teresa did not intend that Guill, Anson, and Crawford benefit from her estate. (3) The spontaneous interjections of Teresa as Wolpert read to her the letter from her niece and nephew to the Bishop and the Bishop's response clearly demonstrate that the intention continued. (4) The letter of August 21, 1967, affirms her continued purpose that the church and Wolpert receive the property after her death and the death of Carruthers. The plaintiffs imply that Wolpert is responsible for this letter, but there is no evidence whatever to sustain the implication. Wolpert testified he did not prepare it nor type it and does not know who did, and that the receipt of the letter was unexpected by him. The letter itself indicates that it was impelled by some recent act of her relatives. (5) The expert testimony of Dr. Blodig, upon which the plaintiffs rely, supports the proposition that such acts as may be attributed to Wolpert did not overpower the will of Teresa so that she did something she did not want to do. (6) The correspondence between Dea and Teresa did not make any secret of the fact that Wolpert had talked to Dea. The fact the deeds themselves were promptly recorded at Teresa's direction evidences the lack of secrecy. (7) The record demonstrates that Teresa did know the nature and effect of the deeds. There is in the record evidence of statements by her that she considered her needs small and that the income from the real estate, along with her personal property, was sufficient for her purposes. She was mistaken, of course, by reason of the circumstance of her exceptionally long life and her ultimate total incapacitation. It is evident that she assumed she would not outlive Carruthers. We, however, must view the matter as the grantor apparently saw it at the time she executed the deeds. (8) There is no evidence of any kind to support the position that Teresa was in a weakened condition of mind or body when the deeds were executed. People

who dealt with her in business matters affirmatively testified as to her mental capacity. An employee of the rest home where she was for a period of weeks following the 1962 illness testified that Teresa's mental and physical condition was so good that the witness wondered why she was there.

The plaintiffs rely upon cases from other jurisdictions which either do not conform to our law, or which would if followed establish a rule sui generis in cases of alleged undue influence where the grantee is a church or a clergyman. They cite Corporation of Latter-Day Saints v. Watson, 25 Utah 45, 69 P. 531; Corrigan v. Pironi, 48 N. J. Eq. 607, 23 A. 355; Finegan v. Theisen, 92 Mich. 173, 52 N. W. 619; and Coughlin v. St. Patrick's Church of Tama, 201 Iowa 1268, 209 N. W. 426.

The decree of the court in No. 39262 is reversed and the cause remanded with directions to enter judgment for the defendant. The decree of the court in No. 39284 is affirmed so far as the deed of March 20, 1962, is concerned, and reversed insofar as the deed of May 17, 1962, is concerned, and the cause remanded to the trial court with directions to enter judgment for the defendant.

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

NANCY LEE ASHLEY, APPELLANT, V. JAMES VAN ASHLEY, APPELLEE.
217 N. W. 2d 926

Filed May 16, 1974, No. 39287.

Divorce: Domicile: Constitutional Law: Time. Section 42-349, R. S. Supp., 1972, which imposes a 1-year residency requirement for dissolution of marriage, unless the marriage was solemnized in Nebraska and one party has resided in Nebraska continuously, is constitutional.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Stephen R. McCaughey and Steven Swihart, for appellant.

No appearance for appellee.

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

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

BOSLAUGH, J.

This is an action for the dissolution of a marriage. The petition alleged the defendant was a resident of Kansas and the plaintiff had been a resident of Nebraska for 2 weeks.

Section 42-349, R. S. Supp., 1972, provides in part: "No action for dissolution of marriage may be brought unless at least one of the parties has had actual residence in this state with a bona fide intention of making this state his permanent home for at least one year prior to the filing of the petition, or unless the marriage was solemnized in this state and either party has resided in this state from the time of marriage to filing the petition."

The petition sought a declaration that section 42-349, R. S. Supp., 1972, was unconstitutional in that it amounted to a penalty and a restraint upon the plaintiff's right to travel and denied the plaintiff due process and equal protection of law. A general demurrer filed by the Attorney General, pursuant to section 25-21,159, R. R. S. 1943, was sustained and the action dismissed. The plaintiff appeals.

The sole question presented by the appeal is the constitutionality of the durational residency requirement of the Nebraska divorce law. There is a substantial division of authority concerning the validity of such statutes. Similar statutes have been held valid in Davis v. Davis (Minn., 1973), 210 N. W. 2d 221; Coleman v. Coleman, 32 Ohio St. 2d 155, 291 N. E. 2d 530; Sosna v. State of Iowa, 360 F. Supp. 1182; Porter v. Porter, 112 N. H. 403, 296 A. 2d 900; Place v. Place, 129 Vt. 326, 278 A. 2d 710; Shiff-

man v. Askew, 359 F. Supp. 1225; Caizza v. Caizza (Fla. Sup. Ct.) 42 L. W. 2511; Stottlemyer v. Stottlemyer, 224 Pa. Super. 123, 302 A. 2d 830. Other statutes have been held invalid in Wymelenberg v. Syman, 328 F. Supp. 1353; Mon Chi Heung Au v. Lum, 360 F. Supp. 219; Larsen v. Gallogly, 361 F. Supp. 305; Fiorentino v. Probate Court (Mass. Sup. Jud. Ct.), 42 L. W. 2540. Both the Sosna case and the Larsen case are pending on appeal in the United States Supreme Court. Probable jurisdiction in the Sosna case was noted on February 19, 1974. 42 L. W. 3457.

It is fundamental that jurisdiction in a divorce proceeding ordinarily depends upon domicile. Williams v. North Carolina, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366. To insure the integrity of its judicial proceedings, Nebraska has a compelling state interest in ascertaining the domicile of parties who seek a dissolution of marriage in its courts. The problem is whether a durational residency statute is a reasonable method of assuring that at least one of the parties is domiciled in the state. It may well be that a durational residency statute is the least restrictive manner of determining domicile. Coleman v. Coleman, *supra*.

In Davis v. Davis, *supra*, the Minnesota Supreme Court relied in part upon Vlandis v. Kline, 412 U. S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63. The Vlandis case involved a durational residency statute relating to university tuition. The majority opinion in Vlandis stated the decision should not be construed to deny a state the right to impose "a reasonable durational residency requirement" as one element to demonstrate bona fide residence. A 1-year residence requirement for such purpose has been approved. See Starns v. Malkerson, 326 F. Supp. 234, affirmed, 401 U. S. 985, 91 S. Ct. 1231, 28 L. Ed. 2d 527; Sturgis v. Washington, 368 F. Supp. 38, affirmed, 414 U. S. 1057, 94 S. Ct. 563, 38 L. Ed. 2d 464.

The Nebraska statute does not deny all forms of marital relief to parties who cannot satisfy the residency re-

quirement. By a petition for legal separation a party can obtain any relief that is merited short of divorce. After the residency requirement has been satisfied, dissolution of the marriage may be requested by amendment. § 42-350, R. S. Supp., 1972. The only effect of the residency requirement is to delay the dissolution of marriage in some cases. Divorce itself is not a constitutional right or a basic necessity to survival.

We conclude section 42-349, R. S. Supp., 1972, is valid. The judgment of the District Court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The issue here is not limited to whether or not Nebraska has the right to impose a durational residency requirement of 1 year as a method of determining domicile for purposes of jurisdiction in a divorce proceeding. The Nebraska statute imposes no residence requirement where the marriage was solemnized in Nebraska and one party has resided in Nebraska continuously since the marriage. For that reason the rationale of cases such as Fiorentino v. Probate Court (Mass.), 42 L. W. 2540, is persuasive.

SIDNEY R. HENDERSON, APPELLEE, V. HELEN M. JOPLIN, FORMERLY HELEN M. BULLOCK, APPELLANT.
217 N. W. 2d 920

Filed May 16, 1974. No. 39294.

1. **Corporations: Contracts.** No public policy forbids contracts for promoting and managing a corporation according to law and for lawful purposes, or for determining among the promoters what the stock shall be and how it shall be divided, or for election of themselves as officers and employment by the corporation when formed.

2. ———: ———. A control agreement between promoters or stockholders owning a majority of the stock of a corporation as to a course of corporate policy or as to officers or directors whom they will elect is not against public policy where there is no evidence of fraud or wrong against creditors or other stock-

holders, and such control agreement does not contravene any express constitutional or statutory provision and is not otherwise illegal.

3. ———: ———. A control agreement between promoters of a corporation to be organized will be interpreted in accordance with the intention of the parties as expressed.
4. ———: ———. The promoters of a corporation occupy a relation of trust and confidence toward the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries.
5. **Corporations: Contracts: Parties.** An individual stockholder may bring an action in his own name to recover for a breach of a stockholders control agreement when he has sustained a loss separate and distinct from that of other stockholders. An individual stockholder may not bring an action in his own name to recover for wrongs done to the corporation or its property.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed in part, and in part reversed.

Wright & Simmons, for appellant.

Robert M. Harris, for appellee.

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

McCOWN, J.

This is an action for breach of a contract which provided for the formation of a corporation; the ownership of the stock; and the employment of both contracting parties by the corporation. The jury returned a verdict in favor of plaintiff in the sum of $6,000; $5,000 for the loss in value of his shares of corporate stock; and $1,000 for lost salary. The defendant has appealed.

Following the death of her husband, the defendant acquired a retail liquor business operated as a sole proprietorship. To induce plaintiff to enter the business, the defendant made an agreement with the plaintiff on August 29, 1967, to incorporate the business. The preincorporation agreement provided that the plaintiff and

defendant would incorporate the liquor business owned by the defendant. After securing the necessary licenses, the corporation would purchase from the defendant all the assets of the business, effective October 1, 1967. The defendant was to receive capital stock of the corporation in exchange for the assets of the business. Plaintiff was to purchase 25 percent of that stock from the defendant, 20 percent down at the time of sale and the balance by delivery of a promissory note on stated terms. The agreement provided that the corporation was to be governed by a board of directors of not more than three and that so long as the plaintiff owned the stock, he was entitled to elect one director. The agreement also provided that the defendant "shall be the President and Treasurer of the Corporation" and the plaintiff "shall be the Vice President, Secretary and General Manager. Each of the parties shall thereafter draw similar salaries to be agreed upon by the Directors and no bonuses shall be paid by the corporation to either of the parties."

The agreement also provided: "Each of the parties shall devote full time to the business of the corporation and until changed by the Board of Directors each shall be paid a salary of $700.00 per month, payable on the 15th and the 1st of each month." It also provided: "(T)he parties will enter into a written agreement whereby each agrees that she or he will not sell any stock in the corporation without giving the other the first option to purchase it" except that the defendant "may sell or give any of her stock to her son, Charles Jefforey Joplin."

On the same day, the parties also signed articles of incorporation for Chuck Joplin's Beverage Super Market, Inc.

The company was duly incorporated and the parties entered into performance of their agreement. Plaintiff's 25 percent of the stock was 105 shares, for which the purchase price was $10,500. Defendant held the

remaining 75 percent of the stock. All the terms of the agreement were performed initially except that no written agreement not to sell stock without first offering it to the other was ever entered into. At a later time the defendant transferred some shares of stock to her son but at all times the defendant retained the ownership of a majority of the capital stock. Except for the failure to reduce it to writing, there is no evidence that either party ever breached the agreement with respect to the prohibition against selling of stock without first offering it to the other.

The business was prosperous during the years 1967, 1968, and 1969. Sometime during the year 1970, it became apparent that the business was not continuing to be as prosperous as it had been in previous years. A large part of the testimony is devoted to assessing the blame for this lack of prosperity. Several things of importance occurred in 1970. The defendant remarried in March. She transferred some of her stock to her son. In May, liquor by the drink became legal in Scottsbluff, the business obtained such a license, remodeled the premises, and added live entertainment. Grocery stores and supermarkets obtained package liquor licenses in Scottsbluff and began to sell beer and liquor at reduced prices.

In December 1970, having become discouraged as to the prospects, the plaintiff proposed to the defendant that she buy him out or he buy her out or that they sell to someone else. The defendant did not commit herself. On January 19, 1971, the defendant's attorney wrote a letter to plaintiff advising him of a special meeting of the board of directors called for January 25, 1971. The letter also stated: "Mrs. Bullock states that you advised her that you would like to get out of the business and would like to have the business sold. She, however, does not wish to sell and under the circumstances feels that you are no longer a good manager for the business. At the meeting she intends to bring up the matter of

terminating your employment as manager as of January 31, 1971."

At the meeting of the board of directors on January 25, 1971, the plaintiff stated that he "had never been fired from a job before and I would like to resign." He submitted his written resignation as general manager. His resignation was accepted. The plaintiff then paid the defendant the balance due on the note for purchase of his stock and departed. The defendant's son was then appointed general manager and secretary. Plaintiff completed work for the month of January 1971. His salary at the time of termination of his employment was $900 a month.

By action of the board of directors, the plaintiff voting "no," the liquor business was sold on June 30, 1971, for $8,000, plus the inventory, and cancellation of its lease obligations.

Under the instructions of the court, if the jury found for the plaintiff on the issue of breach of contract, it was to fix the damages for (1) the loss of value of the plaintiff's shares of stock on January 25, 1971; and (2) the salary lost for the months of February, March, April, May, and June 1971. The jury's verdict was for $5,000 on item (1) and $1,000 for item (2).

The defendant contends that the cause of action for breach of the preincorporation contract belongs to the corporation and not to the plaintiff. She also asserts that agreements between directors or stockholders purporting to control the actions of directors after they are elected in handling the ordinary business of a corporation are void. The modern rule is contrary. 1 Fletcher Cyclopedia Corporations (1963 Rev. Ed.), section 191, page 714, states: "No public policy forbids contracts for promoting and managing a corporation according to law and for lawful purposes, or for determining among themselves what the stock shall be and how it shall be divided, or for election of themselves as officers and employment by the corporation when formed."

A large majority of jurisdictions hold that such agreements are not invalid unless inspired by fraud or unless they will prejudice other stockholders. Nebraska has clearly adopted the majority rule where the control agreement was between two stockholders owning a majority of the stock of the corporation. In E. K. Buck Retail Stores v. Harkert, 157 Neb. 867, 62 N. W. 2d 288, this court said: "We conclude that stockholders control agreements are not invalid per se. If they are based on a sufficient consideration between the contracting stockholders they are valid and binding if they do not contravene any express constitutional or statutory provision or contemplate any fraud, oppression, or wrong against creditors or other stockholders, or other illegal object. Where such a situation appears it is not illegal or against public policy for two or more stockholders owning the majority of the shares of stock to unite upon a course of corporate policy, or upon the officers, including directors, whom they will elect."

It is difficult, if not impossible, to put the law as to the liability on promoters' contracts into any definitive terms as to a particular class of contract. Such agreements are covered by the general principles of contract law, and, ordinarily, are governed by the intention of the parties as expressed. We think it clear that the agreement here, while technically a preincorporation agreement between promoters, was intended to serve as a stockholders' agreement after incorporation. There is no evidence whatever that there was any fraud or prejudice against anyone, and the two contracting parties were to be and became the holders of all the stock.

This case has many factual similarities to the North Carolina case of Wilson v. McClenny, 262 N. C. 121, 136 S. E. 2d 569. In upholding the validity of a preincorporation agreement between promoters dealing with the designation of officers and directors of a company to be formed, and the salaries to be paid, that court said: "A competent person gainfully employed in his chosen field,

will not ordinarily give up a secure position to take another with a new enterprise without some assurance as to his future. No corporation could ever be created without a preliminary agreement between the parties proposing to form it as to the mode and manner of doing so. * * * The promoters of a corporation occupy a relation of trust and confidence towards the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries. * * * There is no evidence here that the contract between the plaintiff and defendants was not made in good faith or that, at the time it was made, it was not in the best interest of the corporation. Prima facie, it was a valid exercise of the promoter's right to contract."

That case also makes it clear that any agreement of this kind for the employment or continued employment of a corporate officer contains the implied condition that the agreement may be terminated at any time for cause. While there was some attempt to establish cause for the plaintiff's discharge, the jury verdict removes the issue from doubt, and the evidence supports the jury verdict that the plaintiff's employment as general manager at a salary of $900 per month was terminated by the defendant without just cause and constituted a breach of the agreement.

The defendant asserts that there is insufficient proof as to the amount of salary lost because the evidence disclosed that the plaintiff was employed after February 1, 1971, and before June of 1971, and plaintiff had a duty to mitigate damages. There was no evidence as to the exact nature of his new work for an insurance company nor what his salary or income was. The defendant therefore contends that the evidence of damages for lost salary is speculative and conjectural.

There is no question that the plaintiff's salary at the time his employment was terminated was $900 per month,

and that 5 months' salary is involved. While it is true that the plaintiff had a duty to mitigate damages, the burden of proving matters in mitigation or reduction of the amount of plaintiff's damages was on the defendant. See, Lake v. Southwick, 188 Neb. 533, 198 N. W. 2d 319; Fulton v. Tennessee Walking Horse Breeders' Assn., 63 Tenn. App. 569, 476 S. W. 2d 644. The latter case makes it clear that any matter in mitigation of damages should be considered but that in the absence of any evidence pertaining to mitigation of damages, the amount of damages for breach of an employment contract is measured by the salary rate under the contract. It is obvious that the jury took into account the substituted employment of the plaintiff in view of the fact that the jury verdict is for only $1,000 while the full amount of the lost salary was $4,500. The plaintiff has not cross-appealed. The verdict of the jury for damages for loss of salary in the sum of $1,000 must therefore be affirmed.

We turn now to that portion of the verdict awarding damages of $5,000 for the loss of value of the plaintiff's shares of stock on January 25, 1971. In this connection the only evidence as to the value of plaintiff's shares of stock on January 31, 1971, was the statement of plaintiff: "I would say it was around $20,000." The balance sheet of December 31, 1970, if goodwill were subtracted, would show a net worth of the business of less than $20,000, and plaintiff's one-fourth interest would be approximately $5,000. There is no evidence as to the value of the plaintiff's shares as of the date of sale of the business on June 30, 1971. By implication from indirect evidence it might be determined that plaintiff's shares as of that date were worth nothing.

Even if it be accepted that the value of plaintiff's shares substantially decreased after January 25, 1971, there is no evidence that any decrease was the result of any breach of contract, or specifically the termination of plaintiff's employment as general manager. There

is nothing to indicate that any decrease or decline was not due to the same local economic causes which had already persuaded plaintiff that the business should be sold. There is no evidence that if plaintiff had been retained there would have been no such decrease. Neither is there evidence that the conduct of his successor as general manager produced the decrease.

It is also apparent from the evidence that any failure of the defendant to devote full time to the business prior to January 25, 1971, had been waived by the plaintiff. Any subsequent default on that score, along with any other claims of subsequent misconduct by defendant, constituted wrongs against the corporation or its property which would reduce the value of all corporate stock, and not plaintiff's stock alone. Such actions did not constitute additional breaches of the preincorporation agreement, nor result in special and individual damages to the plaintiff.

In E. K. Buck Retail Stores v. Harkert, 157 Neb. 867, 62 N. W. 2d 288, we acknowledged the rule that a stockholder may sue for breach of a stockholders' control agreement when he has sustained a loss separate and distinct from that of other stockholders. We held that a stockholder may not bring an action in his own name to recover for wrongs done to the corporation or its property which result in a decrease of value of all corporate shares. The fact that the action is based on a stockholders control agreement does not authorize a personal action unless the injury is to him or his stock alone and not common to all stockholders. Any decrease in value of plaintiff's stock here did not result to his stock alone and any cause of action for such damage remains in the corporation. That portion of the verdict of the jury awarding damages of $5,000 to the plaintiff for the loss in value of his shares of stock was erroneous.

That portion of the judgment of the District Court

awarding damages to plaintiff in the sum of $1,000 is affirmed, and that portion of the judgment awarding damages of $5,000 for loss of value of plaintiff's shares of stock is reversed and vacated.

AFFIRMED IN PART, AND IN PART REVERSED.

LUCILLE VODEHNAL, APPELLANT, V. GRAND ISLAND DAILY INDEPENDENT, A CORPORATION, APPELLEE.
218 N. W. 2d 220

Filed May 16, 1974. No. 39295.

1. **Dismissal.** It is within the sound discretion of the District Court to dismiss a petition without prejudice for disobedience by the plaintiff of a reasonable order concerning the proceedings in the action.
2. **Pleadings: Appeal and Error.** An order of the District Court requiring a petition to be made more definite and certain will be sustained on appeal unless it clearly appears that the court abused its discretion.

Appeal from the District Court for Hall County: DONALD H. WEAVER, Judge. Affirmed.

John A. Wagoner, for appellant.

Kenneth H. Elson, for appellee.

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

NEWTON, J.

This is an action for libel. The trial court sustained a motion to make plaintiff's petition more definite and certain. Upon a willful failure by plaintiff to abide by the order of the court, the case was dismissed. We affirm the judgment of dismissal.

The alleged libel resulted from the publication of an item in defendant's newspaper wherein plaintiff was said to have been arrested and convicted on a misdemeanor charge. The court sustained a motion to make the petition more definite and certain and directed

plaintiff to allege whether or not the alleged publication was prompted by actual malice and whether or not plaintiff, within 20 days after acquiring notice of the publication, gave defendant notice by registered mail specifying the libelous statement and requesting correction. Plaintiff refused to amend and stood on her petition.

Section 25-840, R. R. S. 1943, provides in part: "The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication."

Section 25-840.01, R. R. S. 1943, provides in part: "(1) In an action for damages for the publication of a libel by any medium, the plaintiff shall recover no more than special damages, unless correction was requested, as herein provided, and was not published. Within twenty days after knowledge of the publication, plaintiff shall have given each defendant a notice by registered mail specifying the statements claimed to be libelous and specifically requesting correction. * * *

"(2) This section shall not apply if it is alleged and proved that the publication was prompted by actual malice, and actual malice shall not be inferred or presumed from the publication."

Section 25-833, R. R. S. 1943, authorizes motions to make pleadings more definite and certain.

Section 25-601, R. R. S. 1943, authorizes the dismissal of an action without prejudice for disobedience by the plaintiff of an order concerning the proceedings in the action. Under similar circumstances involving a failure to comply with an order to amend a petition to make it more definite and certain, this court held: "* * * it is within the sound discretion of the district court to dismiss a petition without prejudice for disobedience by the plaintiff of a reasonable order concerning the proceedings in the action." Howell v. Malmgren, 79

Neb. 16, 112 N. W. 313. See, also, Bushnell v. Thompson, 133 Neb. 115, 274 N. W. 453.

In Rhodes v. Crites, 173 Neb. 501, 113 N. W. 2d 611, we held: "An order of the district court requiring a petition to be made more definite and certain will be sustained on appeal unless it clearly appears that the court abused its discretion."

Plaintiff seeks to justify her failure to comply with the order of the court on the ground that in her second amended petition she has asserted sections 25-840 and 25-840.01, R. R. S. 1943, of the statutes to be unconstitutional and that compliance with the order of the court would waive the defense of unconstitutionality. The argument is ingenious but not sound. Obviously plaintiff did not comply with the statutory requirements. Had she done so, compliance with the order of the court would not have been detrimental. On the other hand, if she alleged a failure to comply, her defense of unconstitutionality would have been preserved. Motions to make more definite and certain are addressed to the sound discretion of the court and we fail to find an abuse of discretion in this instance.

We do not reach the questions of unconstitutionality posed in plaintiff's brief. This court will refuse to pass upon the constitutionality of a statute or a rule promulgated by a court unless it is necessary for a proper disposition of an action pending in this court. See Summit Fidelity & Surety Co. v. Nimtz, 158 Neb. 762, 64 N. W. 2d 803. See, also, Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N. W. 2d 397.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

I concur in the result. The motion to make more definite and certain was in effect a motion for discovery through admissions and should be treated as though it were a request for admissions. The trial court obviously

did not abuse its discretion in granting the motion to make more definite and certain. When the plaintiff failed to comply, she ran the risk of having her petition dismissed for failure to comply with a proper order of the court. I agree that the trial court did not abuse its discretion in dismissing the petition.

I do not agree with the opinion if it be taken to imply, as it seems to me it does, that in order to state a cause of action for libel against a publication medium, a plaintiff needs to anticipatorily plead the facts with reference to the subject matter of sections 25-840 and 25-840.01, R. R. S. 1943. See § 25-839, R. R. S. 1943. Section 25-840, R. R. S. 1943, refers to a matter of defense and reply. Section 25-840.01, R. R. S. 1943, refers to a matter of partial defense on damages. It is optional with the plaintiff whether he pleads actual malice, but he runs the risk of having his damages limited to special damages unless he at some point does so and, of course, follows with the requisite proof.

CARL A. KARMANN ET AL., APPELLEES, V. RAY HAASE, APPELLANT, MARGARET POGGENSEE ET AL., INTERVENERS-APPELLANTS, MARGARETHE REICHE WILLEMS ET AL., DEFENDANTS-APPELLEES.

218 N. W. 2d 242

Filed May 16, 1974. No. 39296.

1. **Appeal and Error: Evidence: Witnesses.** Where the evidence is irreconcilable and in direct conflict, this court will consider the trial court's observation of the witnesses and their manner of testifying, and that the court must have accepted one version of the evidence rather than the opposite.
2. **Deeds: Records: Notice.** Section 76-238, R. R. S. 1943, is designed to protect a subsequent purchaser even though there was a prior conveyance or transaction concerning the property, provided the subsequent purchaser recorded his title first, and provided further that the subsequent purchaser was a bona fide purchaser without notice of any other claims to the property.

Appeal from the District Court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed in part, and in part reversed and remanded.

Mueting & DeLay, for appellant and interveners-appellants.

Brogan & Stafford, for appellees Karmann et al.

John R. Mapes and William G. Whitford, for appellees Willems et al.

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

SPENCER, J.

Plaintiffs, Carl A. Karmann and LeJane F. Karmann, brought this action to enjoin Ray Haase, defendant, from trespassing upon their land which included the east half of Lot 1, Reiche's Sunshine Acres, in the southwest quarter of Section 11, Township 23 North, Range 1 West of the 6th P. M., Madison County, Nebraska.

Mary Ann Haase, Ray's wife, and Margaret Poggensee, his mother, filed a petition in intervention, and joined with defendant in a cross-petition, seeking to quiet title in themselves to the east half of Lot 1. They joined Margarethe Reiche Willems and Margarethe Reiche Willems, executrix of the estate of Oswald Reiche, deceased, as additional defendants, and sought damages from them in the event title was not quieted in cross-petitioners. By stipulation, Margarethe Reiche Willems as an individual was dismissed from the action with prejudice.

The trial court granted plaintiffs a permanent injunction and quieted the title in them to said real estate. It denied damages to defendant and interveners against the additional defendant. Defendant and interveners perfected this appeal. We affirm in part and reverse in part.

On October 17, 1966, Oswald Reiche, a single person,

executed a contract to sell to Ray Haase, Margaret Poggensee, and Patricia Haase, since deceased, the disputed property, together with a 30-acre tract which joined it on the north. At the same time, Oswald Reiche executed a survivorship warranty deed, and the parties entered into an escrow agreement whereby the contract and deed were delivered to J. R. Mapes, escrow agent. Patricia Haase subsequently died, and Ray Haase married Mary Ann Haase, one of the interveners.

Plaintiffs, who were the owners of Lot 2, Reiche's Sunshine Acres, purchased the west half of Lot 1 from Oswald Reiche on March 17, 1964. They acquired the east half of Lot 1 from the executrix of the last will and testament of Oswald Reiche, under testamentary power of sale by executrix' deed dated June 21, 1971. This they filed for record the same day. At that time the contract and the escrow deed were not of record. J. R. Mapes, the escrow agent, was the attorney for the executrix and prepared the deed which conveyed the east half of Lot 1, Reiche's Sunshine Acres, to plaintiffs.

No useful purpose will be served by detailing the respective testimony of the parties. For the purposes herein we merely synopsize their various contentions. Defendant's and interveners' testimony would justify a finding they continuously used the east half of Lot 1 as a driveway for the 30-acres to the north. Plaintiffs' testimony, on the other hand, would support a finding they were bona fide purchasers of the east half of Lot 1 without notice of any claims of any other persons. They contend the first notice they had of the Haase-Poggensee claim was after they purchased the property. Carl put a fence on the disputed area and the defendant cut it and drove his wrecker across the area. Plaintiffs called the sheriff and, at that time, learned that defendant claimed title to the area by virtue of the contract and the escrow deed. This action followed.

The testimony of the parties is in irreconcilable conflict. Our law is well settled, where the evidence is

irreconcilable and in direct conflict, this court will consider the trial court's observation of the witnesses and their manner of testifying, and that the court must have accepted one version of the evidence rather than the opposite. Associates Finance Co. v. Teske (1973), 190 Neb. 747, 212 N. W. 2d 572. We also consider the fact that the trial court viewed the premises.

Defendant and interveners, who will hereafter be referred to as defendants, question whether injunctive relief is available to protect the right of possession of a subsequent purchaser of property. Whatever merit there may have been to this claim, defendants have waived it by cross-petitioning to quiet the title in themselves.

Section 76-238, R. R. S. 1943, provides: "All deeds, mortgages and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages or other instruments shall be first recorded; Provided, that such deeds, mortgages and other instruments shall be valid between the parties."

Fundamental to the law of registry is the principle of establishing priority of title. Section 76-238, R. R. S. 1943, is designed to protect a subsequent purchaser even though there was a prior conveyance or transaction concerning the property, provided the subsequent purchaser recorded his title first, and provided further that the subsequent purchaser was a bona fide purchaser without notice of any other claims to the property. Plaintiffs' deed, although subsequent in time, was the first recorded. The finding of the trial court, based on conflicting evidence, in effect finds that plaintiffs were bona

fide purchasers for value without notice. We cannot say on the record that this finding is clearly erroneous.

Defendants at this late date attempt to question plaintiffs' pleadings. It is defendants' contention that although plaintiffs contended they were the owners of the property they did not specifically plead that they were bona fide purchasers for value without notice. However, the case was tried on that theory. Defendants first raised this point in their motion for a new trial. Defendants, by their conduct, consented to a trial on the pleadings. They are bound by the evidence adduced and cannot now complain because the issue may have been insufficiently pleaded.

In this case, defendants pleaded in the alternative that the additional defendant should be held liable for her unlawful act in issuing an executrix' deed to the plaintiffs when there was a previously issued deed being held in escrow with J. R. Mapes, the attorney for executrix. Margarethe Reiche Willems, executrix, specifically admitted the execution of the escrow agreement and deed, the fact that it was deposited with J. R. Mapes, that defendants had fully performed all the terms and conditions of the contract, and that notwithstanding that fact, said executrix executed and delivered a deed to the plaintiffs for some of the same property. In this case, therefore, the executrix judicially admitted sufficient of defendants' allegations to sustain some award for damages. The court, however, found against the defendants on the answer and cross-petition as it pertained to the executrix. Consequently, the court failed to decide the issue of the executrix' liability to the defendant and interveners, even though some liability was inferentially admitted.

The judgment is affirmed insofar as the title to said real estate was quieted and confirmed in the plaintiffs. That portion of the judgment finding against the defendant and interveners on their cross-petition against the additional defendant is reversed and the cause is

remanded for a determination of the damages sustained by defendant and interveners. In all other respects the judgment is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

CLINTON, J., dissenting in part.

I agree with the opinion of the court on the main case. I disagree with the portion of the opinion that directs the finding of more than nominal damages against the additional defendant. Haase's testimony as to the difference in value of his land with the east half of Lot 1, Reiche's Sunshine Acres severed from it was sufficient to support a finding of damages, but it did not compel such a finding. It is evident that the court did not believe the unsupported exorbitant claim of difference in value. Haase took his own chances of failure when he did not produce disinterested expert testimony of value. The court was not required to speculate on actual difference in value after it refused to accept the party's own testimony nor is the party entitled to a second opportunity to provide acceptable evidence. See authorities cited in my dissent in Bass v. Boetel & Co., *ante* p. 733, 217 N. W. 2d 804. The trial court should have, however, entered a judgment for nominal damages.

RONALD PINNEY, APPELLEE, V. HAROLD HILL, APPELLANT.
218 N. W. 2d 212

Filed May 16, 1974. No. 39304.

1. **Specific Performance: Contracts: Equity.** Specific performance of a parol contract will be enforced by a court of equity where one party has wholly and the other party partly performed it, and its nonfulfillment on the one hand would amount to a fraud on the party who has fully performed it.
2. **Equity: Appeal and Error: Evidence: Witnesses.** Actions in equity on appeal to the Supreme Court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the

trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

Appeal from the District Court for Brown County: WILLIAM C. SMITH, JR., Judge. Affirmed.

Thomas O. David, for appellant.

Laurence N. Smith and Samuel C. Ely, for appellee.

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

SPENCER, J.

Harold Hill, defendant, appeals from a decree of specific performance requiring him to execute the necessary documents to register eight quarter horse colts and to pay $1,500 damages to Ronald Pinney, plaintiff. We affirm.

Plaintiff had a registered quarter horse stallion under his management and control. Defendant was the owner of 10 registered quarter horse mares. Early in 1969, the parties entered into an oral agreement whereby plaintiff paid defendant $1,000 and the defendant leased the 10 mares to plaintiff for breeding purposes. Plaintiff was to own the colts. The mares produced eight colts.

The rules of the quarter horse association require the owner of the mares as well as the owner or lessor of the stallion to sign breeding certificates to make the colts eligible for registration. When proper documents are received at the quarter horse headquarters in Amarillo, Texas, the colts would be registered.

Plaintiff alleged it was understood and agreed by the parties that the defendant would sign any and all papers necessary to register said colts with the American Quarter Horse Association. Plaintiff made several different attempts over a period of 2 years to obtain the necessary papers from the defendant. He procured the

necessary forms for defendant's signature, but defendant failed and neglected to execute the forms.

The record indicates defendant was the owner of another quarter horse stallion and a breeder of quarter horses. He was at all times familiar with the procedure required to register thoroughbred colts.

While the contract herein was oral, it had been performed fully by plaintiff and partially by defendant. The real point in issue raised by defendant is whether or not plaintiff proved that he agreed to furnish the necessary papers to enable plaintiff to register the colts. It is obvious from the nature of the transaction the requirement to furnish the necessary documents would be an implied condition of the contract. The trial court so found. Defendant admits the contract except for the agreement to sign the necessary form. We affirm the granting of specific performance.

Specific performance of a parol contract will be enforced by a court of equity where one party has wholly and the other party partly performed it, and its nonfulfillment on the one hand would amount to a fraud on the party who has fully performed it. Kofka v. Rosicky (1894), 41 Neb. 328, 59 N. W. 788.

Plaintiff has had possession of the colts since October of 1970. This case reached trial July 20, 1973. During this period plaintiff was forced to feed and maintain the colts but was unable to use them as show horses or to sell them because they were not registered. The trial court determined that his special damages in this respect amounted to $1,500. The record supports this allowance.

Actions in equity on appeal to the Supreme Court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict the court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testi-

fying, and must have accepted one version of the facts rather than the opposite. Scripter v. Scripter (1972), 188 Neb. 576, 198 N. W. 2d 201.

For the reasons given we affirm the judgment of the trial court.

AFFIRMED.

CARMEN K. WADE, APPELLANT, V. JEROME HICKS, APPELLEE.
218 N. W. 2d 222

Filed May 16, 1974. No. 39329.

1. **Paternity: Witnesses: Evidence: Trial.** The uncorroborated testimony of the mother shall not alone be sufficient to support a verdict or finding that the alleged father is actually the father.
2. ———: ———: ———: ———. Under our statute a defendant cannot be found guilty in a paternity action upon the wholly unsupported testimony of the mother. If she testifies positively and consistently to the facts involving conception, other evidence of opportunity and disposition on the part of defendant to participate in a sexual relationship will furnish sufficient corroboration.
3. ———: ———: ———: ———. It is not essential that the mother be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded.

William L. Monahan and John Q. Brennan, for appellant.

Gene Mezaell, for appellee.

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

NEWTON, J.

This is an action brought to establish the paternity

of a child born out of wedlock. At the conclusion of plaintiff's evidence, both parties rested. The court dismissed the case on the ground that plaintiff's testimony was not sufficiently corroborated. We reverse.

Plaintiff testified that both she and the defendant were residents of an Omaha hotel from May 1971, to at least January 1972. Plaintiff resided on the fifth floor and defendant on the fourth. They became acquainted in June and first had sexual relations on July 9, 1971. This relationship continued through September 1971. Plaintiff became pregnant in August and gave birth to a child on May 26, 1972. Plaintiff denies having intercourse with any other person between April 1971, and May 1972.

Defendant's answer consists of an unverified general denial. He did not testify or otherwise deny plaintiff's testimony but in answers to interrogatories, he admits both parties lived at the hotel and that he once had sexual relations with plaintiff at the hotel in June 1971.

Section 13-112, R. R. S. 1943, provides in part: "The uncorroborated testimony of the mother shall not alone be sufficient to support a verdict or finding that the alleged father is actually the father." In determining the sufficiency of corroborative evidence resort is frequently had to cases involving rape. These cases hold as follows: "Under our statute a defendant cannot be convicted of rape upon the wholly unsupported testimony of the person against whom it is alleged that the crime was committed. If she testifies positively and consistently to the facts constituting the crime, other evidence of opportunity and disposition on the part of defendant to commit the crime will furnish sufficient corroboration." Dawson v. State, 96 Neb. 777, 148 N. W. 957. See, also, Aller v. State, 114 Neb. 59, 205 N. W. 939.

" 'The rule is settled in this state that in cases of rape unless the testimony of the prosecutrix is corroborated

on material points, where the accused testifies as a witness on his own behalf and denies the charge, her testimony alone is not sufficient to warrant a conviction.' * * * 'But this rule is qualified by the other principle that it is not essential that she be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.'" Texter v. State, 170 Neb. 426, 102 N. W. 2d 655.

"The Nebraska rule requiring certain corroboration of the prosecutrix in prosecutions for rape and assault with intent to commit rape does not extend to, or include, the question of the identity of the accused, and in such cases the unsupported testimony of the prosecutrix may be sufficient to identify the guilty party if the commission of the offense has first been established." Noonan v. State, 117 Neb. 520, 221 N. W. 434, 60 A. L. R. 1118. See, also, Havens v. State, 126 Neb. 125, 252 N. W. 800.

In the present instance the defendant failed to testify; he has admitted that both parties lived in the hotel and that he there indulged in a sexual relationship with plaintiff. He thereby concedes that there was both an inclination on his part to participate in a sexual relationship with plaintiff and that the opportunity to do so existed. That someone did indulge in such a relationship with plaintiff in the month of August is established by the birth of the child. It is not contended that anyone else had sexual knowledge of the plaintiff and her positive identification of defendant as the father stands unchallenged. Under all the circumstances we believe defendant's admissions are sufficient to corroborate plaintiff's testimony within the purview of the statute.

The judgment of the District Court is reversed and the cause remanded with instructions to enter judgment for plaintiff in such sum as to the court may appear to be just and equitable.

REVERSED AND REMANDED.

CLINTON, J., dissenting in part.

I agree the court erred in holding the corroboration was insufficient. The cause should be remanded for a new trial. It is not clear from the judgment whether the trial court accepted plaintiff's testimony, or rejected it and simply assigned lack of corroboration as the reason for the adverse decision. This is not an action in equity triable de novo in this court.

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Absentees.

If a qualified voter who will be absent from the county of his domicile on the day of an election fails to make application either in writing or in person at least "three clear days" before the election as required by section 32-803, R. S. Supp., 1972, he is not entitled to receive an absentee ballot, and if one is issued to him in violation of the statute a vote cast thereon is illegal and void. Dilsaver v. Pollard ---------- 241

Accord and Satisfaction.

1. The principal questions in determining whether a discharge by accord and satisfaction has taken place are: (1) Did the parties in fact agree that the performance rendered should operate as a final discharge and satisfaction; and (2) does that performance constitute a sufficient consideration for a return promise or for a discharge? Schulze v. Jensen ---------- 253
2. The question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered as full satisfaction is a question of fact. Schulze v. Jensen 253
3. This court will scrutinize an alleged accord and satisfaction between a husband and wife with reference to child support very carefully, and the evidence must be such that the court is satisfied by the clear weight of the evidence that an accord and satisfaction was intended and accepted. Schulze v. Jensen ---------- 253

Accounting.

The trustee of a spendthrift trust is not entitled to a charge on a beneficiary's interest in the trust estate for overpayments made to said beneficiary in accordance with the provisions of the trust. The trustee's rights under these circumstances are no greater than those of any other unsecured creditor of the beneficiary. O'Shea v. O'Shea ---------- 217

Acknowledgments.

1. It is not necessary for a lease of nonhomestead land to be acknowledged in order for it to be good as between the parties. Neither is it necessary for a lease to be recorded to take effect against a subsequent purchaser with notice. Grand Island Hotel Corp. v. Second Island Development Co. ---- 98
2. Where a real estate mortgage is acknowledged by some mortgagors, but not all, the mortgage is entitled to be recorded and upon recording is constructive notice of the interest of those persons who acknowledged the instrument. Prudential Ins. Co. v. Holliday ---------- 144
3. A mortgage upon real estate, other than the homestead, executed and delivered by the mortgagor is valid between the parties even though it was not lawfully acknowledged. Prudential Ins. Co. v. Holliday ---------- 144

Actions.

1. The words "unavoidably prevented" refer to circumstances beyond the control of the party desiring to file a pleading in our courts. The law requires diligence on the part of clients and attorneys and the mere neglect of either will not entitle a party to relief on that ground. Community Credit Co. v. Gillham ---------- 198
2. Amendments to statutes which are procedural in nature generally are applicable to pending cases which have not been tried. Oviatt v. Archbishop Bergan Mercy Hospital ---------- 224

Administrative Law.

1. The Nebraska Public Service Commission is without jurisdiction or authority to fix rates and charges for motor vehicle carriers engaged in the transportation of livestock in intrastate commerce. Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn. ---------- 1
2. Where there is substantial evidence supporting the Nebraska Liquor Control Commission's decision of suspension, and the trial court has applied the proper statutory criteria, the decision of the commission should be affirmed. O'Connor v. Nebraska Liquor Control Commission ---------- 436
3. Before the Nebraska Power Review Board may ap-

prove an agreement between suppliers of energy under the provisions of section 70-1002.01, R. R. S. 1943, it must have before it evidence which will support affirmative finding that under the terms of the agreement it can be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the area and customers to be served. City of Lincoln v. Nebraska P. P. Dist. ---------- 556

4. The statutory provision requiring determination by the Nebraska Power Review Board of whether the "proposed agreement or amendment can reasonably be expected to provide a reliable wholesale power supply at a reasonable cost for the area" is a sufficiently definite standard to guide the Nebraska Power Review Board in the exercise of the delegated legislative power of determining the facts on which approval of agreements under section 70-1002.01, R. R. S. 1943, are to be founded. Accordingly the delegation in this instance is not unconstitutional. City of Lincoln v. Nebraska P. P. Dist. ---------- 556

5. An administrative agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their offices. City of Lincoln v. Nebraska P. P. Dist. ---------- 556

6. The Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied and deciding whether licenses should be suspended or revoked upon violations of the liquor law. This discretion, however, must not be abused. Eleven Eighteen Co. v. Nebraska Liquor Control Commission ---- 572

7. The order of the Nebraska Liquor Control Commission will not be upheld if it is found to be arbitrary or unreasonable. Eleven Eighteen Co. v. Nebraska Liquor Control Commission ---------- 572

8. The review of discretion of the Nebraska Liquor Control Commission on appeal applies to the findings of fact and all applications of the law, including the penalty assessed. Eleven Eighteen Co. v. Nebraska Liquor Control Commission ---------- 572

9. In a proceeding instituted by a state bank under the provisions of section 8-195, R. R. S. 1943, the bank has the burden of going forward with the evidence to establish that a declaration of insolvency made and filed by the Director of Banking under

the provisions of section 8-194, R. R. S. 1943, was erroneous. In the absence of a contrary showing, this court will presume that the Director of Banking complied with the law. Elm Creek State Bank v. Department of Banking ---------- 584

10. Any person appealing an order of the Director of the Department of Motor Vehicles must execute and file the required bond within 20 days of the date of the final order complained of, and such filing is a jurisdictional requirement and a condition precedent to the initiation of the appellate process. Buettner v. Sullivan ---------- 592

11. The city council of the city of Omaha acts quasi-judicially in processing applications for a full salary disability pension under section 7.36.195 of the Omaha municipal code. Schmitt v. City of Omaha 608

12. Abstracts of convictions covering void judgments or erroneous or fraudulent records may be challenged at an evidentiary hearing provided for in the District Court on a de novo review of the director's order revoking a driver's license. Baker v. Sullivan ---------- 707

Adverse Possession.

1. A prescriptive right is not looked on with favor by the law. Mehling v. Deines ---------- 287

2. A prescriptive easement can only be established by clear and convincing evidence of an adverse use under claim of right that was continuous, notorious, open, exclusive, with knowledge and acquiescence of the servient owner for the full prescriptive period. Mehling v. Deines ---------- 287

3. A use by express or implied permission or license cannot ripen into an easement by prescription. Mehling v. Deines ---------- 287

4. To establish a road or highway by prescription there must be use by the general public under a claim of right, adverse to the owner of the land, of some particular or defined line of travel. The use must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land. Dunnick v. Stockgrowers Bank of Marmouth ---------- 370

5. Where the use of an easement has been adverse, notorious, and uninterrupted for the statutory period, it will be presumed to have been under a claim of

right. The owner of the servient tenement is charged with knowledge of such use and acquiescence in it is implied. Dunnick v. Stockgrowers Bank of Marmouth ---------- 370

6. Payment of taxes is not a necessary element of proof of adverse possession unless made so by express statutory requirement. Dunnick v. Stockgrowers Bank of Marmouth ---------- 370

7. It is not necessary that a right to a road or highway obtained by prescription or use be equal in all respects to that which would have resulted from the formal establishment of a road by statutory proceedings. Dunnick v. Stockgrowers Bank of Marmouth ---------- 370

8. The title and ownership of land acquired by adverse possession and prescriptive use by the public as a road or street is the same as it would have been if the land had been dedicated as a street or highway and accepted by the appropriate governmental entity. Dunnick v. Stockgrowers Bank of Marmouth ---------- 370

Affidavits.

This court will not review testimony in the form of affidavits used in the trial court on the motion for a new trial unless such affidavits have been included in and presented by a bill of exceptions. Community Credit Co. v. Gillham ---------- 198

Aiders and Abettors.

Where a crime requires the existence of a particular intent, an alleged aider or abettor cannot be held as a principal unless it is established that the aider knew that the perpetrator of the act had the required intent, or that the aider himself possessed the required felonious intent. State v. Dittrich -- 475

Alimony.

1. Upon the dissolution of a marriage the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Casselman v. Casselman ---------- 138

2. The fixing of child support and alimony rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be disturbed on appeal. Sommers v. Sommers ---------- 361
3. The lien of a judgment for child support or alimony constitutes a lien the same as other monetary judgments and is a lien not only for past due installments but also as security for installments to fall due in the future. Action Realty Co., Inc. v. Miller ---------- 381
4. A party acquiring an interest in real estate after the judgment lien for child support has attached takes the property subject to the lien of the judgment for all installments due or to become due. Action Realty Co., Inc. v. Miller ---------- 381
5. An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification. Bryant v. Bryant ---------- 539
6. A judgment of a trial court fixing the amount of alimony, or making a distribution of property, will not be disturbed on appeal unless good cause is shown. Reisig v. Reisig ---------- 612
7. An antenuptial agreement cannot absolutely limit the amount of an award of alimony, although it should be considered by the court with other evidence on that point. Krejci v. Krejci ---------- 698
8. The determination of alimony, division of property, and child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless there is a clear abuse of discretion by the trial court, or it is clearly against the weight of the evidence. Peery v. Peery ---------- 782

Alteration of Instruments.

Where a written instrument shows on its face a material and obvious alteration, the presumption of law is that such alteration was made before the instrument was finally executed and delivered. Grand Island Hotel Corp. v. Second Island Development Co. 98

Annexation.

1. A municipal corporation has no power to extend or change its boundaries otherwise than as pro-

vided by constitutional enactment or as it is empowered by the Legislature by statute to do. Doolittle v. County of Lincoln ---------- 159
2. A city of the first class has no power to annex territory which is not "contiguous or adjacent." § 16-117, R. R. S. 1943. Doolittle v. County of Lincoln ---------- 159
3. Lands, lots, tracts, streets, or highways shall be deemed contiguous although a stream, embankment, strip, or parcel of land not more than two hundred feet wide lies between the same and the corporate limits. § 16-118, R. R. S. 1943. Doolittle v. County of Lincoln ---------- 159
4. The words contiguous and adjacent in section 16-117, R. R. S. 1943, are used synonymously. Doolittle v. County of Lincoln ---------- 159
5. The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it. Doolittle v. County of Lincoln ---------- 159
6. An action to enjoin a merger of a school district or a part thereof under the provisions of sections 79-801 and 79-801.02, R. R. S. 1943, consequent upon an annexation of territory by a city of the first class under the provisions of sections 16-117 and 16-118, R. R. S. 1943, is barred by the statute of limitations provided in section 18-1717, R. R. S. 1943, unless it is brought within 1 year from the effective date of the annexation ordinance. School Dist. No. 127 v. Simpson ---------- 164

Appeal and Error.

1. Ordinarily, failure to make a motion to strike or timely objection to proffered evidence in the trial court waives the right to complain of the admission of such evidence on appeal. Laun v. Roach -- 11
2. There can be no appeal to the Supreme Court until there has been a judgment or final order in the District Court. Fritch v. Fritch ---------- 29
3. An issue which has been fully litigated by direct appeal cannot be relitigated by a motion for post conviction relief. State v. Moss ---------- 36
4. On an appeal in an action in equity, this court will try the issues of fact complained of de novo. Vakoc Constr. Co. v. City of Wayne ---------- 45
5. On direct appeal this court has the power to remand

the cause for a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself invoked appellate jurisdiction for the correction of errors. State v. Gaston ---- 121

6. The findings of the trial court on conflicting evidence will not be disturbed on appeal unless clearly wrong. Prudential Ins. Co. v. Holliday ---------- 144

7. 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. Melia v. Svoboda ---------- 150

8. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed unless a clear abuse of discretion is shown. State v. Irwin 169

9. This court will not review testimony in the form of affidavits used in the trial court on the motion for a new trial unless such affidavits have been included in and presented by a bill of exceptions. Community Credit Co. v. Gillham ---------- 198

10. Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Quincy v. J & S of Nebraska, Inc. -- 208

11. On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. Quincy v. J & S of Nebraska, Inc. ---- 208
Sopher v. Nebraska P. P. Dist. ---------- 402

12. Where evidence supporting the District Court findings of fact is substantial, the findings will not be disturbed on appeal. Duffy v. Physicians Mut. Ins. Co. ---------- 233

13. In an election contest appealed to this court the cause is heard de novo. Dilsaver v. Pollard ------ 241

14. The inclusion of evidence in a bill of exceptions is the only vehicle for bringing evidence before this court on appeal. Evidence not included in the bill of exceptions may not be considered. Dilsaver v. Pollard ---------- 241

15. This court will scrutinize an alleged accord and satisfaction between a husband and wife with reference to child support very carefully, and the evidence must be such that the court is satisfied by the clear weight of the evidence that an accord and satisfaction was intended and accepted. Schulze v. Jensen ---------- 253

16. In a divorce action the case is to be tried de novo in the Supreme Court on the issues presented on appeal. Schuller v. Schuller ---------- 266

17. In a "trial de novo" in the Supreme Court, it is settled law that this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Schuller v. Schuller --- 266

18. In cases involving determinations of child custody, the findings of the trial court both as to evaluation of evidence and as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion shown. Schuller v. Schuller -- 266

19. There is a presumption that the court, trying a case without a jury, in arriving at a decision, will consider such evidence only as is competent and relevant, and the Supreme Court will not reverse a case so tried because other evidence was admitted, when there is material, competent, and relevant evidence admitted sufficient to sustain a judgment of the trial court. Schuller v. Schuller ---------- 266

20. Generally, the admission of incompetent or irrelevant evidence is not reversible error, where the cause is tried to the court without a jury. Schuller v. Schuller ---------- 266

21. Upon a trial de novo in the Supreme Court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objection by the adverse party, will be disregarded by this court. Schuller v. Schuller ---- 266

22. On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Mehling v. Deines ------- 287

23. An action for specific performance is triable de

novo on appeal to this court. Friehe Farms, Inc. v. Haberman ---------- 292
24. In cases involving child custody, the finding of the trial court both as to the evaluation of the evidence and as to the matter of custody will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Carner v. Anderson ---------- 341
25. The Supreme Court may, at its option, consider a plain error not specified in appellant's brief. Schmidt v. Richman Gordman, Inc. ---------- 345
26. There is a presumption that the court, trying a case without a jury, in arriving at a decision, will consider such evidence only as is competent and relevant and the Supreme Court will not reverse a case so tried because other evidence was admitted, where there is material, competent, and relevant evidence admitted sufficient to sustain the judgment of the trial court. Christensen v. Christensen ---------- 355
27. Upon a trial de novo in this court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objection by the adverse party will be disregarded by this court. Christensen v. Christensen ---------- 355
28. A ruling of a trial judge on a motion to disqualify himself is immaterial where the cause is an action triable de novo in this court. Christensen v. Christensen ---------- 355
29. An appeal from a finding and judgment of the District Court by authority of Chapter 43, article 2, R. R. S. 1943, that a child is neglected or dependent is disposed of in this court by trial de novo upon the record. State v. Kinkner ---------- 367
30. In determining the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and he must have the benefit of every inference that can reasonably be drawn from the evidence. Cook v. Nordahl ---------- 424
31. In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. State v. DeBerry ---------- 445
32. In a divorce action the case is to be tried de novo in the Supreme Court on the issues presented on appeal. Seybold v. Seybold ---------- 480

33. In a trial de novo in the Supreme Court, it is settled law that this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Seybold v. Seybold ---- 480
34. A judgment of the trial court, in a case tried without a jury, will not be disturbed on appeal unless it is clearly wrong. Engel v. Mead ---------- 541
35. Proceedings in error are brought to determine if the final order of the inferior tribunal is in accordance with law. Such proceedings are based on the record of the proceedings before the tribunal; and new evidence may not be introduced to show errors of law before the tribunal. Rhodes v. Johnstone ---------- 552
36. Any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions. Rhodes v. Johnstone ---------- 552
37. In the absence of a bill of exceptions, the only issue on appeal is the sufficiency of the pleadings to support the judgment. Rhodes v. Johnstone -- 552
38. The order of the Nebraska Liquor Control Commission will not be upheld if it is found to be arbitrary or unreasonable. Eleven Eighteen Co. v. Nebraska Liquor Control Commission -------- 572
39. The review of discretion of the Nebraska Liquor Control Commission on appeal applies to the findings of fact and all applications of the law, including the penalty assessed. Eleven Eighteen Co. v. Nebraska Liquor Control Commission --------- 572
40. In the absence of a bill of exceptions, no questions regarding the evidence presented in the trial court will be considered, and under such circumstances the only issue on appeal is the sufficiency of the pleadings to support the judgment. Elm Creek State Bank v. Department of Banking ---------- 584
41. A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. Elm Creek State Bank v. Department of Banking ---------- 584
42. Any person appealing an order of the Director of the Department of Motor Vehicles must execute

and file the required bond within 20 days of the date of the final order complained of, and such filing is a jurisdictional requirement and a condition precedent to the initiation of the appellate process. Buettner v. Sullivan ---------- 592

43. A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable ruling. Wisnieski v. Coufal ------ 598

44. Generally, the action of the trial court in excluding testimony of a witness during his direct examination may not be reviewed on appeal in the absence of an offer to prove what it is claimed the testimony would show. Wisnieski v. Coufal ------ 598

45. The requirement that a plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified within the time specified is mandatory and jurisdictional. Schmitt v. City of Omaha ---------- 608

46. The action of the city council is reviewable in the District Court by way of petition in error or appeal. Schmitt v. City of Omaha ---------- 608

47. A judgment will not be reversed on appeal if the result is correct, merely because the trial court assigned the wrong reason for its decision. Schmitt v. City of Omaha ---------- 608

48. In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusions of the trial court as to such reliability will be carefully regarded by the Supreme Court on review. Reisig v. Reisig ------ 612

49. An order overruling a motion made after verdict for judgment in conformity with a previously denied motion for a directed verdict is an appealable order. Edquist v. Commercial Sav. & Loan Assn. ------- 618

50. A right to a cross-appeal exists only by virtue of Rule 1 d, Revised Rules of the Supreme Court, 1971, and in order to perfect a cross-appeal the appellee need comply only with Rule 8 b 3, Revised Rules of the Supreme Court, 1971. Edquist v. Commercial Sav. & Loan Assn. ---------- 618

51. The District Court is authorized to modify an award of the Workmen's Compensation Court upon

an appeal from a rehearing before the full compensation court if the findings of fact are not supported by the record. Behrens v. Ken Corp. ---- 625

52. In appeals from the District Court to the Supreme Court in suits in equity, it is the duty of this court to retry the issues of fact involved upon the evidence in the record and upon such trial de novo reach an independent conclusion. Parry v. State Farm Mut. Auto. Ins. Co. ---------- 628

53. Section 48-183, R. R. S. 1943, relating to service of the petition on appeal after a rehearing before the full Workmen's Compensation Court is directory and not jurisdictional. Bourn v. James ---------- 635

54. The law imposes the duty of valuing and equalizing of property for taxation purposes upon the county assessor and the county board of equalization. In reviewing the actions of tribunals created by law for ascertaining the valuation and equalization of property for taxation purposes, courts will not usurp the functions of such tribunals. It is only where such assessed valuations are not in accordance with law or it is made to appear that they were made arbitrarily or capriciously, that courts will interfere. Nash Finch Co. v. County Board of Equalization ---------- 645

55. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. Nash Finch Co. v. County Board of Equalization - 645

56. In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. Kockrow v. Kockrow ---------- 657

57. The term "all parties bound by the award" as used

in section 76-715.01, R. R. S. 1943, and upon whom notice of appeal must be served refers: (1) In case the condemner is the appealing party, to the condemnee or condemnees from the award in favor of whom the condemner desires to take his appeal; or (2) in case a condemnee is the appealing party, it refers to the condemner. An appealing condemnee need not serve notice of appeal upon other condemnees. Grace Land & Cattle Co. v. Tri-State G. & T. Assn., Inc. ---------- 663

58. On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. Dahlsten v. Harris ---------- 714

59. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene. Dahlsten v. Harris ---------- 714

60. In criminal cases alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal. State v. Seger ---- 760

61. Alleged errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon. State v. Seger ---------- 760

62. An order of the District Court requiring a petition to be made more definite and certain will be sustained on appeal unless it clearly appears that the court abused its discretion. Vodehnal v. Grand Island Daily Independent ---------- 836

63. Where the evidence is irreconcilable and in direct conflict, this court will consider the trial court's observation of the witnesses and their manner of testifying, and that the court must have accepted one version of the evidence rather than the opposite. Karmann v. Haase ---------- 839

64. Actions in equity on appeal to the Supreme Court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider

the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Pinney v. Hill ---------- 844

Arrest.

1. The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of routine investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest. State v. Irwin ---------- 169
2. Probable cause justifying an arrest without warrant exists if the facts and circumstances known to the arresting officer warrant a prudent man in believing the offense has been committed and that the defendant committed it. State v. Irwin ------ 169
3. The existence of probable cause must be determined by a practical and not by any technical standard. State v. Irwin ---------- 169
4. A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony. § 29-404.02, R. S. Supp., 1972. State v. Irwin ---------- 169

Assault and Battery.

In a prosecution for violation of section 28-729.01, R. S. Supp., 1972, specific intent is not an essential element of the crime. State v. Wingate -------- 388

Assumption of Risk.

Where one, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. Blum v. Brichacek -------- 457

Attorneys at Law.

1. For post conviction relief on the ground of ineffective assistance of counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Henry --------- 27
   State v. Cortez ---------- 800
2. It must appear that counsel's assistance was so

grossly inept as to shock the conscience of the court before relief on the ground of ineffective assistance of counsel will be granted. State v. Williams ---- 57
3. For relief on the ground of ineffective assistance of counsel, it must appear that assistance of trial counsel was so grossly inept as to shock the conscience of the court. State v. Garza ---------- 118
4. When counsel has advised a defendant to plead guilty, a defendant who has heeded such advice may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases. State v. Krider ---------- 285
5. The requirement that a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing. State v. Krider ---------- 285
6. A reasonable attorney's fee is to be determined by the nature of the case, the amount involved in the controversy, the results obtained and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorney. Seybold v. Seybold ---------- 480

Banks and Banking.

1. In a proceeding instituted by a state bank under the provisions of section 8-195, R. R. S. 1943, the bank has the burden of going forward with the evidence to establish that a declaration of insolvency made and filed by the Director of Banking under the provisions of section 8-194, R. R. S. 1943, was erroneous. In the absence of a contrary showing, this court will presume that the Director of Banking complied with the law. Elm Creek State Bank v. Department of Banking ---------- 584
2. When a bank or savings institution is found to be liable for the unauthorized withdrawal of funds from a depositor's account, the depositor is entitled to interest from the date of the unauthorized withdrawals to date of judgment. Edquist v. Commercial Sav. & Loan Assn. ---------- 618

Bills and Notes.

The holder of an instrument may, even without con-

sideration, discharge any party by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged. Gorham v. John F. Kennedy College, Inc. 790

Bonds.

When a contractor's performance bond requires that notice of default by the contractor be given to the surety within a reasonable time and the failure to give such notice results in prejudice or damage to the surety, the principal cannot recover on the bond. R. C. Walters Co., Inc. v. DeBower ---------- 544

Boundaries.

The fixing of the boundaries of a political subdivision is essentially a legislative matter. Neeman v. Nebraska Nat. Resources Commission ---------- 672

Buildings.

In the absence of some contractual provision to the contrary the risk of loss or damage by windstorm, fire, etc., to a new building in the course of construction is normally on the builder. Cook v. Nordahl ---------- 424

Cancellation of Instruments.

The holder of an instrument may, even without consideration, discharge any party by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged. Gorham v. John F. Kennedy College, Inc. 790

Carriers.

1. The Nebraska Public Service Commission is without jurisdiction or authority to fix rates and charges for motor vehicle carriers engaged in the transportation of livestock in intrastate commerce. Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn. ---------- 1
2. Where a carrier, holding a certificate of public convenience and necessity for hauling commodities generally or a generic class of commodities over irregular routes, does not perform a portion of such service through no fault of his own, but is ready, able, and willing to do so, the question of dormancy

becomes a question of fact under all the circumstances of the case. Dahlsten v. Harris ---------- 714
3. Where commission approval of a transfer of authority is requested under section 75-318, R. R. S. 1943, and an issue of dormancy is properly raised, the Nebraska Public Service Commission must determine both the fact of dormancy and on the basis of the evidence whether the public convenience and necessity require the transfer. Dahlsten v. Harris 714
4. The power of the Nebraska Public Service Commission to regulate common carriers is derived from Article IV, section 20, of the Constitution of Nebraska. Such powers are plenary and self-executing in the absence of specific legislation on the subject. Dahlsten v. Harris ---------- 714
5. Where the Legislature enacts specific legislation implementing Article IV, section 20, of the Constitution of Nebraska, the Nebraska Public Service Commission is subject to and governed by the provisions of such enactment. Dahlsten v. Harris ---- 714
6. "Willful failure to perform a service" and "dormancy" cannot in all cases be equated. The same evidence which might support a finding of willful failure in the case of a regular route authority does not necessarily support such a finding in a case of irregular route authority authorizing carriage of commodities generally or a generic class of commodities where the demand for service is the critical factor and where the evidence shows an ability and willingness to serve. Dahlsten v. Harris ---------- 714
7. The protestant to the transfer of an authority who alleges dormancy has the burden of proving it and the applicant has the burden of showing that despite dormancy the transfer was required by the present and future public convenience and necessity. Dahlsten v. Harris ---------- 714
8. Common carriers are required to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged for the safety of their passengers and they are liable for the slightest negligence causing injury. Siciunas v. Checker Cab Co., Inc. ---------- 766

Civil Rights.
1. To sustain a charge of discrimination where there is no charge of a universal discriminatory practice

or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions. Duffy v. Physicians Mut. Ins. Co. ---------- 233

2. The burden of proof is on complainant to prove a discriminatory pay differential by reason of her sex. Duffy v. Physicians Mut. Ins. Co. ---------- 233

Comity.

Child custody provisions of a divorce decree entered in a sister state have no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to the welfare of the children. Carner v. Anderson 341

Confessions.

1. Before admissions or confessions may be considered as evidence of guilt, the evidence pertaining to the making thereof must be such as will justify a finding by a jury beyond a reasonable doubt that they were freely, voluntarily, and intelligently made. State v. Irwin ---------- 169

2. If a defendant is in custody of law enforcement officers or otherwise deprived of his freedom in a material way by such officers at the time a confession or admissions are made, the evidence must be such as to permit the jury to find beyond a reasonable doubt that prior to making such admissions or confessions the Miranda warnings were given and that the defendant knowingly and intelligently affirmatively waived his rights. State v. Irwin ---------- 169

3. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and in so doing we will look to the totality of the circumstances. State v. Irwin ---------- 169

4. The determination by the trial court of the admissibility of a confession by a preponderance of the evidence is not inconsistent with the mandate of proof of guilt beyond a reasonable doubt. State v. Irwin ---------- 169

5. Where voluntary statements or confessions are not

offered or received in evidence, the foundational requirements for such are not relevant and, on objection or motion, should be excluded or stricken if they are not otherwise relevant to the issues. State v. Garrett ---------- 439

6. After Miranda warnings have been given and the suspect requests counsel and indicates he wishes to remain silent, interrogation must cease. State v. Garrett ---------- 439

Constitutional Law.

1. Standards relating to the privilege against self-incrimination are not affected by the circumstance that the witness is called by the defense and not by the State. State v. Richter ---------- 84

2. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the defendant such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Moss ---------- 36

3. Embedded in the traditional rules governing constitutional adjudication is that a person to whom a statute may be constitutionally applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the court. State v. Brown ---------- 61

4. Section 29-2011.01, R. S. Supp., 1972, held constitutional. State v. Rhodes ---------- 131

5. In the absence of a violation of a constitutional right, no relief may be had under the Post Conviction Act. State v. Blackwell ---------- 155

6. The question of determining a voter's residence or domicile under the provisions of Article VI, section 1, of the Constitution of the State of Nebraska, is a judicial one and should be determined in accordance with principles which determined the meaning of residence or domicile at the time the Constitution was adopted. Section 32-475, R. R. S. 1943, does not establish absolute criteria for determining residence or domicile. Dilsaver v. Pollard ---------- 241

7. The Legislature cannot invoke its powers of statutory definition to nullify constitutional provisions. State ex rel. Meyer v. Peters ---------- 330

8. We hold that the language "as defined by law," in Article VIII, section 2, of the Nebraska Constitution, referred to extant law in a descriptive and limitational manner. State ex rel. Meyer v. Peters ---------- 330
9. When financial burdens are imposed upon property owners through an exercise of judicial power pursuant to specific terms of a statute, due process of law requires notice and an opportunity to be heard. State ex rel. Meyer v. Peters ---------- 330
10. Where an increase in the assessed valuation of any classes of property as returned by any county or counties is made by the State Board of Equalization and Assessment without notice to such county or counties and without affording sufficient opportunity to be heard, such increase amounts to confiscation of property without due process, and is therefore a void increase of assessment. State ex rel. Meyer v. Peters ---------- 330
11. The true principle of taxation, the one enjoined by our Constitution, is that of uniformity as to persons and property within the particular district for which the tax is imposed. State ex rel. Meyer v. Peters - 330
12. Under the provisions of Article VIII, section 1, of the Constitution of Nebraska, the taxation of personal property, except as otherwise authorized by such provision, must be uniform not only as to the rate of taxation, but as to the valuation of the property as well. State ex rel. Meyer v. Peters -- 330
13. There can be no difference in the method of valuation or the rate of tax to be imposed unless the separate classification rests on some reasonable public policy, some substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. State ex rel. Meyer v. Peters ---------- 330
14. Due process tolerates variances in the form of a hearing appropriate to the nature of the case, depending upon the importance of the interests involved and the nature of any subsequent proceedings. State v. One 1970 2-Door Sedan Rambler -- 462
15. The absolute requirement of section 28-4,135, R. S. Supp., 1972, that a forfeiture complaint be filed within 5 days after seizure with provision for notice

and hearing meets the test of due process. State v. One 1970 2-Door Sedan Rambler ---------- 462

16. The constitutional right of an accused to the presence and assistance of legal counsel does not apply as a matter of absolute right to a lineup or showup conducted by the police previous to the initiation of adversary judicial criminal proceedings. State v. Sanchell ---------- 505

17. The conduct by the police, at whatever time, of identification procedures must not be so unnecessarily suggestive and conducive to a substantial likelihood of irreparable mistaken identification as to be a denial of due process of law. State v. Sanchell ---------- 505

18. Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it. State v. Sanchell ---------- 505

19. Even though an identification procedure may have been suggestive, the in-court identification may be allowed to go to the jury if under the totality of the circumstances it is determined to be reliable because it has an origin independent of the taint. State v. Sanchell ---------- 505

20. If identification procedures are such as to violate due process, the denial of a proper and timely motion to suppress and the admission of the in-court identification constitutes reversible error unless this court can say beyond a reasonable doubt that the error was harmless. State v. Sanchell ---------- 505

21. The authority vested in a prosecuting attorney to determine whether a child under 16 years of age who has committed a crime shall be prosecuted in the juvenile or criminal court is not violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States or Article I, section 3, Constitution of Nebraska. State v. Grayer ---------- 523

22. The discretion vested in a prosecuting attorney to determine in which court a minor shall be prosecuted is not violative of Article II, section 1, of the Constitution of Nebraska, as an unlawful delegation of legislative power. State v. Grayer ------ 523

23. Due process does not require a prosecuting attorney to hold an adversary hearing prior to deter-

mining the manner in which a minor offender shall be proceeded against. State v. Grayer ---------- 523
24. Juvenile courts do not have the sole or exclusive jurisdiction of children under 18 years of age who have violated the laws of Nebraska. State v. Grayer 523
25. It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury when Article I, section 6, of the Constitution of Nebraska, is not violated. State v. Johnson 535
26. Where a defendant is charged with a violation of a city ordinance, with a maximum authorized penalty of 6 months incarceration, he is not entitled to a jury trial under the federal Constitution. State v. Johnson ---------- 535
27. If legislation violates no constitutional provision the courts have no authority to declare it void because they might doubt its wisdom. City of Lincoln v. Nebraska P. P. Dist. ---------- 556
28. The statutory provision requiring determination by the Nebraska Power Review Board of whether the "proposed agreement or amendment can reasonably be expected to provide a reliable wholesale power supply at a reasonable cost for the area" is a sufficiently definite standard to guide the Nebraska Power Review Board in the exercise of the delegated legislative power of determining the facts on which approval of agreements under section 70-1002.01, R. R. S. 1943, are to be founded. Accordingly the delegation in this instance is not unconstitutional. City of Lincoln v. Nebraska P. P. Dist. ---------- 556
29. The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself. The 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. Neeman v. Nebraska Nat. Resources Commission ---------- 672
30. It is a general rule that a statute must be reasonably clear and definite to be valid. But a statute which is otherwise valid will not be held void or unintelligible and meaningless unless it is so im-

perfect and deficient in its terms as to render it impossible of execution and enforcement. Neeman v. Nebraska Nat. Resources Commission ---------- 672

31. The fixing of the boundaries of a political subdivision is essentially a legislative matter. Neeman v. Nebraska Nat. Resources Commission ---------- 672

32. The Legislature may impose additional power and duties on constitutional or statutory officers. Neeman v. Nebraska Nat. Resources Commission ---- 672

33. The power of the Nebraska Public Service Commission to regulate common carriers is derived from Article IV, section 20, of the Constitution of Nebraska. Such powers are plenary and self-executing in the absence of specific legislation on the subject. Dahlsten v. Harris ---------- 714

34. Where the Legislature enacts specific legislation implementing Article IV, section 20, of the Constitution of Nebraska, the Nebraska Public Service Commission is subject to and governed by the provisions of such enactment. Dahlsten v. Harris ---------- 714

35. Section 42-349, R. S. Supp., 1972, which imposes a 1-year residency requirement for dissolution of marriage, unless the marriage was solemnized in Nebraska and one party has resided in Nebraska continuously, is constitutional. Ashley v. Ashley ---- 824

Continuances.

1. Where a witness has refused to answer questions before trial, and during the trial his testimony is compelled under section 29-2011.01, R. S. Supp., 1972, the defendant may request a continuance to interview the witness. State v. Rhodes ---------- 131

2. Where a witness for the State, who has previously refused to answer questions, is compelled to testify under section 29-2011.01, R. S. Supp., 1972, and the defendant's objection and request for a continuance are denied, all the circumstances must be considered in determining whether there has been an abuse of discretion and the defendant was prevented from properly preparing for trial. State v. Rhodes ---- 131

3. A denial of a party's motion for continuance of a hearing on a motion for new trial is not an abuse of sound legal discretion. Engel v. Mead -------- 541

4. A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling

on a motion for a continuance will not be disturbed on appeal. Elm Creek State Bank v. Department of Banking ---------- 584

Contracts.

1. When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it. Grantham v. General Tel. Co. ---------- 21
2. The meaning of an ambiguity in a contract is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment. Grantham v. General Tel. Co. -- 21
3. When a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, interpretation of the contract is a matter of law. Grantham v. General Tel. Co. ---------- 21
4. Performance of a contract for appraisal of damage to property of A. by reason of a building that contractors of B. were to construct on B.'s adjoining property with temporary work on A.'s property, and for payment of the appraisal by B., may afford a defense to A.'s claims against B.'s architect and contractors and a subcontractor for negligent damage to A.'s property. Grantham v. General Tel. Co. 21
5. To avoid a written release of damages for personal injuries on grounds of mutual mistake of the parties, the mistake must relate to facts that are material to the contract of settlement and not to an opinion as to future conditions as the result of present known facts. Swartz v. Topping ---------- 41
6. A party who has the capacity and opportunity to read a release of claims for personal injuries but fails to do so is estopped by his own negligence from claiming that the release is not binding on him. Swartz v. Topping ---------- 41
7. Mere inadequacy of consideration alone is generally not considered to be a ground upon which a release may be avoided. It is a factor which may be considered along with other circumstances. Swartz v. Topping ---------- 41
8. The general rules governing contracts or interpretation of contracts other than indemnity contracts apply in construing indemnity contracts and in de-

termining rights and liabilities of the parties thereunder. Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc. ---------- 50

9. An indemnity contract should be construed so as to ascertain and give effect to the intention of the parties to it, if that can be done consistent with legal principles. Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc. ---------- 50

10. An indemnitee may be indemnified against his own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties. Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc. ---------- 50

11. It is the duty of a contractor, engaged in construction work on a public highway, to erect barricades or signs, or otherwise adequately warn the traveling public if the highway is dangerous to travel. Huber v. Cornhusker Paving Co. ---------- 108

12. As a general rule every person of mature age, able to read and write, who has an opportunity to read an instrument, and executes the same is presumed to know the contents of the instrument signed and is estopped from denying the contents thereof. Prudential Ins. Co. v. Holliday ---------- 144

13. In the absence of agreement, rent is not due until the expiration of the term. First Nat. Bank v. Omaha Nat. Bank ---------- 249

14. Rent, as such, is not payable until it falls due under the terms of a lease, and no suit can be brought for future rent in the absence of a clause permitting acceleration. First Nat. Bank v. Omaha Nat. Bank 249

15. The general rule is that a provision for forfeiture of an insurance policy for nonpayment of premiums is self-executing, and notice of forfeiture or other affirmative act on the part of the insurer is necessary only if required by statute, by the terms of the contract, or by course of dealing. Tighe v. Security Nat. Life Ins. Co. ---------- 271

16. An unqualified renunciation of an executory contract before time for performance by one party excuses tender of performance by the other party at the time set for performance. Friehe Farms, Inc. v. Haberman ---------- 292

17. In building and construction contracts, in the absence of an express agreement to the contrary, it

is implied that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose. Henggeler v. Jindra ---------- 317

18. Where a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. Henggeler v. Jindra ---------- 317

19. An executory contract for the sale of nonhomestead land in which the husband of the vendor has not joined is specifically enforceable against the vendor to the extent of her interest, but not as to the marital interest of her husband in the land. Fudge v. Byrom ---------- 363

20. In the absence of some contractual provision to the contrary the risk of loss or damage by windstorm, fire, etc., to a new building in the course of construction is normally on the builder. Cook v. Nordahl ---------- 424

21. Where an insurer agrees to pay all costs taxed against the insured in any suit and all interest accruing after the entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, the insurer is liable for interest on the total amount of the judgment until it complies with this provision. Niemeyer v. Estate of Tichota ---------- 484

22. Before the Nebraska Power Review Board may approve an agreement between suppliers of energy under the provisions of section 70-1002.01, R. R. S. 1943, it must have before it evidence which will support affirmative finding that under the terms of the agreement it can be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the area and customers to be served. City of Lincoln v. Nebraska P. P. Dist. -- 556

23. The statutory provision requiring determination by the Nebraska Power Review Board of whether the "proposed agreement or amendment can reasonably be expected to provide a reliable wholesale power supply at a reasonable cost for the area" is a sufficiently definite standard to guide the Nebraska Power Review Board in the exercise of the delegated legislative power of determining the facts

on which approval of agreements under section 70-1002.01, R. R. S. 1943, are to be founded. Accordingly the delegation in this instance is not unconstitutional. City of Lincoln v. Nebraska P. P. Dist. ---------- 556

24. When a soliciting agent of an insurance company and the insured mutually agree upon the terms and conditions of the insurance contract, and the policy, later issued by the company, omits one of the essential elements of the contract, which is not discovered by the insured until after a loss occurs, he may then have the policy reformed so as to express the real agreement of the parties. Parry v. State Farm Mut. Auto. Ins. Co. ---------- 628

25. If persons to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent. LaPuzza v. Prom Town House Motor Inn, Inc. ---------- 687

26. In a cost plus contract the contractor must credit the owner with all discounts and credits unless the contract specifically provides otherwise. LaPuzza v. Prom Town House Motor Inn, Inc. ---------- 687

27. Ambiguities in a contract are construed most strictly against its author. LaPuzza v. Prom Town House Motor Inn, Inc. ---------- 687

28. Under contracts designed as cost plus agreements, the amount owing the builder should be computed on the basis of the amount actually spent for labor, materials, and supplies which go into and become a part of the finished structure, including the amounts paid to subcontractors. LaPuzza v. Prom Town House Motor Inn, Inc. ---------- 687

29. An antenuptial agreement cannot absolutely limit the amount of an award of alimony, although it should be considered by the court with other evidence on that point. Krejci v. Krejci ---------- 698

30. The holder of an instrument may, even without consideration, discharge any party by renouncing

his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged. Gorham v. John F. Kennedy College, Inc. ---------- 790

31. No public policy forbids contracts for promoting and managing a corporation according to law and for lawful purposes, or for determining among the promoters what the stock shall be and how it shall be divided, or for election of themselves as officers and employment by the corporation when formed. Henderson v. Joplin ---------- 827

32. A control agreement between promoters or stockholders owning a majority of the stock of a corporation as to a course of corporate policy or as to officers or directors whom they will elect is not against public policy where there is no evidence of fraud or wrong against creditors or other stockholders, and such control agreement does not contravene any express constitutional or statutory provision and is not otherwise illegal. Henderson v. Joplin ---------- 827

33. A control agreement between promoters of a corporation to be organized will be interpreted in accordance with the intention of the parties as expressed. Henderson v. Joplin ---------- 827

34. The promoters of a corporation occupy a relation of trust and confidence toward the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries. Henderson v. Joplin ---------- 827

35. An individual stockholder may bring an action in his own name to recover for a breach of a stockholders control agreement when he has sustained a loss separate and distinct from that of the other stockholders. An individual stockholder may not bring an action in his own name to recover for wrongs done to the corporation or its property. Henderson v. Joplin ---------- 827

36. Specific performance of a parol contract will be enforced by a court of equity where one party has wholly and the other party partly performed it, and its nonfulfillment on the one hand would amount to a fraud on the party who has fully performed it. Pinney v. Hill ---------- 844

Controlled Substances.

When evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the court and will not be reversed on appeal in the absence of an abuse of discretion. State v. Batchelor ---------- 148

Conveyances.

1. It is not necessary for a lease of nonhomestead land to be acknowledged in order for it to be good as between the parties. Neither is it necessary for a lease to be recorded to take effect against a subsequent purchaser with notice. Grand Island Hotel Corp. v. Second Island Development Co. ---- 98
2. A lessee of real estate under a written lease for a term of 25 years, notice of which is duly recorded, is an "assignee" within the meaning of section 76-208, R. R. S. 1943, and may enforce covenants of title involving possessory rights contained in a prior conveyance of the real estate to his lessor. Grand Island Hotel Corp. v. Second Island Development Co. ---------- 98

Corporations.

1. The District Court shall have full power to liquidate the assets and business of a corporation: "(1) In an action by a shareholder when it is established: * * * (b) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent." Hockenberger v. Curry -- 404
2. The Nebraska Business Corporation Act has given to the courts the power to relieve minority shareholders from oppressive acts of the majority, but the remedy of liquidation is so drastic that it must be invoked with extreme caution. The ends of justice would not be served by too broad an application of the statute, for that would merely eliminate one evil by substituting a greater one—oppression of the majority by the minority. Hockenberger v. Curry ---------- 404
3. No public policy forbids contracts for promoting and managing a corporation according to law and for lawful purposes, or for determining among the promoters what the stock shall be and how it shall be divided, or for election of themselves as officers and employment by the corporation when formed.

Henderson v. Joplin ---------- 827

4. A control agreement between promoters or stockholders owning a majority of the stock of a corporation as to a course of corporate policy or as to officers or directors whom they will elect is not against public policy where there is no evidence of fraud or wrong against creditors or other stockholders, and such control agreement does not contravene any express constitutional or statutory provision and is not otherwise illegal. Henderson v. Joplin ---------- 827
5. A control agreement between promoters of a corporation to be organized will be interpreted in accordance with the intention of the parties as expressed. Henderson v. Joplin ---------- 827
6. The promoters of a corporation occupy a relation of trust and confidence toward the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries. Henderson v. Joplin ---------- 827
7. An individual stockholder may bring an action in his own name to recover for a breach of a stockholders control agreement when he has sustained a loss separate and distinct from that of other stockholders. An individual stockholder may not bring an action in his own name to recover for wrongs done to the corporation or its property. Henderson v. Joplin ---------- 827

Courts.

1. In the construction of a statute, courts must consider the preexisting law and any other laws relating to the same subject. Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn. 1
2. Courts should not give an interpretation to a statute which would have the effect of nullifying another statute when obviously that was not the clear legislative intent. Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn. -------- 1
3. The authority vested in a prosecuting attorney to determine whether a child under 16 years of age who has committed a crime shall be prosecuted in the juvenile or criminal court is not violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States or

Article I, section 3, Constitution of Nebraska. State v. Grayer ---------- 523
4. Juvenile courts do not have the sole or exclusive jurisdiction of children under 18 years of age who have violated the laws of Nebraska. State v. Grayer ---------- 523
5. In the interest of proper state practice and procedure we initially require a party to file a petition for a writ of habeas corpus in the state trial court. State v. Goham ---------- 639
6. The doctrine of forum non conveniens refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum. Qualley v. Chrysler Credit Corp. ---------- 787
7. Whether a suit should be entertained or dismissed under the rule of forum non conveniens depends largely upon the facts of the particular case and rests in the sound discretion of the trial court. Factors which relate to the public interest and the welfare of the court are to be considered together with factors which relate to the convenience of the parties. Qualley v. Chrysler Credit Corp. -------- 787
8. An action should not be dismissed under the rule of forum non conveniens unless an alternative forum is still available to the plaintiff. Qualley v. Chrysler Credit Corp. ---------- 787
9. To the extent that Herrmann v. Franklin Ice Cream Co., 114 Neb. 468, 208 N. W. 141, implies that the doctrine of forum non conveniens is not recognized in Nebraska, it is overruled. Qualley v. Chrysler Credit Corp. ---------- 787

Covenants.

A lessee of real estate under a written lease for a term of 25 years, notice of which is duly recorded, is an "assignee" within the meaning of section 76-208, R. R. S. 1943, and may enforce covenants of title involving possessory rights contained in a prior conveyance of the real estate to his lessor. Grand Island Hotel Corp. v. Second Island Development Co. ---------- 98

Creditor's Suits.

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. Schulze v. Jensen ----- 253

Criminal Law.

1. In computation of the statutory period of 6 months within which the State must bring an accused to trial, periods of delay because of motions for change of venue and for a continuance granted at the request, or with the consent, of defense counsel are excluded. State v. Ogden ---------- 7
2. In a criminal prosecution the court will grant a new trial on timely application of defendant for the reason of newly discovered evidence material for the defendant, provided, the reason materially affects his substantial rights and he could not with reasonable diligence have discovered and produced the evidence at the trial. State v. Atkinson ------ 9
3. Under a statute making a willful failure to return to custody a crime, the word "willful" only means "intentional" and not accidental or involuntary. State v. Gascoigen ---------- 15
4. Before trial, the District Court, in its discretion, may permit the amendment of a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information, as amended, does not charge a crime other than the one on which the accused has his preliminary examination. State v. Gascoigen ---- 15
5. An amendment adding an omitted allegation of a substantive element of the offense sought to be charged does not "change the offense." State v. Gascoigen ---------- 15
6. The District Court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. State v. Gascoigen ---------- 15
7. A sentence within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. State v. Johnson ---------- 26
   State v. Brown ---------- 61
   State v. Sheets ---------- 153
   State v. Zeigler ---------- 322

State v. Clay ---------- 654
State v. Brown ---------- 713
8. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Henry ---------- 27
9. 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 on appeal unless there appears to be an abuse of such discretion. State v. McCowin ------ 31
State v. Johnson ---------- 54
State v. Moore ---------- 596
State v. Cano ---------- 709
10. Standards relating to the privilege against self-incrimination are not affected by the circumstance that the witness is called by the defense and not by the State. State v. Richter ---------- 34
11. The District Court may permit inspection of a presentence report or examination of parts of the report by the offender or his attorney or other person having a proper interest whenever the court finds it is in the best interest of the offender. State v. Richter ---------- 34
12. Should the court in the exercise of its discretion permit inspection of all or part of a presentence report, it may at the request of defendant hold an in camera hearing. State v. Richter ---------- 34
13. A plea of guilty made with full knowledge of the charge and the consequences of the plea will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement. State v. Williams ---------- 57
14. It must appear that counsel's assistance was so grossly inept as to shock the conscience of the court before relief on the ground of ineffective assistance of counsel will be granted. State v. Williams ---------- 57
15. The Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of pleas of guilty or no contest in this state. State v. Gee ---------- 60
16. Where an information charges former convictions which give rise to enhanced punishment under the habitual criminal statute, a plea of nolo contendere

or guilty to the information confesses the prior convictions and no hearing for proof of the convictions is required under section 29-2221(2), R. S. Supp., 1972. State v. Youngstrom ---------- 112

17. The fact that the previous offenses at the time of their commission and at the time of conviction thereof were felonies and have since been by statute reduced to misdemeanors will not preclude their use under the habitual criminal statute to enhance punishment. State v. Youngstrom ---------- 112

18. A finding of guilty will not be set aside for errors which are not prejudicial to the substantial rights of the defendant. State v. Youngstrom ---------- 112

19. For relief on the ground of ineffective assistance of counsel, it must appear that assistance of trial counsel was so grossly inept as to shock the conscience of the court. State v. Garza ---------- 118

20. Section 29-1301.01, R. R. S. 1943, permits the trial court to proceed either in the county where the offense is committed or in any county into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense. State v. Garza ---------- 118

21. On direct appeal this court has the power to remand the cause for a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself invoked appellate jurisdiction for the correction of errors. State v. Gaston ------- 121

22. 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. State v. Rhodes ------ 131
State v. Cortez ---------- 800

23. Where a witness has refused to answer questions before trial, and during the trial his testimony is compelled under section 29-2011.01, R. S. Supp., 1972, the defendant may request a continuance to interview the witness. State v. Rhodes -------- 131

24. Where a witness for the State, who has previously refused to answer questions, is compelled to testify under section 29-2011.01, R. S. Supp., 1972, and the defendant's objection and request for a contin-

uance are denied, all the circumstances must be considered in determining whether there has been an abuse of discretion and the defendant was prevented from properly preparing for trial. State v. Rhodes ---------- 131

25. Testimony which is relevant and admissible on independent grounds is not inadmissible solely because it tends to show immoral or illegal conduct by the defendant. State v. Rhodes ---------- 131

26. When evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the court and will not be reversed on appeal in the absence of an abuse of discretion. State v. Batchelor ---------- 148

27. The brief detention of a citizen based upon an officer's reasonable suspicion that criminal activity may be afoot is permissible for the purpose of limited inquiry in the course of routine investigation, and any incriminating evidence which comes to that officer's attention during this period of detention may become a reasonable basis for effecting a valid arrest. State v. Irwin ---------- 169

28. Probable cause justifying an arrest without warrant exists if the facts and circumstances known to the arresting officer warrant a prudent man in believing the offense has been committed and that the defendant committed it. State v. Irwin ------ 169

29. The existence of probable cause must be determined by a practical and not by any technical standard. State v. Irwin ---------- 169

30. A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony. § 29-404.02, R. S. Supp., 1972. State v. Irwin ---- 169

31. In the context of this case where it is possible that the questioning officer took the defendant's remark that "maybe I should talk to an attorney" not as a request that the interrogation cease but as a passing remark, there was no denial of counsel under Miranda. State v. Irwin ---------- 169

32. Before admissions or confessions may be considered as evidence of guilt, the evidence pertaining to the making thereof must be such as will justify a finding by a jury beyond a reasonable doubt that they were freely, voluntarily, and intelligently made. State v. Irwin ---------- 169

33. If a defendant is in custody of law enforcement officers or otherwise deprived of his freedom in a material way by such officers at the time a confession or admissions are made, the evidence must be such as to permit the jury to find beyond a reasonable doubt that prior to making such admissions or confessions the Miranda warnings were given and that the defendant knowingly and intelligently affirmatively waived his rights. State v. Irwin ---------- 169

34. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and in so doing we will look to the totality of the circumstances. State v. Irwin ---------- 169

35. The determination by the trial court of the admissibility of a confession by a preponderance of the evidence is not inconsistent with the mandate of proof of guilt beyond a reasonable doubt. State v. Irwin ---------- 169

36. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed unless a clear abuse of discretion is shown. State v. Irwin ---------- 169

37. When the defense invites a responsive rebuttal argument which might otherwise be prejudicial, it cannot complain. State v. Irwin ---------- 169

38. If the evidence warrants a finding by the trial court that a defendant is a sexual sociopath and would not be benefited by treatment he should be committed in accordance with the sexual sociopath act for an indefinite period in the Nebraska Penal and Correctional Complex. State v. Irwin ------ 169

39. The sexual sociopath act, sections 29-2901 to 29-2910, R. S. Supp., 1972, is constitutional. We construe the act to provide that when a defendant who has been committed under the indefinite commitment provisions thereof is found to be no longer a sexual sociopath, any sentence which the court may impose for the original conviction may not exceed the maximum sentence for the sexual crime of which he was found guilty less any time the defendant

has been committed under the provisions for indefinite commitment. State v. Irwin ---------- 169
40. 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 convincing evidence. State v. Parker 263
41. In determining whether or not photographic identification procedures have been impermissibly suggestive, the question must be determined by an evaluation of all the surrounding circumstances. State v. Huerta ---------- 280
42. There is no right to counsel at a pretrial photographic identification. State v. Huerta ---------- 280
43. Each case must be considered on its own facts and a conviction based on eyewitness identification at trial, following pretrial identification by photograph, will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. State v. Huerta ---------- 280
44. Even though an in-court identification may have been tainted by an impermissibly suggestive out-of-court photographic identification, the in-court identification may properly be received if it has an independent source. State v. Huerta ---------- 280
45. Cases may be consolidated for trial if the offenses charged are based on the same act or transaction. State v. Shiller ---------- 291
46. A ruling on a motion for consolidation will not be disturbed on appeal in the absence of an abuse of discretion. State v. Shiller ---------- 291
47. In a prosecution for violation of section 28-729.01, R. S. Supp., 1972, specific intent is not an essential element of the crime. State v. Wingate ---------- 388
48. A county sheriff serving a distress warrant and levying on personal property is not a trespasser in a prosecution under section 28-729.01, R. S. Supp., 1972. State v. Wingate ---------- 388
49. An instruction based on a statute is not erroneous if it correctly states the substance of the statute. It is not necessary to quote the statute verbatim. State v. Wingate ---------- 388
50. The determination of whether to grant probation to one convicted of a crime is a matter within the sound discretion of the trial court; and the denial

of probation will not be disturbed on appeal in the absence of a showing of abuse of judicial discretion. State v. Ward ---------- 421

51. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise. State v. Waldrop ---------- 434

52. When a legislative act, adopted after one has been convicted and sentenced for a crime but while the cause is still pending on a motion for new trial or on appeal, serves to mitigate the sentence imposed, this court will either amend the sentence to conform to the legislative intent or will remand the cause to the District Court for resentencing in conformity with the statute. State v. Waldrop ---- 434
State v. White ---------- 772

53. Where voluntary statements or confessions are not offered or received in evidence, the foundational requirements for such are not relevant and, on objection or motion, should be excluded or stricken if they are not otherwise relevant to the issues. State v. Garrett ---------- 439

54. After Miranda warnings have been given and the suspect requests counsel and indicates he wishes to remain silent, interrogation must cease. State v. Garrett ---------- 439

55. The Nebraska obscenity statutes are in full compliance with the criteria and standards required by recent United States Supreme Court decisions including Miller v. California. State v. Little Art Corp. ---------- 448

56. The use of a vehicle in criminal activities ordinarily creates an emergent situation. State v. One 1970 2-Door Sedan Rambler ---------- 462

57. An information charging defendant with homicide committed in the perpetration of a robbery under section 28-401, R. R. S. 1943, charges only murder in the first degree and the court should not ordinarily instruct the jury as to the lesser offenses of murder in the second degree and manslaughter. State v. Montgomery ---------- 470

58. If the intention to rob is formed either antecedent to or contemporaneously with the acts which result

in the death, the homicide is committed in the perpetration of the robbery. State v. Montgomery -- 470

59. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent. State v. Dittrich ---------- 475

60. The constitutional right of an accused to the presence and assistance of legal counsel does not apply as a matter of absolute right to a lineup or showup conducted by the police previous to the initiation of adversary judicial criminal proceedings. State v. Sanchell ---------- 505

61. The provisions of section 29-1606, R. R. S. 1943, are construed to include the requirement of approval by the trial court before an information may be dismissed. An agreement by a prosecuting attorney to dismiss an information against a defendant conditioned upon his "passing" a polygraph examination may not be enforced in the absence of approval by the court either of the agreement or of a dismissal requested by the prosecutor pursuant thereto. State v. Sanchell ---------- 505

62. The conduct by the police, at whatever time, of identification procedures must not be so unnecessarily suggestive and conducive to a substantial likelihood of irreparable mistaken identification as to be a denial of due process of law. State v. Sanchell ---------- 505

63. Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it. State v. Sanchell ---------- 505

64. Even though an identification procedure may have been suggestive, the in-court identification may be allowed to go to the jury if under the totality of the circumstances it is determined to be reliable because it has an origin independent of the taint. State v. Sanchell ---------- 505

65. If identification procedures are such as to violate due process, the denial of a proper and timely motion to suppress and the admission of the in-court identification constitutes reversible error unless this court can say beyond a reasonable doubt that the error was harmless. State v. Sanchell ---------- 505

66. The authority vested in a prosecuting attorney to determine whether a child under 16 years of age who has committed a crime shall be prosecuted in the juvenile or criminal court is not violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States or Article I, section 3, Constitution of Nebraska. State v. Grayer ---------- 523

67. The discretion vested in a prosecuting attorney to determine in which court a minor shall be prosecuted is not violative of Article II, section 1, of the Constitution of Nebraska, as an unlawful delegation of legislative power. State v. Grayer ---- 523

68. Due process does not require a prosecuting attorney to hold an adversary hearing prior to determining the manner in which a minor offender shall be proceeded against. State v. Grayer ---------- 523

69. Juvenile courts do not have the sole or exclusive jurisdiction of children under 18 years of age who have violated the laws of Nebraska. State v. Grayer ---------- 523

70. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. State v. Earlywine ---------- 533

71. Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. State v. Earlywine ---------- 533

72. It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury when Article I, section 6, of the Constitution of Nebraska, is not violated. State v. Johnson 535

73. Where a defendant is charged with a violation of a city ordinance, with a maximum authorized penalty of 6 months incarceration, he is not entitled to a jury trial under the federal Constitution. State v. Johnson ---------- 535

74. The State of Nebraska never intended to and did not abandon jurisdiction over crimes committed on the Omaha Indian Reservation prior to 12:01 a.m.,

EST, October 25, 1970. State v. Goham ---------- 639

75. The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Clay ---------- 654

76. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Ray -- 702

77. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausability of explanations, or weigh the evidence. Such matters are for the jury. State v. Cano ---------- 709

78. The credibility of the witnesses and the weight of the evidence in a criminal case are for the jury and a verdict will not be set aside on appeal if the evidence sustains some rational theory of guilt. State v. Cano ---------- 709

79. In criminal cases alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal. State v. Seger ---- 760

80. Alleged errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon. State v. Seger ---------- 760

81. New evidence tendered in support of a motion for a new trial on the grounds of newly discovered evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Seger ---- 760

82. A new trial will not be granted for newly discovered evidence which, when produced, would merely impeach or discredit a witness. State v. Seger ---- 760

83. There is reversible error if the record affirmatively shows that defendant has been prejudiced by private communication between the trial court and jurors, and a new trial should be granted where the record is silent as to a possibility of prejudice, although reversal is not required if the record affirmatively shows communication had no tendency to influence the verdict. State v. White ---------- 772

84. In a prosecution for uttering and publishing a forged instrument, knowing it to be forged, a conviction

cannot be sustained without proof of the forgery. State v. Addison ---------- 792

85. To sustain a conviction for forgery it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority. State v. Addison ---------- 792

86. The doubt referred to in the requirement that a hearing on the competency of a defendant to stand trial is required when a reasonable doubt as to this issue is raised refers to a doubt arising in the mind of the trial judge. State v. Cortez ---------- 800

87. For post conviction relief on the ground of ineffective assistance of counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Cortez ------ 800

Damages.

1. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. Laun v. Roach ---------- 11

2. Performance of a contract for appraisal of damage to property of A. by reason of a building that contractors of B. were to construct on B.'s adjoining property with temporary work on A.'s property, and for payment of the appraisal by B., may afford a defense to A.'s claims against B.'s architect and contractors and a subcontractor for negligent damage to A.'s property. Grantham v. General Tel. Co. 21

3. Where the recovery is not a mere matter of computation, it will not be interfered with unless so excessive or so grossly inadequate as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or unless it appears to have been based on an oversight, mistake, misconception, or misrepresentation, or on a consideration of elements not within the scope of the action. Huber v. Cornhusker Paving Co. ---------- 108

4. Property which cannot be returned in a replevin action is to be valued as of the time of trial. Community Credit Co. v. Gillham ---------- 198

5. Where a construction contract is substantially performed, the damage which the owner suffers be-

cause of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. Henggeler v. Jindra ---- 317

6. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law. Schmidt v. Richman Gordman, Inc. ---------- 345

7. In an action for damages, where the law furnishes no legal rule for measuring them, the amount rests largely in the sound discretion of the jury, and the courts are reluctant to interfere with a verdict rendered by the jury. Schmidt v. Richman Gordman, Inc. ---------- 345

8. Where one, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. Blum v. Brichacek ---------- 457

9. It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which it should take into consideration in arriving at its verdict, otherwise the jury may be confused and misled. Bass v. Boetel & Co. ---- 733

10. Loss of past earnings is a separate and distinct element of damage from loss or impairment of future earning capacity, and an instruction which in a proper case submits both elements of damage is not erroneous on the ground that the instruction permits duplicate recovery. Siciunas v. Checker Cab Co., Inc. ---------- 766

11. The amount of a verdict of a jury will not be disturbed on appeal unless it has been shown to be so excessive that it is the result of passion or prejudice. Siciunas v. Checker Cab Co., Inc. ---- 766

12. In a condemnation proceeding an owner receives full compensation for all damages sustained and the measure of those damages is the actual legal rights acquired by the condemner and not the use actually made of the land by the condemner. Danish Vennerforning & Old Peoples Home v. State ---- 774

13. A condemner must take the rights he appropriates unconditionally by his petition of taking and he

must pay full compensation to the condemnee for what he takes or is entitled to take by his petition of taking. Danish Vennerforning & Old Peoples Home v. State ---------- 774

14. An unaccepted promise by a condemner to do something in the future cannot affect the character or the extent of the rights acquired or the amount of damages to be recovered as just compensation. Danish Vennerforning & Old Peoples Home v. State 774

15. Where land has been taken or damaged for public use and the work completed without just compensation being first made, and continued possession is necessary and proper for such public use, the owner is not entitled to injunctive relief but is limited to an action for damages for the property taken or damaged. Danish Vennerforning & Old Peoples Home v. State ---------- 774

Declaratory Judgments.

The District Court has power to retain jurisdiction and grant further relief where it has entered a declaratory judgment declaring the rights of the parties under a contract. First Nat. Bank v. Omaha Nat. Bank ---------- 249

Deeds.

1. The general rule is that the delivery by the grantor of a deed to a third person to hold until the happening of a contingency does not operate as a delivery. Action Realty Co., Inc. v. Miller ----- 381

2. To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport and effect of what he was then doing. Westerdale v. Johnson ---------- 391

3. A case of undue influence is made out, in case of a deed, where it is shown by clear and satisfactory evidence (1) that the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. Guill v. Wolpert ---------- 805

4. The undue influence which will avoid a deed is an

unlawful or fraudulent influence which controls the will of the grantor. Guill v. Wolpert ---------- 805

5. The one attacking an instrument on the ground that its execution was procured by undue influence has the burden resting on him to establish that fact. However, the circumstances under which it was made, the condition of the grantor at the time, and the injustice to her and her heirs, if it is upheld, may be such as to cast upon the grantee the burden of going forward with the evidence to show that it is not tainted with undue influence but is the deliberate and bona fide act of the grantor. Guill v. Wolpert ---------- 805

6. It is impossible to lay down any hard and fast rule as to when a presumption of undue influence arises. The rule must, of necessity, be applied according to the particular facts and circumstances of each case in which the question arises. Generally, it may be said that if the facts and circumstances show such confidential, fiduciary, or trust relationship that it would be inequitable to sustain the deed in question, then such presumption arises, and the burden of going forward with the evidence rests upon the grantee to show the bona fides thereof. Guill v. Wolpert ---------- 805

7. Where the validity of an alleged gift between persons occupying a confidential relationship is attacked, the burden of proving that a confidential relationship existed between the parties rests on the one attacking the gift. Guill v. Wolpert ---------- 805

8. Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence. Guill v. Wolpert ---------- 805

9. The mere existence of a confidential relationship between grantor and grantee does not of itself show undue influence where the deed is made by the grantor with full knowledge of its nature and effect, and because of the deliberate desire of the grantor. Guill v. Wolpert ---------- 805

10. The court, in determining whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only to determine whether it was the voluntary act of the grantor. The fact that the grantor has others who were so related to him who were proper subjects to receive his bounty can be considered by the court

only as it bears upon the validity of the conveyance. Guill v. Wolpert ---------- 805

11. Section 76-238, R. R. S. 1943, is designed to protect a subsequent purchaser even though there was a prior conveyance or transaction concerning the property, provided the subsequent purchaser recorded his title first, and provided further that the subsequent purchaser was a bona fide purchaser without notice of any other claims to the property. Karmann v. Haase ---------- 839

Discovery.

Proceedings of the medical staff committee of a hospital are privileged in the absence of a showing of good cause arising from extraordinary circumstances. Oviatt v. Archbishop Bergan Mercy Hospital ---------- 224

Dismissal.

It is within the sound discretion of the District Court to dismiss a petition without prejudice for disobedience by the plaintiff of a reasonable order concerning the proceedings in the action. Vodehnal v. Grand Island Daily Independent ---------- 836

Divorce.

1. In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Boyles v. Boyles ---------- 66
Christensen v. Christensen ---------- 355
Erks v. Erks ---------- 603
Kockrow v. Kockrow ---------- 657

2. 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. Boyles v. Boyles ---------- 66

3. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Boyles v. Boyles ---- 66

4. Upon the dissolution of a marriage the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Casselman v. Casselman ____ 138
5. In determining the issue of child custody, the paramount consideration is the best interests and welfare of the children. Schuller v. Schuller _____ 266
6. In a divorce action the case is to be tried de novo in the Supreme Court on the issues presented on appeal. Schuller v. Schuller _____ 266
Seybold v. Seybold _____ 480
7. In cases involving determinations of child custody, the findings of the trial court both as to evaluation of evidence and as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion shown. Schuller v. Schuller __ 266
Erks v. Erks _____ 603
Kockrow v. Kockrow _____ 657
8. Child custody provisions of a divorce decree entered in a sister state have no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to the welfare of the children. Carner v. Anderson __ 341
9. The fixing of child support and alimony rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be disturbed on appeal. Sommers v. Sommers _____ 361
10. The lien of a judgment for child support or alimony constitutes a lien the same as other monetary judgments and is a lien not only for past due installments but also as security for installments to fall due in the future. Action Realty Co., Inc. v. Miller 381
11. A party acquiring an interest in real estate after the judgment lien for child support has attached takes the property subject to the lien of the judgment for all installments due or to become due. Action Realty Co., Inc. v. Miller _____ 381
12. An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an

allowance for support, or both, is not subject to modification. Bryant v. Bryant ---------- 539

13. When it appears that minor children in a divorce action may have interests, independent of the parents, in the outcome of the litigation, the District Court should ordinarily appoint counsel to represent them under section 42-358, R. S. Supp., 1972. Ford v. Ford ---------- 548

14. Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock. Ford v. Ford ---------- 548

15. It is generally the best policy to keep minor children within the jurisdiction of the court, but this policy must yield to the paramount consideration which is the best interests of the children. Erks v. Erks 603

16. In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusions of the trial court as to such reliability will be carefully regarded by the Supreme Court on review. Reisig v. Reisig ---------- 612

17. A judgment of a trial court fixing the amount of alimony, or making a distribution of property, will not be disturbed on appeal unless good cause is shown. Reisig v. Reisig ---------- 612

18. The determination of the amount of child support to be allowed, if any, rests in the sound discretion of the trial court. The ultimate criteria under the statute as well as under the former decisions of this court is one of reasonableness. The determination of the court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Kockrow v. Kockrow ---------- 657

19. As we interpret our no-fault divorce statute, under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other. In the matter of child support while the father has the primary responsibility to support his children, the trial court should not ignore the ability of the

mother. It has the responsibility of adjusting the equities between the parties. Kockrow v. Kockrow 657

20. An antenuptial agreement cannot absolutely limit the amount of an award of alimony, although it should be considered by the court with other evidence on that point. Krejci v. Krejci ---------- 698

21. The determination of alimony, division of property, and child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless there is a clear abuse of discretion by the trial court, or it is clearly against the weight of the evidence. Peery v. Peery ---------- 782

22. Section 42-349, R. S. Supp., 1972, which imposes a 1-year residency requirement for dissolution of marriage, unless the marriage was solemnized in Nebraska and one party has resided in Nebraska continuously, is constitutional. Ashley v. Ashley -- 824

Domicile.

1. If a qualified voter who will be absent from the county of his domicile on the day of an election fails to make application either in writing or in person at least "three clear days" before the election as required by section 32-803, R. S. Supp., 1972, he is not entitled to receive an absentee ballot, and if one is issued to him in violation of the statute a vote cast thereon is illegal and void. Dilsaver v. Pollard ---------- 241

2. The question of determining a voter's residence or domicile under the provisions of Article VI, section 1, of the Constitution of the State of Nebraska, is a judicial one and should be determined in accordance with principles which determined the meaning of residence or domicile at the time the Constitution was adopted. Section 32-475, R. R. S. 1943, does not establish absolute criteria for determining residence or domicile. Dilsaver v. Pollard -------- 241

3. Section 42-349, R. S. Supp., 1972, which imposes a 1-year residency requirement for dissolution of marriage, unless the marriage was solemnized in Nebraska and one party has resided in Nebraska continuously, is constitutional. Ashley v. Ashley ---- 824

Due Process.

1. When financial burdens are imposed upon property owners through an exercise of judicial power pur-

suant to specific terms of a statute, due process of law requires notice and an opportunity to be heard. State ex rel. Meyer v. Peters ---------- 330

2. Where an increase in the assessed valuation of any classes of property as returned by any county or counties is made by the State Board of Equalization and Assessment without notice to such county or counties and without affording sufficient opportunity to be heard, such increase amounts to confiscation of property without due process, and is therefore a void increase of assessment. State ex rel. Meyer v. Peters ---------- 330

Easements.

1. A prescriptive right is not looked on with favor by the law. Mehling v. Deines ---------- 287
2. A prescriptive easement can only be established by clear and convincing evidence of an adverse use under claim of right that was continuous, notorious, open, exclusive, with knowledge and acquiescence of the servient owner for the full prescriptive period. Mehling v. Deines ---------- 287
3. A use by express or implied permission or license cannot ripen into an easement by prescription. Mehling v. Deines ---------- 287
4. To establish a road or highway by prescription there must be use by the general public under a claim of right, adverse to the owner of the land, of some particular or defined line of travel. The use must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land. Dunnick v. Stockgrowers Bank of Marmouth ---------- 370
5. Where the use of an easement has been adverse, notorious, and uninterrupted for the statutory period, it will be presumed to have been under a claim of right. The owner of the servient tenement is charged with knowledge of such use and acquiescence in it is implied. Dunnick v. Stockgrowers Bank of Marmouth ---------- 370
6. Payment of taxes is not a necessary element of proof of adverse possession unless made so by express statutory requirement. Dunnick v. Stockgrowers Bank of Marmouth ---------- 370
7. It is not necessary that a right to a road or highway obtained by prescription or use be equal in all

respects to that which would have resulted from the formal establishment of a road by statutory proceedings. Dunnick v. Stockgrowers Bank of Marmouth ---------- 370

8. The title and ownership of land acquired by adverse possession and prescriptive use by the public as a road or street is the same as it would have been if the land had been dedicated as a street or highway and accepted by the appropriate governmental entity. Dunnick v. Stockgrowers Bank of Marmouth 370

Elections.

1. If a qualified voter who will be absent from the county of his domicile on the day of an election fails to make application either in writing or in person at least "three clear days" before the election as required by section 32-803, R. S. Supp., 1972, he is not entitled to receive an absentee ballot, and if one is issued to him in violation of the statute a vote cast thereon is illegal and void. Dilsaver v. Pollard ---------- 241
2. The period of "three clear days" is determined by excluding both the day of the election and the day of the request. Dilsaver v. Pollard ---------- 241
3. The question of determining a voter's residence or domicile under the provisions of Article VI, section 1, of the Constitution of the State of Nebraska, is a judicial one and should be determined in accordance with principles which determined the meaning of residence or domicile at the time the Constitution was adopted. Section 32-475, R. R. S. 1943, does not establish absolute criteria for determining residence or domicile. Dilsaver v. Pollard - 241
4. In an election contest the burden of proving the facts which may make a vote illegal is upon the party so contending. He also has the burden of proving how the alleged illegal vote affected the election and so must show how it was cast. Dilsaver v. Pollard ---------- 241
5. In an election contest appealed to this court the cause is heard de novo. Dilsaver v. Pollard ---- 241

Electricity.

1. Power companies engaged in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high

degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with the electric lines but they are not insurers and not liable for damages in the absence of negligence. Lorence v. Omaha P. P. Dist. ---- 68

2. Before the Nebraska Power Review Board may approve an agreement between suppliers of energy under the provisions of section 70-1002.01, R. R. S. 1943, it must have before it evidence which will support affirmative finding that under the terms of the agreement it can be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the area and customers to be served. City of Lincoln v. Nebraska P. P. Dist. -- 556
3. The statutory provision requiring determination by the Nebraska Power Review Board of whether the "proposed agreement or amendment can reasonably be expected to provide a reliable wholesale power supply at a reasonable cost for the area" is a sufficiently definite standard to guide the Nebraska Power Review Board in the exercise of the delegated legislative power of determining the facts on which approval of agreements under section 70-1002.01, R. R. S. 1943, are to be founded. Accordingly the delegation in this instance is not unconstitutional. City of Lincoln v. Nebraska P. P. Dist. 556

Eminent Domain.

1. The assessed value of property for tax purposes, in and of itself, is generally not admissible as direct evidence of value for purposes other than taxation. Lienemann v. City of Omaha ---------- 442
2. Where error is established in the admission of evidence of value in a condemnation case, and there is no contention in brief or argument that the error was not prejudicial, the error will be presumed to be prejudicial unless it clearly appears from the record that it did not affect unfavorably the party against whom it was admitted. Lienemann v. City of Omaha ---------- 442
3. The term "all parties bound by the award" as used in section 76-715.01, R. R. S. 1943, and upon whom notice of appeal must be served refers: (1) In case the condemner is the appealing party, to the condemnee or condemnees from the award in favor of whom the condemner desires to take his appeal;

or (2) in case a condemnee is the appealing party, it refers to the condemner. An appealing condemnee need not serve notice of appeal upon other condemnees. Grace Land & Cattle Co. v. Tri-State G. & T. Assn., Inc. ---------- 663

4. The statutory provision which permits a petition to condemn to be filed in the county court of the county where "some part" of the property is situated has reference to a tract some part of which lies in both counties. Grace Land & Cattle Co. v. Tri-State G. & T. Assn., Inc. ---------- 663

5. In a condemnation proceeding an owner receives full compensation for all damages sustained and the measure of those damages is the actual legal rights acquired by the condemner and not the use actually made of the land by the condemner. Danish Vennerforning & Old Peoples Home v. State ---------- 774

6. A condemner must take the rights he appropriates unconditionally by his petition of taking and he must pay full compensation to the condemnee for what he takes or is entitled to take by his petition of taking. Danish Vennerforning & Old Peoples Home v. State ---------- 774

7. An unaccepted promise by a condemner to do something in the future cannot affect the character or the extent of the rights acquired or the amount of damages to be recovered as just compensation. Danish Vennerforning & Old Peoples Home v. State 774

8. An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway or street. Danish Vennerforning & Old Peoples Home v. State ---------- 774

9. Where land has been taken or damaged for public use and the work completed without just compensation being first made, and continued possession is necessary and proper for such public use, the owner is not entitled to injunctive relief but is limited to an action for damages for the property taken or damaged. Danish Vennerforning & Old Peoples Home v. State ---------- 774

Employer and Employee.

1. In workmen's compensation cases related to recreational or social activities one test of compensability is whether the employer derives substantial, direct

benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreational and social life. Kuethe v. State ---------- 167

2. To sustain a charge of discrimination where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions. Duffy v. Physicians Mut. Ins. Co. ---------- 233

3. It is well settled that a duty rests on an employer to warn his employees of defects or dangers not apparent which may arise in the course of the employment, which the employer knows or ought to know about, and which he has reason to believe the employee does not know and will not discover in time to protect himself. Anstine v. Briggs -- 489

4. The master is not compelled to foresee and guard against an accident which reasonable and prudent men would not expect to happen, and where an injury to a servant could not reasonably have been anticipated, a failure to take precautionary measures is not negligence on the part of the master for which he is liable to the servant. Anstine v. Briggs 489

Equity.

1. On an appeal in an action in equity, this court will try the issues of fact complained of de novo. Vakoc Constr. Co. v. City of Wayne ---------- 45

2. Ordinarily, the doctrine of equitable estoppel can not be invoked against a municipal corporation in the exercise of a governmental function, but exceptions can be made where right and justice so demand. Vakoc Constr. Co. v. City of Wayne ---- 45

3. In order to establish an equitable estoppel against one asserting his title or claim to real property, the party attempting to raise it must show an actual fraudulent representation, concealment, or such conduct or negligence as will amount to a fraud in law, and that the party claiming such estoppel relied thereon and was actually misled thereby to his injury. Vakoc Constr. Co. v. City of Wayne ---------- 45

4. On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict,

this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Mehling v. Deines ---------- 287
5. An action brought to foreclose a mortgage on personal property and for a deficiency judgment is an action in equity and a trial by jury is not required by section 25-1104, R. R. S. 1943. State Securities Co. v. Corkle ---------- 578
6. In appeals from the District Court to the Supreme Court in suits in equity, it is the duty of this court to retry the issues of fact involved upon the evidence in the record and upon such trial de novo reach an independent conclusion. Parry v. State Farm Mut. Auto. Ins. Co. ---------- 628
7. Specific performance of a parol contract will be enforced by a court of equity where one party has wholly and the other party partly performed it, and its nonfulfillment on the one hand would amount to a fraud on the party who has fully performed it. Pinney v. Hill ---------- 844
8. Actions in equity on appeal to the Supreme Court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Pinney v. Hill ---------- 844

Escrows.

The general rule is that the delivery by the grantor of a deed to a third person to hold until the happening of a contingency does not operate as a delivery. Action Realty Co., Inc. v. Miller ---------- 381

Estoppel.

1. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of a governmental function, but exceptions can be made where right and justice so demand. Vakoc Constr. Co. v. City of Wayne ---- 45
2. In order to establish an equitable estoppel against one asserting his title or claim to real property, the party attempting to raise it must show an

actual fraudulent representation, concealment, or such conduct or negligence as will amount to a fraud in law, and that the party claiming such estoppel relied thereon and was actually misled thereby to his injury. Vakoc Constr. Co. v. City of Wayne ---------- 45

3. As a general rule every person of mature age, able to read and write, who has an opportunity to read an instrument, and executes the same is presumed to know the contents of the instrument signed and is estopped from denying the contents thereof. Prudential Ins. Co. v. Holliday ---------- 144

4. To constitute an estoppel, there must be a reliance in good faith upon the conduct or statements of the party to be estopped; and action or inaction based thereon of such a character to change the position or status of the party claiming the estoppel to his injury, detriment, or prejudice. Tighe v. Security Nat. Life Ins. Co. ---------- 271

5. An extension of credit for the payment of premiums by an insurer to the insured may under certain circumstances constitute a waiver or estoppel, but whether credit was so extended is a question of fact. Tighe v. Security Nat. Life Ins. Co. ------ 271

Evidence.

1. In a criminal prosecution the court will grant a new trial on timely application of defendant for the reason of newly discovered evidence material for the defendant, provided, the reason materially affects his substantial rights and he could not with reasonable diligence have discovered and produced the evidence at the trial. State v. Atkinson ---- 9

2. Ordinarily, failure to make a motion to strike or timely objection to proffered evidence in the trial court waives the right to complain of the admission of such evidence on appeal. Laun v. Roach -- 11

3. In personal injury cases where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary. Eiting v. Godding ---------- 88

4. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily

be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. Eiting v. Godding ---------- 88

5. When symptoms from which personal injury may be inferred are subjective only, medical testimony is required. Eiting v. Godding ---------- 88

6. It is the duty of the trial court to rule upon the admissibility of evidentiary facts when they are offered in evidence. Their relevancy should then appear or the court should be informed as to the connection in which they will become relevant. Ritzau v. Wiebe Constr. Co. ---------- 92

7. There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced. Ritzau v. Wiebe Constr. Co. 92

8. The opinion of a qualified witness as to the value of services is admissible to prove such value when his testimony will aid the jury. Ritzau v. Wiebe Constr. Co. ---------- 92

9. Testimony which is relevant and admissible on independent grounds is not inadmissible solely because it tends to show immoral or illegal conduct by the defendant. State v. Rhodes ---------- 131

10. When, upon a jury trial, defendant, at the conclusion of plaintiff's evidence, moves for a dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to the plaintiff, and she is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom. Bohling v. Farm Bureau Ins. Co. ---------- 141

11. Circumstantial evidence is insufficient to warrant a recovery in a civil case unless the circumstances proved are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom. Conjecture, speculation, or choice of possibilities is not proof. There must be something more which would lead a reasoning mind to one conclusion rather than another. Bohling v. Farm Bureau Ins. Co. ---------- 141

12. In every jury case, at the conclusion of plaintiff's evidence, there is a preliminary question for the

court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. Bohling v. Farm Bureau Ins. Co. ---------- 141

13. When evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the court and will not be reversed on appeal in the absence of an abuse of discretion. State v. Batchelor ---------- 148

14. A motion for directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Melia v. Svoboda ---------- 150

15. A finding of fact by the trial court, either the Workmen's Compensation Court en banc or the District Court on direct appeal from the order by one judge of the compensation court, against the party with the burden of proof will be set aside only if the evidence compels a finding for that party. Kuethe v. State ---------- 167

16. In workmen's compensation cases related to recreational or social activities one test of compensability is whether the employer derives substantial, direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreational and social life. Kuethe v. State ---------- 167

17. Before admissions or confessions may be considered as evidence of guilt, the evidence pertaining to the making thereof must be such as will justify a finding by a jury beyond a reasonable doubt that they were freely, voluntarily, and intelligently made. State v. Irwin ---------- 169

18. If a defendant is in custody of law enforcement officers or otherwise deprived of his freedom in a material way by such officers at the time a confession or admissions are made, the evidence must be such as to permit the jury to find beyond a reasonable doubt that prior to making such admissions or confessions the Miranda warnings were

given and that the defendant knowingly and intelligently affirmatively waived his rights. State v. Irwin ---------- 169

19. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and in so doing we will look to the totality of the circumstances. State v. Irwin ---------- 169

20. The determination by the trial court of the admissibility of a confession by a preponderance of the evidence is not inconsistent with the mandate of proof of guilt beyond a reasonable doubt. State v. Irwin ---------- 169

21. Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Quincy v. J & S of Nebraska, Inc. -- 208

22. On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. Quincy v. J & S of Nebraska, Inc. ---- 208
Sopher v. Nebraska P. P. Dist. ---------- 402

23. Where an award in a workmen's compensation case is supported by reasonable competent evidence and the medical testimony is uncontradicted that future medical examinations, treatment, and medicines will be necessary, the employer shall be liable for reasonable medical and hospital services and medicines as and when needed, subject to the approval of the Workmen's Compensation Court. Quincy v. J & S of Nebraska, Inc. ---------- 208

24. In testing the sufficiency of the evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. Mid-States Equipment Co. v. Evans ---------- 230

25. The exercise by a trial court of its discretion in ruling on admission or rejection of evidence will not be disturbed on appeal unless the trial court

clearly or plainly abused its discretion. Duffy v. Physicians Mut. Ins. Co. ---------- 238

26. To sustain a charge of discrimination where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions. Duffy v. Physicians Mut. Ins. Co. ---------- 233

27. The burden of proof is on complainant to prove a discriminatory pay differential by reason of her sex. Duffy v. Physicians Mut. Ins. Co. ---------- 233

28. Where evidence supporting the District Court findings of fact is substantial, the findings will not be disturbed on appeal. Duffy v. Physicians Mut. Ins. Co. ---------- 233

29. The inclusion of evidence in a bill of exceptions is the only vehicle for bringing evidence before this court on appeal. Evidence not included in the bill of exceptions may not be considered. Dilsaver v. Pollard ---------- 241

30. Where the evidence adduced to sustain an issue, although conflicting, is so conclusive that reasonable minds can draw but one conclusion therefrom, it is the court's duty to decide the question as a matter of law, rather than submit it to a jury. Exchange Bank of Gibbon v. Ashley ---------- 259

31. 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 convincing evidence. State v. Parker 263

32. There is a presumption that the court, trying a case without a jury, in arriving at a decision, will consider such evidence only as is competent and relevant, and the Supreme Court will not reverse a case so tried because other evidence was admitted, when there is material, competent, and relevant evidence admitted sufficient to sustain a judgment of the trial court. Schuller v. Schuller ---- 266

33. Generally, the admission of incompetent or irrelevant evidence is not reversible error, where the cause is tried to the court without a jury. Schuller v. Schuller ---------- 266

34. Upon a trial de novo in the Supreme Court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over

proper objection by the adverse party, will be disregarded by this court. Schuller v. Schuller ____ 266
35. The failure to object promptly to an offer of evidence waives the objection. State v. Huerta ____ 280
36. In determining whether or not photographic identification procedures have been impermissibly suggestive, the question must be determined by an evaluation of all the surrounding circumstances. State v. Huerta ____ 280
37. Each case must be considered on its own facts and a conviction based on eyewitness identification at trial, following pretrial identification by photograph, will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. State v. Huerta ____ 280
38. Even though an in-court identification may have been tainted by an impermissibly suggestive out-of-court photographic identification, the in-court identification may properly be received if it has an independent source. State v. Huerta ____ 280
39. On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Mehling v. Deines __ 287
40. Error in the admission of evidence is not grounds for reversal if no substantial miscarriage of justice occurred. State v. Russ ____ 300
41. In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party and every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom. Schmidt v. Knox ____ 302
42. There is a presumption that the court, trying a case without a jury, in arriving at a decision, will consider such evidence only as is competent and relevant and the Supreme Court will not reverse a case so tried because other evidence was admitted, where there is material, competent, and relevant evidence admitted sufficient to sustain the judgment of the trial court. Christensen v. Christensen 355

43. Upon a trial de novo in this court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objection by the adverse party will be disregarded by this court. Christensen v. Christensen ---------- 355
44. Payment of taxes is not a necessary element of proof of adverse possession unless made so by express statutory requirement. Dunnick v. Stockgrowers Bank of Marmouth ---------- 370
45. Discretion is vested in the District Court in the admission of lay opinion testimony when it is rationally based upon the perception of the witness, and could be helpful for a clear understanding by the jury of the facts. Epperson v. Utley ---------- 413
46. In determining the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and he must have the benefit of every inference that can reasonably be drawn from the evidence. Cook v. Nordahl ---------- 424
47. The verdict of a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Cook v. Nordahl ---------- 424
48. Where voluntary statements or confessions are not offered or received in evidence, the foundational requirements for such are not relevant and, on objection or motion, should be excluded or stricken if they are not otherwise relevant to the issues. State v. Garrett ---------- 439
49. The assessed value of property for tax purposes, in and of itself, is generally not admissible as direct evidence of value for purposes other than taxation. Lienemann v. City of Omaha ---------- 442
50. Where error is established in the admission of evidence of value in a condemnation case, and there is no contention in brief or argument that the error was not prejudicial, the error will be presumed to be prejudicial unless it clearly appears from the record that it did not affect unfavorably the party against whom it was admitted. Lienemann v. City of Omaha ---------- 442
51. In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. State v. DeBerry ---------- 445
52. Ordinarily, when an objection to, or motion to

strike, improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice resulting. State v. Dittrich ---------- 475

53. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent. State v. Dittrich ---------- 475

54. In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in favor of the nonmoving party, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. Anstine v. Briggs ---------- 489

55. Ordinarily a failure to object waives any error in the admission of evidence. Miller v. Arends ---- 494

56. Where the undisputed physical facts demonstrate the collision out of which the injuries arose was not caused by the negligence of the defendant, the evidence will not support a verdict for the plaintiff. Miller v. Arends ---------- 494

57. Even though an identification procedure may have been suggestive, the in-court identification may be allowed to go to the jury if under the totality of the circumstances it is determined to be reliable because it has an origin independent of the taint. State v. Sanchell ---------- 505

58. If identification procedures are such as to violate due process, the denial of a proper and timely motion to suppress and the admission of the in-court identification constitutes reversible error unless this court can say beyond a reasonable doubt that the error was harmless. State v. Sanchell ---------- 505

59. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. State v. Earlywine ---------- 533

60. Any fact or circumstance reasonably susceptible of

two interpretations must be resolved most favorably to the accused. State v. Earlywine ---------- 533
61. Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock. Ford v. Ford ---------- 548
62. Proceedings in error are brought to determine if the final order of the inferior tribunal is in accordance with law. Such proceedings are based on the record of the proceedings before the tribunal; and new evidence may not be introduced to show errors of law before the tribunal. Rhodes v. Johnstone -- 552
63. Any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions. Rhodes v. Johnstone 552
64. In the absence of a bill of exceptions, the only issue on appeal is the sufficiency of the pleadings to support the judgment. Rhodes v. Johnstone -- 552
65. An administrative agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their offices. City of Lincoln v. Nebraska P. P. Dist. ---------- 556
66. Generally, the action of the trial court in excluding testimony of a witness during his direct examination may not be reviewed on appeal in the absence of an offer to prove what it is claimed the testimony would show. Wisnieski v. Coufal ------ 598
67. In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusions of the trial court as to such reliability will be carefully regarded by the Supreme Court on review. Reisig v. Reisig ------ 612
68. In every case before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed. Edquist v. Commercial Sav. & Loan Assn. ---------- 618
69. In an action for reformation of a written instru-

ment, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. To sustain that burden of proof, evidence that is plain and convincing beyond reasonable controversy is required. A mere preponderance of the evidence is not sufficient. Parry v. State Farm Mut. Auto. Ins. Co. ---------- 628

70. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. Nash Finch Co. v. County Board of Equalization ---------- 645

71. In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. Kockrow v. Kockrow ---------- 657

72. If persons to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent. LaPuzza v. Prom Town House Motor Inn, Inc. ---------- 687

73. Fraud is never presumed but must be proved by clear and convincing evidence. LaPuzza v. Prom Town House Motor Inn, Inc. ---------- 687

74. An antenuptial agreement cannot absolutely limit the amount of an award of alimony, although it should be considered by the court with other evidence on that point. Krejci v. Krejci ---------- 698

75. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Ray -- 702
76. Abstracts of convictions covering void judgments or erroneous or fraudulent records may be challenged at an evidentiary hearing provided for in the District Court on a de novo review of the director's order revoking a driver's license. Baker v. Sullivan ---------- 707
77. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausability of explanations, or weigh the evidence. Such matters are for the jury. State v. Cano ---------- 709
78. The credibility of the witnesses and the weight of the evidence in a criminal case are for the jury and a verdict will not be set aside on appeal if the evidence sustains some rational theory of guilt. State v. Cano ---------- 709
79. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene. Dahlsten v. Harris ---------- 714
80. "Willful failure to perform a service" and "dormancy" cannot in all cases be equated. The same evidence which might support a finding of willful failure in the case of a regular route authority does not necessarily support such a finding in a case of irregular route authority authorizing carriage of commodities generally or a generic class of commodities where the demand for service is the critical factor and where the evidence shows an ability and willingness to serve. Dahlsten v. Harris ---------- 714
81. New evidence tendered in support of a motion for a new trial on the grounds of newly discovered evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Seger -- 760
82. A new trial will not be granted for newly discovered evidence which, when produced, would

merely impeach or discredit a witness. State v. Seger ---------- 760

83. The admission of a prior consistent statement after a witness has been impeached with a prior inconsistent statement is largely a matter within the discretion of the trial court, and absent an abuse of that discretion will not be disturbed on appeal. Siciunas v. Checker Cab Co., Inc. ------ 766

84. In a prosecution for uttering and publishing a forged instrument, knowing it to be forged, a conviction cannot be sustained without proof of the forgery. State v. Addison ---------- 792

85. To sustain a conviction for forgery it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority. State v. Addison ---------- 792

86. A case of undue influence is made out, in case of a deed, where it is shown by clear and satisfactory evidence (1) that the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. Guill v. Wolpert ------- 805

87. The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. Guill v. Wolpert ---------- 805

88. The one attacking an instrument on the ground that its execution was procured by undue influence has the burden resting on him to establish that fact. However, the circumstances under which it was made, the condition of the grantor at the time, and the injustice to her and her heirs, if it is upheld, may be such as to cast upon the grantee the burden of going forward with the evidence to show that it is not tainted with undue influence but is the deliberate and bona fide act of the grantor. Guill v. Wolpert ---------- 805

89. Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence. Guill v. Wolpert ---------- 805

90. The mere existence of a confidential relationship between grantor and grantee does not of itself show undue influence where the deed is made by the grantor with full knowledge of its nature and

effect, and because of the deliberate desire of the grantor. Guill v. Wolpert ---------- 805

91. The court, in determining whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only to determine whether it was the voluntary act of the grantor. The fact that the grantor has others who were so related to him who were proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance. Guill v. Wolpert ---------- 805

92. Where the evidence is irreconcilable and in direct conflict, this court will consider the trial court's observation of the witnesses and their manner of testifying, and that the court must have accepted one version of the evidence rather than the opposite. Karmann v. Haase ---------- 839

93. Actions in equity on appeal to the Supreme Court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Pinney v. Hill ---------- 844

94. The uncorroborated testimony of the mother shall not alone be sufficient to support a verdict or finding that the alleged father is actually the father. Wade v. Hicks ---------- 847

95. Under our statute a defendant cannot be found guilty in a paternity action upon the wholly unsupported testimony of the mother. If she testifies positively and consistently to the facts involving conception, other evidence of opportunity and disposition on the part of defendant to participate in a sexual relationship will furnish sufficient corroboration. Wade v. Hicks ---------- 847

96. It is not essential that the mother be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. Wade v. Hicks ---------- 847

False Imprisonment.

False imprisonment consists in the unlawful restraint against his will of an individual's personal liberty. Any intentional conduct that results in the placing of a person in a position where he cannot exercise his will in going where he may lawfully go, may constitute false imprisonment. Schmidt v. Richman Gordman, Inc. ---------- 345

Fees.

A reasonable attorney's fee is to be determined by the nature of the case, the amount involved in the controversy, the results obtained and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorney. Seybold v. Seybold ---------- 480

Forcible Entry and Detainer.

1. Self-help, relating to the repossession of real estate has long been contrary to the public policy of Nebraska and is not to be condoned. Bass v. Boetel & Co. ---------- 733
2. A landlord otherwise entitled to possession, must, on the refusal of the tenant to surrender the leased premises, resort to the remedy given by law to secure it; otherwise he would be liable in damages for using force or deception to regain possession. Bass v. Boetel & Co. ---------- 733

Foreclosure.

A person having a lien upon the property of another must enforce that lien by proper legal action rather than by force. Bass v. Boetel & Co. ---------- 733

Forfeitures.

1. The statutory provision providing for forfeiture of right-of-way because of unlawful speed was expressly repealed by the 1969 Legislature. Epperson v. Utley ---------- 413
2. The previous statutory provision providing for forfeiture of right-of-way by unlawful speed was limited by the statute and by case law interpretation to forfeiture of directional right-of-way. Epperson v. Utley ---------- 413
3. The inference found in dicta in Hacker v. Perez,

187 Neb. 485, 192 N. W. 2d 166, to the effect that forfeiture of right-of-way by unlawful speed is inherent in other regulations covering right-of-way is disapproved. Epperson v. Utley ---------- 413

4. The absolute requirement of section 28-4,135, R. S. Supp., 1972, that a forfeiture complaint be filed within 5 days after seizure with provision for notice and hearing meets the test of due process. State v. One 1970 2-Door Sedan Rambler ---------- 462

Forfeitures and Penalties.

1. The general rule is that a provision for forfeiture of an insurance policy for nonpayment of premiums is self-executing, and notice of forfeiture or other affirmative act on the part of the insurer is necessary only if required by statute, by the terms of the contract, or by course of dealing. Tighe v. Security Nat. Life Ins. Co. ---------- 271
2. A forfeiture or lapse of an insurance policy for nonpayment of a premium generally takes effect from the time the premium is due and unpaid. Tighe v. Security Nat. Life Ins. Co. ---------- 271

Forgery.

1. In a prosecution for uttering and publishing a forged instrument, knowing it to be forged, a conviction cannot be sustained without proof of the forgery. State v. Addison ---------- 792
2. To sustain a conviction for forgery it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority. State v. Addison 792

Forum.

1. The doctrine of forum non conveniens refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum. Qualley v. Chrysler Credit Corp. ---------- 787
2. Whether a suit should be entertained or dismissed under the rule of forum non conveniens depends largely upon the facts of the particular case and rests in the sound discretion of the trial court. Factors which relate to the public interest and the

welfare of the court are to be considered together with factors which relate to the convenience of the parties. Qualley v. Chrysler Credit Corp. ---------- 787

3. An action should not be dismissed under the rule of forum non conveniens unless an alternative forum is still available to the plaintiff. Qualley v. Chrysler Credit Corp. ---------- 787

4. To the extent that Herrmann v. Franklin Ice Cream Co., 114 Neb. 468, 208 N. W. 141, implies that the doctrine of forum non conveniens is not recognized in Nebraska, it is overruled. Qualley v. Chrysler Credit Corp. ---------- 787

Fraud.

1. A person is justified in relying upon a representation made to him in all cases where the representation is a positive statement of material fact, and where an investigation would be required to discover the truth. Mid-States Equipment Co. v. Evans ---------- 230

2. An instruction stating that one element of fraud is that the false representations were made knowing them to be false or without knowledge of their truth or falsity as a positive statement of fact is a correct statement of the law. Mid-States Equipment Co. v. Evans ---------- 230

3. The District Court shall have full power to liquidate the assets and business of a corporation: "(1) In an action by a shareholder when it is established: * * * (b) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent." Hockenberger v. Curry ---------- 404

4. The Nebraska Business Corporation Act has given to the courts the power to relieve minority shareholders from oppressive acts of the majority, but the remedy of liquidation is so drastic that it must be invoked with extreme caution. The ends of justice would not be served by too broad an application of the statute, for that would merely eliminate one evil by substituting a greater one—oppression of the majority by the minority. Hockenberger v. Curry ---------- 404

5. The power of the District Court to modify its own judgments at any time during the term in which they were pronounced is for the purpose of cor-

recting errors or to relieve against fraud, accident, or mistake. Bates v. Schuelke ---------- 498
6. Fraud is never presumed but must be proved by clear and convincing evidence. LaPuzza v. Prom Town House Motor Inn, Inc. ---------- 687
7. Where a claimant, either by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust, either by including items not furnished for the particular building or by failure to give credit for payments made, the law will not aid him in enforcing his lien. On the other hand, if the errors are trifling and immaterial, or if they are readily explainable as the result of mistake, and no element of willfulness appears, regard will be had for the imperfections of human machinery, and the recovery of a just debt will not be denied where nothing but fair dealing was intended. LaPuzza v. Prom Town House Motor Inn, Inc. -- 687

Fraudulent Conveyances.

1. Section 36-401, R. R. S. 1943, provides that conveyances or assignments of property made to defraud creditors are void. Schulze v. Jensen ------ 253
2. 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. Schulze v. Jensen -------- 253

Gifts.

Where the validity of an alleged gift between persons occupying a confidential relationship is attacked, the burden of proving that a confidential relationship existed between the parties rests on the one attacking the gift. Guill v. Wolpert ---------- 805

Guilty Plea.

1. A plea of guilty made with full knowledge of the charge and the consequences of the plea will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement. State v. Williams ---------- 57
2. The Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of

pleas of guilty or no contest in this state. State v. Gee ---------- 60
3. Where an information charges former convictions which give rise to enhanced punishment under the habitual criminal statute, a plea of nolo contendere or guilty to the information confesses the prior convictions and no hearing for proof of the convictions is required under section 29-2221(2), R. S. Supp., 1972. State v. Youngstrom ---------- 112
4. A finding of guilty will not be set aside for errors which are not prejudicial to the substantial rights of the defendant. State v. Youngstrom ---------- 112
5. When counsel has advised a defendant to plead guilty, a defendant who has heeded such advice may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases. State v. Krider ---------- 285
6. The requirement that a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing. State v. Krider ---------- 285
7. The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Clay -- 654

Habeas Corpus.

1. When a court's jurisdiction is invoked by a habeas corpus petition seeking custody of a child, the child becomes a ward of the court and the prime consideration is the best interests and welfare of the child. Carner v. Anderson ---------- 341
2. In the interest of proper state practice and procedure we initially require a party to file a petition for a writ of habeas corpus in the state trial court. State v. Goham ---------- 639

Habitual Criminals.

1. Where an information charges former convictions which give rise to enhanced punishment under the habitual criminal statute, a plea of nolo contendere or guilty to the information confesses the prior convictions and no hearing for proof of the con-

victions is required under section 29-2221(2), R. S. Supp., 1972. State v. Youngstrom ---------- 112

2. The fact that the previous offenses at the time of their commission and at the time of conviction thereof were felonies and have since been by statute reduced to misdemeanors will not preclude their use under the habitual criminal statute to enhance punishment. State v. Youngstrom ---------- 112

Highways.

1. It is the duty of a contractor, engaged in construction work on a public highway, to erect barricades or signs, or otherwise adequately warn the traveling public if the highway is dangerous to travel. Huber v. Cornhusker Paving Co. -------- 108
2. It is elementary that the public may assume that those charged with the maintenance of highways have performed their duty. Huber v. Cornhusker Paving Co. ---------- 108
3. A failure to so warn the traveling public of a dangerous condition caused by the contractor on a highway is continuing negligence as distinguished from a condition, and if reasonable minds could conclude from the evidence that such negligence proximately caused an accident, then the issue should be submitted to a jury for its determination. Huber v. Cornhusker Paving Co. ---------- 108
4. To establish a road or highway by prescription there must be use by the general public under a claim of right, adverse to the owner of the land, of some particular or defined line of travel. The use must be uninterrupted and without substantial change for a period of time necessary to bar an action to recover the land. Dunnick v. Stockgrowers Bank of Marmouth ---------- 370
5. It is not necessary that a right to a road or highway obtained by prescription or use be equal in all respects to that which would have resulted from the formal establishment of a road by statutory proceedings. Dunnick v. Stockgrowers Bank of Marmouth ---------- 370
6. The title and ownership of land acquired by adverse possession and prescriptive use by the public as a road or street is the same as it would have been if the land had been dedicated as a street or high-

way and accepted by the appropriate governmental entity. Dunnick v. Stockgrowers Bank of Marmouth 370

7. The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on the highway to be entered. Pence v. Liermann 614

8. An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway or street. Danish Vennerforning & Old Peoples Home v. State ---- 774

Homestead.

A mortgage upon real estate, other than the homestead, executed and delivered by the mortgagor is valid between the parties even though it was not lawfully acknowledged. Prudential Ins. Co. v. Holliday ---------- 144

Homicide.

1. An information charging defendant with homicide committed in the perpetration of a robbery under section 28-401, R. R. S. 1943, charges only murder in the first degree and the court should not ordinarily instruct the jury as to the lesser offenses of murder in the second degree and manslaughter. State v. Montgomery ---------- 470

2. If the intention to rob is formed either antecedent to or contemporaneously with the acts which result in the death, the homicide is committed in the perpetration of the robbery. State v. Montgomery -- 470

3. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent. State v. Dittrich ---------- 475

Hospitals.

Proceedings of the medical staff committee of a hospital are privileged in the absence of a showing of good cause arising from extraordinary circumstances. Oviatt v. Archbishop Bergan Mercy Hospital 224

Husband and Wife.

1. This court will scrutinize an alleged accord and

satisfaction between a husband and wife with reference to child support very carefully, and the evidence must be such that the court is satisfied by the clear weight of the evidence that an accord and satisfaction was intended and accepted. Schulze v. Jensen ---------- 253

2. An executory contract for the sale of nonhomestead land in which the husband of the vendor has not joined is specifically enforceable against the vendor to the extent of her interest, but not as to the marital interest of her husband in the land. Fudge v. Byrom ---------- 363

Implied Consent Law.

A conditional or qualified refusal to take one of the authorized tests to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act. Lewis v. Department of Motor Vehicles - 704

Indemnity.

1. The general rules governing contracts or interpretation of contracts other than indemnity contracts apply in construing indemnity contracts and in determining rights and liabilities of the parties thereunder. Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc. ---------- 50

2. An indemnity contract should be construed so as to ascertain and give effect to the intention of the parties to it, if that can be done consistent with legal principles. Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc. ---------- 50

3. An indemnitee may be indemnified against his own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties. Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc. ---------- 50

Indians.

The State of Nebraska never intended to and did not abandon jurisdiction over crimes committed on the Omaha Indian Reservation prior to 12:01 a.m., EST, October 25, 1970. State v. Goham ---------- 639

Indictments and Informations.

1. Before trial, the District Court, in its discretion, may permit the amendment of a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information, as amended, does not charge a crime other than the one on which the accused has his preliminary examination. State v. Gascoigen ---- 15
2. An amendment adding an omitted allegation of a substantive element of the offense sought to be charged does not "change the offense." State v. Gascoigen ---------- 15
3. The District Court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. State v. Gascoigen ---------- 15
4. Where an information charges former convictions which give rise to enhanced punishment under the habitual criminal statute, a plea of nolo contendere or guilty to the information confesses the prior convictions and no hearing for proof of the convictions is required under section 29-2221(2), R. S. Supp., 1972. State v. Youngstrom ---------- 112
5. An information charging defendant with homicide committed in the perpetration of a robbery under section 28-401, R. R. S. 1943, charges only murder in the first degree and the court should not ordinarily instruct the jury as to the lesser offenses of murder in the second degree and manslaughter. State v Montgomery ---------- 470
6. The provisions of section 29-1606, R. R. S. 1943, are construed to include the requirement of approval by the trial court before an information may be dismissed. An agreement by a prosecuting attorney to dismiss an information against a defendant conditioned upon his "passing" a polygraph examination may not be enforced in the absence of approval by the court either of the agreement or of a dismissal requested by the prosecutor pursuant thereto. State v. Sanchell ---------- 505

Infants.

1. A decree fixing custody of minor children will not be modified unless there has been a change in cir-

cumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Boyles v. Boyles ---------- 66

2. 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 on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Boyles v. Boyles ---- 66

3. In cases involving child custody, the finding of the trial court both as to the evaluation of the evidence and as to the matter of custody will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Carner v. Anderson ---------- 341

4. When a court's jurisdiction is invoked by a habeas corpus petition seeking custody of a child, the child becomes a ward of the court and the prime consideration is the best interests and welfare of the child. Carner v. Anderson ---------- 341

5. Child custody provisions of a divorce decree entered in a sister state have no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to the welfare of the children. Carner v. Anderson 341

6. In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Christensen v. Christensen ---------- 355
Erks v. Erks ---------- 603
Kockrow v. Kockrow ---------- 657

7. An appeal from a finding and judgment of the District Court by authority of Chapter 43, article 2, R. R. S. 1943, that a child is neglected or dependent is disposed of in this court by trial de novo upon the record. State v. Kinkner ---------- 367

8. A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child. State v. Kinkner ------ 367

9. Where a parent has been shown to be unfit to

have the care and custody of a minor child, the primary concern of the court is the best interests and welfare of the child. State v. Kinkner ------ 367

10. The authority vested in a prosecuting attorney to determine whether a child under 16 years of age who has committed a crime shall be prosecuted in the juvenile or criminal court is not violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States or Article I, section 3, Constitution of Nebraska. State v. Grayer ---------- 523

11. The discretion vested in a prosecuting attorney to determine in which court a minor shall be prosecuted is not violative of Article II, section 1, of the Constitution of Nebraska, as an unlawful delegation of legislative power. State v. Grayer ------ 523

12. Due process does not require a prosecuting attorney to hold an adversary hearing prior to determining the manner in which a minor offender shall be proceeded against. State v. Grayer ---------- 523

13. Juvenile courts do not have the sole or exclusive jurisdiction of children under 18 years of age who have violated the laws of Nebraska. State v. Grayer ---------- 523

14. When it appears that minor children in a divorce action may have interests, independent of the parents, in the outcome of the litigation, the District Court should ordinarily appoint counsel to represent them under section 42-358, R. S. Supp., 1972. Ford v. Ford ---------- 548

15. Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock. Ford v. Ford ---------- 548

16. It is generally the best policy to keep minor children within the jurisdiction of the court, but this policy must yield to the paramount consideration which is the best interests of the children. Erks v. Erks ---------- 603

17. 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 on appeal unless there is a clear abuse of discretion. Erks v. Erks -- 603

Kockrow v. Kockrow ---------- 657

18. The determination of the amount of child support to be allowed, if any, rests in the sound discretion of the trial court. The ultimate criteria under the statute as well as under the former decisions of this court is one of reasonableness. The determination of the court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Kockrow v. Kockrow ---------- 657

19. As we interpret our no-fault divorce statute, under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other. In the matter of child support while the father has the primary responsibility to support his children, the trial court should not ignore the ability of the mother. It has the responsibility of adjusting the equities between the parties. Kockrow v. Kockrow ---------- 657

Injunction.

1. An action to enjoin a merger of a school district or a part thereof under the provisions of sections 79-801 and 79-801.02, R. R. S. 1943, consequent upon an annexation of territory by a city of the first class under the provisions of sections 16-117 and 16-118, R. R. S. 1943, is barred by the statute of limitations provided in section 18-1717, R. R. S. 1943, unless it is brought within 1 year from the effective date of the annexation ordinance. School Dist. No. 127 v. Simpson ---------- 164

2. It is the general rule that an injunction will not issue to restrain public officers from performing an official act which is not in excess of the authority reposed in them, but that unlawful acts by public officers may in a proper case be restrained. Kuester v. State ---------- 680

3. It is the general rule that police officers will not be enjoined from performing their proper duties, but that the threatened continued repetition of illegal acts may be enjoined, where under the circumstances an action for damages is not an adequate remedy. The courts should be slow in issuing injunctions against police officers and an in-

junction should not be issued on the mere apprehension that the officer will commit an unlawful act. Kuester v. State ---------- 680

Injury.

1. In personal injury cases where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary. Eiting v. Godding ----- 88
2. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. Eiting v. Godding ---------- 88
3. When symptoms from which personal injury may be inferred are subjective only, medical testimony is required. Eiting v. Godding ---------- 88

Insane Persons.

1. 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. State v. Rhodes ------ 131
   State v. Cortez ---------- 800
2. It is within the discretion of the trial court to permit an action to be maintained by the next friend of a person who has not been adjudged incompetent but is incapable of managing his affairs and has no appointed guardian. Westerdale v. Johnson ---------- 391
3. To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport and effect of what he was then doing. Westerdale v. Johnson -------- 391
4. The doubt referred to in the requirement that a hearing on the competency of a defendant to stand trial is required when a reasonable doubt as to

this issue is raised refers to a doubt arising in the mind of the trial judge. State v. Cortez ---- 800

Instructions.

1. An instruction stating that one element of fraud is that the false representations were made knowing them to be false or without knowledge of their truth or falsity as a positive statement of fact is a correct statement of the law. Mid-States Equipment Co. v. Evans ---------- 230
2. When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given. Exchange Bank of Gibbon v. Ashley ---------- 259
3. An instruction based on a statute is not erroneous if it correctly states the substance of the statute. It is not necessary to quote the statute verbatim. State v. Wingate ---------- 388
4. The trial court may and ordinarily should hold a conference before or during the trial with reference to the preparation of proposed instructions. At the conference on instructions each counsel should aid the trial court by stating any specific objection that he has on any instruction proposed to be given. Anderson v. Farmer Brown's Steak House, Inc. -- 410
5. An information charging defendant with homicide committed in the perpetration of a robbery under section 28-401, R. R. S. 1943, charges only murder in the first degree and the court should not ordinarily instruct the jury as to the lesser offenses of murder in the second degree and manslaughter. State v. Montgomery ---------- 470
6. Ordinarily, when an objection to, or motion to strike, improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice resulting. State v. Dittrich ---------- 475
7. It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which it should take into consideration in arriving at its verdict, otherwise the jury may be confused and misled. Bass v. Boetel & Co. ---- 733
8. Loss of past earnings is a separate and distinct element of damage from loss or impairment of

future earning capacity, and an instruction which in a proper case submits both elements of damage is not erroneous on the ground that the instruction permits duplicate recovery. Siciunas v. Checker Cab Co., Inc. ---------- 766

9. There is reversible error if the record affirmatively shows that defendant has been prejudiced by private communication between the trial court and jurors, and a new trial should be granted where the record is silent as to a possibility of prejudice, although reversal is not required if the record affirmatively shows communication had no tendency to influence the verdict. State v. White ---------- 772

Insurance.

1. The general rule is that a provision for forfeiture of an insurance policy for nonpayment of premiums is self-executing, and notice of forfeiture or other affirmative act on the part of the insurer is necessary only if required by statute, by the terms of the contract, or by course of dealing. Tighe v. Security Nat. Life Ins. Co. ---------- 271

2. A forfeiture or lapse of an insurance policy for nonpayment of a premium generally takes effect from the time the premium is due and unpaid. Tighe v. Security Nat. Life Ins. Co. ---------- 271

3. As a general rule, a mere demand for overdue premiums by an insurer does not amount to a waiver if the insured does not comply with the demand. Tighe v. Security Nat. Life Ins. Co. ----- 271

4. To constitute an estoppel, there must be a reliance in good faith upon the conduct or statements of the party to be estopped; and action or inaction based thereon of such a character to change the position or status of the party claiming the estoppel to his injury, detriment, or prejudice. Tighe v. Security Nat. Life Ins. Co. ---------- 271

5. An extension of credit for the payment of premiums by an insurer to the insured may under certain circumstances constitute a waiver or estoppel, but whether credit was so extended is a question of fact. Tighe v. Security Nat. Life Ins. Co. ------ 271

6. The mere fact that the records of an insurer list premiums due from an insured pursuant to premium notices previously sent him as "account receivable" is not conclusive upon the question of whether the

insured intended to and did waive a forfeiture of the policy because of prior nonpayment of premiums. Tighe v. Security Nat. Life Ins. Co. ---------- 271

7. The second sentence of section 44-358, R. R. S. 1943, means that a breach of a warranty or a condition which exists at the time of a loss and contributes to a loss may avoid the policy or enable the insurer to avoid liability. It has no application to a breach which could only arise after a loss has occurred. Ach v. Farmers Mut. Ins. Co. ---------- 407

8. The statute relates to the question of a recoverable loss and not to the question of procedure to be followed in collecting for the loss after it has occurred. Ach v. Farmers Mut. Ins. Co. ---------- 407

9. The statute does not deny an insurer the right to rely upon conditions of a policy which the insured is required, as a condition of recovery, to perform after the loss has occurred. Ach v. Farmers Mut. Ins. Co. ---------- 407

10. The terms "immediate" or "as soon as practicable" in referring to the notice required in an insurance policy mean with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances of each particular case. Ach v. Farmers Mut. Ins. Co. ---------- 407

11. In the absence of some contractual provision to the contrary the risk of loss or damage by windstorm, fire, etc., to a new building in the course of construction is normally on the builder. Cook v. Nordahl 424

12. Where an insurer agrees to pay all costs taxed against the insured in any suit and all interest accruing after the entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, the insurer is liable for interest on the total amount of the judgment until it complies with this provision. Niemeyer v. Estate of Tichota ---------- 484

13. The word immediate in referring to the notice required in an insurance policy means with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances of each particular case. R. C. Walters Co., Inc. v. DeBower ---------- 544

14. When a soliciting agent of an insurance company

and the insured mutually agree upon the terms and conditions of the insurance contract, and the policy, later issued by the company, omits one of the essential elements of the contract, which is not discovered by the insured until after a loss occurs, he may then have the policy reformed so as to express the real agreement of the parties. Parry v. State Farm Mut. Auto. Ins. Co. ---------- 628

Intent.

1. In a prosecution for violation of section 28-729.01, R. S. Supp., 1972, specific intent is not an essential element of the crime. State v. Wingate ---------- 388
2. If the intention to rob is formed either antecedent to or contemporaneously with the acts which result in the death, the homicide is committed in the perpetration of the robbery. State v. Montgomery -- 470
3. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent. State v. Dittrich ---------- 475
4. Where a crime requires the existence of a particular intent, an alleged aider or abettor cannot be held as a principal unless it is established that the aider knew that the perpetrator of the act had the required intent, or that the aider himself possessed the required felonious intent. State v. Dittrich -- 475
5. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Ray -------- 702

Interest.

1. The general rule is that, in the absence of agreement to the contrary, liquidated demands bear interest whereas unliquidated demands do not. Schmidt v. Knox ---------- 302
2. In order to be liquidated so as to bear interest, a claim must be fixed and determined or readily determinable; but it is sufficient for this purpose if it is ascertainable by computation or a recognized standard. Schmidt v. Knox ---------- 302
3. When payment of a dividend is deferred by reason of an unsuccessful contest of an alleged setoff, the creditor so delayed should be allowed interest on

the dividend to put that creditor on an equality with the other creditors in his class. Colburn v. Ley 427

4. Where an insurer agrees to pay all costs taxed against the insured in any suit and all interest accruing after the entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, the insurer is liable for interest on the total amount of the judgment until it complies with this provision. Niemeyer v. Estate of Tichota ---------- 484

5. An industrial loan and investment company computing interest at the maximum rate, on the basis of a 360-day year, does not contract for and receive an annual return in excess of that allowed by sections 8-435 and 8-441, R. R. S. 1943. State Securities Co. v. Corkle ---------- 578

6. When a bank or savings institution is found to be liable for the unauthorized withdrawal of funds from a depositor's account, the depositor is entitled to interest from the date of the unauthorized withdrawals to date of judgment. Edquist v. Commercial Sav. & Loan Assn. ---------- 618

Intoxicating Liquors.

1. Where there is substantial evidence supporting the Nebraska Liquor Control Commission's decision of suspension, and the trial court has applied the proper statutory criteria, the decision of the commission should be affirmed. O'Connor v. Nebraska Liquor Control Commission ---------- 436

2. The Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied and deciding whether licenses should be suspended or revoked upon violations of the liquor law. This discretion, however, must not be abused. Eleven Eighteen Co. v. Nebraska Liquor Control Commission ---------- 572

3. The order of the Nebraska Liquor Control Commission will not be upheld if it is found to be arbitrary or unreasonable. Eleven Eighteen Co. v. Nebraska Liquor Control Commission ---------- 572

4. The review of discretion of the Nebraska Liquor Control Commission on appeal applies to the findings of fact and all applications of the law, in-

cluding the penalty assessed. Eleven Eighteen Co. v. Nebraska Liquor Control Commission ---------- 572

5. A conditional or qualified refusal to take one of the authorized tests to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act. Lewis v. Department of Motor Vehicles 704

Judges.

A ruling of a trial judge on a motion to disqualify himself is immaterial where the cause is an action triable de novo in this court. Christensen v. Christensen ---------- 355

Judgments.

1. No judgment is rendered until the pronouncement thereof is noted on the trial docket. Fritch v. Fritch ---------- 29
2. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the defendant such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Moss ---------- 36
3. A judgment is not a lien upon the judgment debtor's equitable interest in real estate until the commencement of the creditor's bill to subject the equitable interest to the payment of the judgment or until execution is levied upon the interest of a judgment debtor who is in possession of the real estate in which he has the equitable interest. Action Realty Co., Inc. v. Miller ---------- 381
4. A lien of a judgment does not attach to the mere legal title of a judgment debtor where the equitable and beneficial interest is in another. Action Realty Co., Inc. v. Miller ---------- 381
5. The interest of a vendee under the contract to purchase where no deed has been delivered is an equitable one which may be subjected to the judgment of a creditor of the vendee by appropriate proceedings. Action Realty Co., Inc. v. Miller ---- 381
6. The lien of a judgment for child support or alimony constitutes a lien the same as other monetary judgments and is a lien not only for past due install-

ments but also as security for installments to fall due in the future. Action Realty Co., Inc. v. Miller 381

7. A party acquiring an interest in real estate after the judgment lien for child support has attached takes the property subject to the lien of the judgment for all installments due or to become due. Action Realty Co., Inc. v. Miller ---------- 381

8. Where an insurer agrees to pay all costs taxed against the insured in any suit and all interest accruing after the entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, the insurer is liable for interest on the total amount of the judgment until it complies with this provision. Niemeyer v. Estate of Tichota ---------- 484

9. The District Court has jurisdiction to set aside its own judgment during the term in which it is rendered if it believes that its former conclusion is erroneous. Bates v. Schuelke ---------- 498

10. The power of the District Court to modify its own judgments at any time during the term in which they were pronounced is for the purpose of correcting errors or to relieve against fraud, accident, or mistake. Bates v. Schuelke ---------- 498

11. An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification. Bryant v. Bryant ---------- 539

12. A judgment of the trial court, in a case tried without a jury, will not be disturbed on appeal unless it is clearly wrong. Engel v. Mead ---------- 541

13. A judgment will not be reversed on appeal if the result is correct, merely because the trial court assigned the wrong reason for its decision. Schmitt v. City of Omaha ---------- 608

14. A judgment of a trial court fixing the amount of alimony, or making a distribution of property, will not be disturbed on appeal unless good cause is shown. Reisig v. Reisig ---------- 612

15. The District Court is authorized to modify an award of the Workmen's Compensation Court upon an appeal from a rehearing before the full com-

pensation court if the findings of fact are not supported by the record. Behrens v. Ken Corp. ---- 625

Judicial Sales.

1. The District Court has jurisdiction to set aside its own judgment during the term in which it is rendered if it believes that its former conclusion is erroneous. Bates v. Schuelke ---------- 498
2. The power of the District Court to modify its own judgments at any time during the term in which they were pronounced is for the purpose of correcting errors or to relieve against fraud, accident, or mistake. Bates v. Schuelke ---------- 498

Juries.

1. It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury when Article I, section 6, of the Constitution of Nebraska, is not violated. State v. Johnson -- 535
2. Where a defendant is charged with a violation of a city ordinance, with a maximum authorized penalty of 6 months incarceration, he is not entitled to a jury trial under the federal Constitution. State v. Johnson ---------- 535

Landlord and Tenant.

1. A purchaser is charged with notice of a tenant's rights when the tenant is in actual possession of the real estate. Grand Island Hotel Corp. v. Second Island Development Co. ---------- 98
2. Possession of the land is notice to the world of the possessor's rights therein and of all possessory interests of which inquiry of the possessor would elicit knowledge. Grand Island Hotel Corp. v. Second Island Development Co. ---------- 98
3. A lessee of real estate under a written lease for a term of 25 years, notice of which is duly recorded, is an "assignee" within the meaning of section 76-208, R. R. S. 1943, and may enforce covenants of title involving possessory rights contained in a prior conveyance of the real estate to his lessor. Grand Island Hotel Corp. v. Second Island Development Co. ---------- 98
4. In the absence of agreement, rent is not due until

the expiration of the term. First Nat. Bank v. Omaha Nat. Bank ---------- 249
5. Rent, as such, is not payable until it falls due under the terms of a lease, and no suit can be brought for future rent in the absence of a clause permitting acceleration. First Nat. Bank v. Omaha Nat. Bank ---------- 249
6. Self-help, relating to the repossession of real estate has long been contrary to the public policy of Nebraska and is not to be condoned. Bass v. Boetel & Co. ---------- 733
7. A landlord otherwise entitled to possession, must, on the refusal of the tenant to surrender the leased premises, resort to the remedy given by law to secure it; otherwise he would be liable in damages for using force or deception to regain possession. Bass v. Boetel & Co. ---------- 733

Legislature.

1. The Legislature cannot invoke its powers of statutory definition to nullify constitutional provisions. State ex rel. Meyer v. Peters ---------- 330
2. Public policy in matters within the legislative powers of government is for the Legislature to determine. City of Lincoln v. Nebraska P. P. Dist. ---------- 556
3. The intention of the Legislature when ascertained will prevail over the literal sense of the words used and this is especially true when the strict letter of the law would lead to injustice or absurdity. State v. Goham ---------- 639
4. In interpreting a statute the legislative intent may be found from the reason of the enactment. State v. Goham ---------- 639
5. 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. State v. Goham ---------- 639
6. The rationale involved in the rule of construing legislative intent does not mean the court is substituting its judgment for that of the legislative body. Rather, it is attempting to ascertain the legislative intent. It will presume the Legislature

intended a sensible, just, and reasonable result rather than the opposite. State v. Goham ---------- 639
7. To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is a traditional and appropriate function of the courts. State v. Goham ---------- 639
8. The fixing of the boundaries of a political subdivision is essentially a legislative matter. Neeman v. Nebraska Nat. Resources Commission -------- 672
9. The Legislature may impose additional power and duties on constitutional or statutory officers. Neeman v. Nebraska Nat. Resources Commission ---- 672

Licensees.

A police officer who is called to investigate a burglary on premises and is injured as a consequence of a condition upon a portion of the premises not open to the public has the status of a licensee. The occupier of the premises owes to the licensee the duty to warn, if an opportunity is afforded, of hidden dangers known to the occupier but unknown to and not readily observable by the licensee. The means by which or the person from whom notice comes to the officer or the police department of the need for the officer's services is immaterial to a determination of his status. Nared v. School Dist. of Omaha ---------- 376

Licenses and Permits.

1. Where there is substantial evidence supporting the Nebraska Liquor Control Commission's decision of suspension, and the trial court has applied the proper statutory criteria, the decision of the commission should be affirmed. O'Connor v. Nebraska Liquor Control Commission ---------- 436
2. The Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied and deciding whether licenses should be suspended or revoked upon violations of the liquor law. This discretion, however, must not be abused. Eleven Eighteen Co. v. Nebraska Liquor Control Commission ---------- 572
3. The offense of failing to carry an operator's license when operating a motor vehicle on the public highways is a traffic violation for which two points are

to be assessed under section 39-7,128, R. R. S. 1943. Coffey v. Sullivan ---------- 781

Liens.

1. A judgment is not a lien upon the judgment debtor's equitable interest in real estate until the commencement of the creditor's bill to subject the equitable interest to the payment of the judgment or until execution is levied upon the interest of a judgment creditor who is in possession of the real estate in which he has the equitable interest. Action Realty Co., Inc. v. Miller ---------- 381
2. A lien of a judgment does not attach to the mere legal title of a judgment debtor where the equitable and beneficial interest is in another. Action Realty Co., Inc. v. Miller ---------- 381
3. The interest of a vendee under the contract to purchase where no deed has been delivered is an equitable one which may be subjected to the judgment of a creditor of the vendee by appropriate proceedings. Action Realty Co., Inc. v. Miller ------ 381
4. The lien of a judgment for child support or alimony constitutes a lien the same as other monetary judgments and is a lien not only for past due installments but also as security for installments to fall due in the future. Action Realty Co., Inc. v. Miller 381
5. A party acquiring an interest in real estate after the judgment lien for child support has attached takes the property subject to the lien of the judgment for all installments due or to become due. Action Realty Co., Inc. v. Miller ---------- 381
6. A person having a lien upon the property of another must enforce that lien by proper legal action rather than by force. Bass v. Boetel & Co. ------ 733

Limitations of Actions.

1. An action to enjoin a merger of a school district or a part thereof under the provisions of sections 79-801 and 79-801.02, R. R. S. 1943, consequent upon an annexation of territory by a city of the first class under the provisions of sections 16-117 and 16-118, R. R. S. 1943, is barred by the statute of limitations provided in section 18-1717, R. R. S. 1943, unless it is brought within 1 year from the effective date of the annexation ordinance. School Dist. No. 127 v. Simpson ---------- 164

2. In a malpractice action against a physician, the statute of limitations does not commence to run until the time the act of malpractice with resulting injury was, or by the use of reasonable diligence could have been, discovered. Toman v. Creighton Memorial St. Josephs Hosp., Inc. ---------- 751

3. A patient who has an unexpected result from surgery has used reasonable diligence within the meaning of the discovery rule where she does not discover an act of alleged malpractice and resulting injury during the post-operative period because of the surgeon's repeated assurances of recovery combined with repeated recommendations for therapy to aid in that recovery. Toman v. Creighton Memorial St. Josephs Hosp., Inc. ---------- 751

Malicious Prosecution.

In a malicious prosecution case, the necessary elements for plaintiff to establish are: (1) The commencement or prosecution of the proceeding against him; (2) its legal causation by the present defendant; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage, conforming to legal standards, resulting to plaintiff. If any one of these elements is lacking, the result is fatal to the action. Schmidt v. Richman Gordman, Inc. ---------- 345

Malpractice.

1. In a malpractice action against a physician, the statute of limitations does not commence to run until the time the act of malpractice with resulting injury was, or by the use of reasonable diligence could have been, discovered. Toman v. Creighton Memorial St. Josephs Hosp., Inc. ---------- 751

2. A patient who has an unexpected result from surgery has used reasonable diligence within the meaning of the discovery rule where she does not discover an act of alleged malpractice and resulting injury during the post-operative period because of the surgeon's repeated assurances of recovery combined with repeated recommendations for therapy to aid in that recovery. Toman v. Creighton Memorial St. Josephs Hosp., Inc. ---------- 751

Manufacturers.

1. A manufacturer of goods has a duty to use reasonable care in their design to protect those who will use them from unreasonable risk of harm while they are being used for their intended purpose or for any purpose which could be reasonably expected. Friedrich v. Anderson ---------- 724
2. The subjection of an automobile to accidental collision with another automobile or object while being used for its intended purpose is a use which a manufacturer could reasonably expect. Friedrich v. Anderson ---------- 724
3. An automobile manufacturer is not an insurer that its product is, from a design viewpoint, incapable of producing injury. Friedrich v. Anderson ------ 724
4. Where all the evidence relating to the claimed duty of a manufacturer in the design of a product is before the court and undisputed and is not sufficient that reasonable minds could properly find that a defectively designed product created a foreseeable and unreasonable risk of harm, the court is justified in granting summary judgment in favor of the manufacturer. Friedrich v. Anderson ------ 724

Mechanic's Liens.

1. Where a claimant, either by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust, either by including items not furnished for the particular building or by failure to give credit for payments made, the law will not aid him in enforcing his lien. On the other hand, if the errors are trifling and immaterial, or if they are readily explainable as the result of mistake, and no element of willfulness appears, regard will be had for the imperfections of human machinery, and the recovery of a just debt will not be denied where nothing but fair dealing was intended. LaPuzza v. Prom Town House Motor Inn, Inc. -- 687
2. In a cost plus contract the contractor must credit the owner with all discounts and credits unless the contract specifically provides otherwise. LaPuzza v. Prom Town House Motor Inn, Inc. ---------- 687
3. Under contracts designed as cost plus agreements, the amount owing the builder should be computed

on the basis of the amount actually spent for labor, materials, and supplies which go into and become a part of the finished structure, including the amounts paid to subcontractors. LaPuzza v. Prom Town House Motor Inn, Inc. ---------- 687

4. The object of the mechanic's lien law being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions. LaPuzza v. Prom Town House Motor Inn, Inc. ---------- 687

Mistake.

1. To avoid a written release of damages for personal injuries on grounds of mutual mistake of the parties, the mistake must relate to facts that are material to the contract of settlement and not to an opinion as to future conditions as the result of present known facts. Swartz v. Topping ---------- 41

2. A creditor who has innocently received payment of a debt from a third party is under no duty to make restitution to the third party if it is later discovered that the third party had no responsibility to make the payment and payment was made solely because of the third party's mistake. Federated Mut. Ins. Co. v. Good Samaritan Hospital 212

3. The power of the District Court to modify its own judgments at any time during the term in which they were pronounced is for the purpose of correcting errors or to relieve against fraud, accident, or mistake. Bates v. Schuelke ---------- 498

4. Where a claimant, either by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust, either by including items not furnished for the particular building or by failure to give credit for payments made, the law will not aid him in enforcing his lien. On the other hand, if the errors are trifling and immaterial, or if they are readily explainable as the result of mistake, and no element of willfulness appears, regard will be had for the imperfections of human machinery, and the recovery of a just debt will not be denied where nothing but fair dealing was intended. LaPuzza v. Prom Town House Motor Inn, Inc. --- 687

Mortgages.

1. A chattel mortgage may serve both as a "security agreement" and a "financing statement" under the Nebraska Uniform Commercial Code, provided it complies with the requirements for said instruments, and contains the necessary information, as set out in the Uniform Commercial Code. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. ---------- 74
2. Where, under the evidence, the chattel mortgage filed as a "security agreement" and "financing statement" is deficient as to address of secured party, it does not put subsequent purchaser on notice of outstanding security interest. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. ---------- 74
3. Where a real estate mortgage is acknowledged by some mortgagors, but not all, the mortgage is entitled to be recorded and upon recording is constructive notice of the interest of those persons who acknowledged the instrument. Prudential Ins. Co. v. Holliday ---------- 144
4. A mortgage upon real estate, other than the homestead, executed and delivered by the mortgagor is valid between the parties even though it was not lawfully acknowledged. Prudential Ins. Co. v. Holliday ---------- 144
5. An action brought to foreclose a mortgage on personal property and for a deficiency judgment is an action in equity and a trial by jury is not required by section 25-1104, R. R. S. 1943. State Securities Co. v. Corkle ---------- 578

Motions, Rules, and Orders.

1. Ordinarily, failure to make a motion to strike or timely objection to proffered evidence in the trial court waives the right to complain of the admission of such evidence on appeal. Laun v. Roach ------ 11
2. When, upon a jury trial, defendant, at the conclusion of plaintiff's evidence, moves for a dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to the plaintiff, and she is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom. Bohling v. Farm Bureau Ins. Co. ---------- 141

3. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the District Court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief. State v. Fincher ---------- 446
4. A denial of a party's motion for continuance of a hearing on a motion for new trial is not an abuse of sound legal discretion. Engel v. Mead -------- 541
5. A motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. Elm Creek State Bank v. Department of Banking ---------- 584
6. An order overruling a motion made after verdict for judgment in conformity with a previously denied motion for a directed verdict is an appealable order. Edquist v. Commercial Sav. & Loan Assn. -------- 618

Motor Vehicles.

1. A driver entering an intersection is obligated to look for approaching automobiles and see those within that radius which denotes the limit of danger. If he fails to see an automobile which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar his recovery as a matter of law. Snipes v. Smith 4
2. Ordinarily, the failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger is not contributory negligence as a matter of law. Swartz v. Topping ---------- 41
3. The holder of a security interest in an automobile which was perfected pursuant to the laws of a nontitle state, who had no knowledge of its removal to this state, has priority over a Nebraska purchaser without knowledge of the security interest who purchases the automobile with a clear Nebraska title within 4 months of its arrival in Nebraska. Community Credit Co. v. Gillham ------ 198
4. The statutory provision providing for forfeiture of right-of-way because of unlawful speed was expressly repealed by the 1969 Legislature. Epperson v. Utley ---------- 413

5. The previous statutory provision providing for forfeiture of right-of-way by unlawful speed was limited by the statute and by case law interpretation to forfeiture of directional right-of-way. Epperson v. Utley ---------- 413
6. The inference found in dicta in Hacker v. Perez, 187 Neb. 485, 192 N. W. 2d 166, to the effect that forfeiture of right-of-way by unlawful speed is inherent in other regulations covering right-of-way is disapproved. Epperson v. Utley ---------- 413
7. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. Blum v. Brichacek ---------- 457
8. The use of a vehicle in criminal activities ordinarily creates an emergent situation. State v. One 1970 2-Door Sedan Rambler ---------- 462
9. Any person appealing an order of the Director of the Department of Motor Vehicles must execute and file the required bond within 20 days of the date of the final order complained of, and such filing is a jurisdictional requirement and a condition precedent to the initiation of the appellate process. Buettner v. Sullivan ---------- 592
10. The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on the highway to be entered. Pence v. Liermann ----- 614
11. A conditional or qualified refusal to take one of the authorized tests to determine the alcoholic content of body fluids under the implied consent law is not sanctioned by the act and such refusal is a refusal to submit to the test within the meaning of the act. Lewis v. Department of Motor Vehicles - 704
12. Abstracts of convictions covering void judgments or erroneous or fraudulent records may be challenged at an evidentiary hearing provided for in the District Court on a de novo review of the director's order revoking a driver's license. Baker v. Sullivan ---------- 707
13. The subjection of an automobile to accidental collision with another automobile or object while being

used for its intended purpose is a use which a manufacturer could reasonably expect. Friedrich v. Anderson ---------- 724

14. An automobile manufacturer is not an insurer that its product is, from a design viewpoint, incapable of producing injury. Friedrich v. Anderson ------ 724

15. The offense of failing to carry an operator's license when operating a motor vehicle on the public highways is a traffic violation for which two points are to be assessed under section 39-7,128, R. R. S. 1943. Coffey v. Sullivan ---------- 781

Municipal Corporations.

1. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of a governmental function, but exceptions can be made where right and justice so demand. Vakoc Constr. Co. v. City of Wayne --- 45

2. A municipal corporation has no power to extend or change its boundaries otherwise than as provided by constitutional enactment or as it is empowered by the Legislature by statute to do. Doolittle v. County of Lincoln ---------- 159

3. A city of the first class has no power to annex territory which is not "contiguous or adjacent." § 16-117, R. R. S. 1943. Doolittle v. County of Lincoln ---------- 159

4. Lands, lots, tracts, streets, or highways shall be deemed contiguous although a stream, embankment, strip, or parcel of land not more than two hundred feet wide lies between the same and the corporate limits. § 16-118, R. R. S. 1943. Doolittle v. County of Lincoln ---------- 159

5. The words contiguous and adjacent in section 16-117, R. R. S. 1943, are used synonymously. Doolittle v. County of Lincoln ---------- 159

6. The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it. Doolittle v. County of Lincoln ---------- 159

7. An action to enjoin a merger of a school district or a part thereof under the provisions of sections 79-801 and 79-801.02, R. R. S. 1943, consequent upon an annexation of territory by a city of the first class under the provisions of sections 16-117 and 16-118, R. R. S. 1943, is barred by the statute of

limitations provided in section 18-1717, R. R. S. 1943, unless it is brought within 1 year from the effective date of the annexation ordinance. School Dist. No. 127 v. Simpson ---------- 164
8. Section 14-804, R. R. S. 1943, provides all claims against the city must be filed with the city comptroller. This filing is mandatory. Schmitt v. City of Omaha ---------- 608
9. The city council of the city of Omaha acts quasi-judicially in processing applications for a full salary disability pension under section 7.36.195 of the Omaha municipal code. Schmitt v. City of Omaha - 608
10. The action of the city council is reviewable in the District Court by way of petition in error or appeal. Schmitt v. City of Omaha ---------- 608

Negligence.

1. A driver entering an intersection is obligated to look for approaching automobiles and see those within that radius which denotes the limit of danger. If he fails to see an automobile which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar his recovery as a matter of law. Snipes v. Smith ---- 4
2. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. Laun v. Roach ---------- 11
3. Performance of a contract for appraisal of damage to property of A. by reason of a building that contractors of B. were to construct on B.'s adjoining property with temporary work on A.'s property, and for payment of the appraisal by B., may afford a defense to A.'s claims against B.'s architect and contractors and a subcontractor for negligent damage to A.'s property. Grantham v. General Tel. Co. 21
4. Ordinarily, the failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger is not contributory negligence as a matter of law. Swartz v. Topping ---------- 41
5. A party who has the capacity and opportunity to read a release of claims for personal injuries but fails to do so is estopped by his own negligence from claiming that the release is not binding on him. Swartz v. Topping ---------- 41

6. Power companies engaged in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with the electric lines but they are not insurers and not liable for damages in the absence of negligence. Lorence v. Omaha P. P. Dist. ---- 68

7. One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. Lorence v. Omaha P. P. Dist. ---------- 68
Leary v. Martin K. Eby Constr. Co., Inc. --------- 575

8. To constitute want of due care it is not required that a person should have anticipated the exact risk which occurred, or that the peril was a deadly one; it is sufficient that he places himself in a position of a known danger where there was no need for him to be or that he knew or should have known that substantial injury was likely to result from his act. Lorence v. Omaha P. P. Dist. ---- 68

9. It is elementary that the public may assume that those charged with the maintenance of highways have performed their duty. Huber v. Cornhusker Paving Co. ---------- 108

10. A failure to so warn the traveling public of a dangerous condition caused by the contractor on a highway is continuing negligence as distinguished from a condition, and if reasonable minds could conclude from the evidence that such negligence proximately caused an accident, then the issue should be submitted to a jury for its determination. Huber v. Cornhusker Paving Co. ---------- 108

11. A police officer who is called to investigate a burglary on premises and is injured as a consequence of a condition upon a portion of the premises not open to the public has the status of a licensee. The occupier of the premises owes to the licensee the duty to warn, if an opportunity is afforded, of hidden dangers known to the occupier but unknown to and not readily observable by the licensee. The means by which or the person from whom notice comes to the officer or the police department of the need for the officer's services is immaterial to

a determination of his status. Nared v. School Dist. of Omaha ---------- 376
12. The statutory provision providing for forfeiture of right-of-way because of unlawful speed was expressly repealed by the 1969 Legislature. Epperson v. Utley ---------- 413
13. The previous statutory provision providing for forfeiture of right-of-way by unlawful speed was limited by the statute and by case law interpretation to forfeiture of directional right-of-way. Epperson v. Utley ---------- 413
14. The inference found in dicta in Hacker v. Perez, 187 Neb. 485, 192 N. W. 2d 166, to the effect that forfeiture of right-of-way by unlawful speed is inherent in other regulations covering right-of-way is disapproved. Epperson v. Utley ---------- 413
15. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. Blum v. Brichacek 457
16. It is well settled that a duty rests on an employer to warn his employees of defects or dangers not apparent which may arise in the course of the employment, which the employer knows or ought to know about, and which he has reason to believe the employee does not know and will not discover in time to protect himself. Anstine v. Briggs ---- 489
17. The master is not compelled to foresee and guard against an accident which reasonable and prudent men would not expect to happen, and where an injury to a servant could not reasonably have been anticipated, a failure to take precautionary measures is not negligence on the part of the master for which he is liable to the servant. Anstine v. Briggs 489
18. One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid open and obvious dangers is contributorily negligent. Anstine v. Briggs ---------- 489
19. Where the undisputed physical facts demonstrate the collision out of which the injuries arose was not caused by the negligence of the defendant, the evidence will not support a verdict for the plaintiff. Miller v. Arends ---------- 494

20. Darkness alone calls upon a person to exercise greater care for his own safety than is ordinarily required. Where light has failed, obstructions have been encountered, and there are no special circumstances requiring a person to proceed, he who goes forward into an unfamiliar dark space does so at his own risk, and if accident and injury follow, he is guilty of negligence, as a matter of law, which bars recovery. Leary v. Martin K. Eby Constr. Co., Inc. ---------- 575
21. The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on the highway to be entered. Pence v. Liermann - 614
22. Newly discovered evidence is not sufficient reason for a new trial of a cause if diligence before the trial would have produced notice or knowledge of the alleged recently discovered evidence. Pence v. Liermann ---------- 614
23. A manufacturer of goods has a duty to use reasonable care in their design to protect those who will use them from unreasonable risk of harm while they are being used for their intended purpose or for any purpose which could be reasonably expected. Friedrich v. Anderson ---------- 724
24. The subjection of an automobile to accidental collision with another automobile or object while being used for its intended purpose is a use which a manufacturer could reasonably expect. Friedrich v. Anderson ---------- 724
25. Where all the evidence relating to the claimed duty of a manufacturer in the design of a product is before the court and undisputed and is not sufficient that reasonable minds could properly find that a defectively designed product created a foreseeable and unreasonable risk of harm, the court is justified in granting summary judgment in favor of the manufacturer. Friedrich v. Anderson ---- 724
26. Common carriers are required to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged for the safety of their passengers and they are liable for the slightest negligence causing injury. Siciunas v. Checker Cab Co., Inc. ---------- 766
27. On an appeal to this court of an action under the State Tort Claims Act the findings of the trial

court will not be disturbed unless clearly wrong. Cortes v. State ---------- 795
28. A patron of a public park using an area of the park open to the public where such use is in conformity with valid park regulations is generally a licensee and the possessor of the park owes to him the duty to warn of traps and concealed hazards. Cortes v. State ---------- 795
29. A body of water, natural or artificial, does not constitute a concealed, dangerous condition. Cortes v. State ---------- 795

New Trial.

1. In a criminal prosecution the court will grant a new trial on timely application of defendant for the reason of newly discovered evidence material for the defendant, provided, the reason materially affects his substantial rights and he could not with reasonable diligence have discovered and produced the evidence at the trial. State v. Atkinson ----- 9
2. This court will not review testimony in the form of affidavits used in the trial court on the motion for a new trial unless such affidavits have been included in and presented by a bill of exceptions. Community Credit Co. v. Gillham ---------- 198
3. A denial of a party's motion for continuance of a hearing on a motion for new trial is not an abuse of sound legal discretion. Engel v. Mead ------- 541
4. Permission to file a counterclaim on remand for a new trial rests within the sound discretion of the trial court. Wisnieski v. Coufal ---------- 598
5. Newly discovered evidence is not sufficient reason for a new trial of a cause if diligence before the trial would have produced notice or knowledge of the alleged recently discovered evidence. Pence v. Liermann ---------- 614
6. In criminal cases alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal. State v. Seger ---- 760
7. Alleged errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon. State v. Seger ---------- 760
8. New evidence tendered in support of a motion for a new trial on the grounds of newly discovered evidence must be so potent that, by strengthening evi-

dence already offered, a new trial would probably result in a different verdict. State v. Seger ------ 760

9. A new trial will not be granted for newly discovered evidence which, when produced, would merely impeach or discredit a witness. State v. Seger _ 760

10. There is reversible error if the record affirmatively shows that defendant has been prejudiced by private communication between the trial court and jurors, and a new trial should be granted where the record is silent as to a possibility of prejudice, although reversal is not required if the record affirmatively shows communication had no tendency to influence the verdict. State v. White ---------- 772

Notice.

1. The address of the secured party to be set out in the financing statement under section 9-402, U. C. C., must be such an address as to enable one interested in searching the records to contact the party in question for the purpose of obtaining information concerning the security interest. An address must be sufficiently complete to enable a prudent person using reasonable care to locate the secured party. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. ---------- 74

2. The question of the sufficiency of the address of the secured creditor required under section 9-402, U. C. C., is a question of fact. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. ---------- 74

3. Where, under the evidence, the chattel mortgage filed as a "security agreement" and "financing statement" is deficient as to address of secured party, it does not put subsequent purchaser on notice of outstanding security interest. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. ---------- 74

4. A purchaser is charged with notice of a tenant's rights when the tenant is in actual possession of the real estate. Grand Island Hotel Corp. v. Second Island Development Co. ---------- 98

5. Possession of the land is notice to the world of the possessor's rights therein and of all possessory interests of which inquiry of the possessor would elicit knowledge. Grand Island Hotel Corp. v. Second Island Development Co. ---------- 98

6. A lessee of real estate under a written lease for a term of 25 years, notice of which is duly recorded, is an "assignee" within the meaning of section 76-208, R. R. S. 1943, and may enforce covenants of title involving possessory rights contained in a prior conveyance of the real estate to his lessor. Grand Island Hotel Corp. v. Second Island Development Co. ---------- 98
7. Where a real estate mortgage is acknowledged by some mortgagors, but not all, the mortgage is entitled to be recorded and upon recording is constructive notice of the interest of those persons who acknowledged the instrument. Prudential Ins. Co. v. Holliday ---------- 144
8. The general rule is that a provision for forfeiture of an insurance policy for nonpayment of premiums is self-executing, and notice of forfeiture or other affirmative act on the part of the insurer is necessary only if required by statute, by the terms of the contract, or by course of dealing. Tighe v. Security Nat. Life Ins. Co. ---------- 271
9. The terms "immediate" or "as soon as practicable" in referring to the notice required in an insurance policy mean with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances of each particular case. Ach v. Farmers Mut. Ins. Co. ---------- 407
10. The absolute requirement of section 28-4,135, R. S. Supp., 1972, that a forfeiture complaint be filed within 5 days after seizure with provision for notice and hearing meets the test of due process. State v. One 1970 2-Door Sedan Rambler ---------- 462
11. The word immediate in referring to the notice required in an insurance policy means with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances of each particular case. R. C. Walters Co., Inc. v. DeBower ---------- 544
12. When a contractor's performance bond requires that notice of default by the contractor be given to the surety within a reasonable time and the failure to give such notice results in prejudice or damage to the surety, the principal cannot recover on the bond. R. C. Walters Co., Inc. v. DeBower ---------- 544
13. Section 76-238, R. R. S. 1943, is designed to protect

a subsequent purchaser even though there was a prior conveyance or transaction concerning the property, provided the subsequent purchaser recorded his title first, and provided further that the subsequent purchaser was a bona fide purchaser without notice of any other claims to the property. Karmann v. Haase ---------- 839

Obscenity.

The Nebraska obscenity statutes are in full compliance with the criteria and standards required by recent United States Supreme Court decisions including Miller v. California. State v. Little Art Corp. ---- 448

Officers.

1. The Legislature may impose additional power and duties on constitutional or statutory officers. Neeman v. Nebraska Nat. Resources Commission ------ 672
2. It is the general rule that an injunction will not issue to restrain public officers from performing an official act which is not in excess of the authority reposed in them, but that unlawful acts by public officers may in a proper case be restrained. Kuester v. State ---------- 680

Ordinances.

1. It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury when Article I, section 6, of the Constitution of Nebraska, is not violated. State v. Johnson ---------- 535
2. Where a defendant is charged with a violation of a city ordinance, with a maximum authorized penalty of 6 months incarceration, he is not entitled to a jury trial under the federal Constitution. State v. Johnson ---------- 535

Parent and Child.

1. In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Boyles v. Boyles ---------- 66
   Christensen v. Christensen ---------- 355
   Erks v. Erks ---------- 603
   Kockrow v. Kockrow ---------- 657

2. 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. Boyles v. Boyles -- 66
3. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Boyles v. Boyles ---------- 66
4. This court will scrutinize an alleged accord and satisfaction between a husband and wife with reference to child support very carefully, and the evidence must be such that the court is satisfied by the clear weight of the evidence that an accord and satisfaction was intended and accepted. Schulze v. Jensen ------ 253
5. In determining the issue of child custody, the paramount consideration is the best interests and welfare of the children. Schuller v. Schuller ---------- 266
6. In cases involving determinations of child custody, the findings of the trial court both as to evaluation of evidence and as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion shown. Schuller v. Schuller ---------- 266
Erks v. Erks ---------- 603
Kockrow v. Kockrow ---------- 657
7. In cases involving child custody, the finding of the trial court both as to the evaluation of the evidence and as to the matter of custody will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Carner v. Anderson ---------- 341
8. The fixing of child support and alimony rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be disturbed on appeal. Sommers v. Sommers ---------- 361
9. A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child. State v. Kinkner ---------- 367
10. Where a parent has been shown to be unfit to have the care and custody of a minor child, the primary

concern of the court is the best interests and welfare of the child. State v. Kinkner ---------- 367

11. When it appears that minor children in a divorce action may have interests, independent of the parents, in the outcome of the litigation, the District Court should ordinarily appoint counsel to represent them under section 42-358, R. S. Supp., 1972. Ford v. Ford 548

12. Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock. Ford v. Ford ---------- 548

13. The determination of the amount of child support to be allowed, if any, rests in the sound discretion of the trial court. The ultimate criteria under the statute as well as under the former decisions of this court is one of reasonableness. The determination of the court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Kockrow v. Kockrow ---------- 657

14. As we interpret our no-fault divorce statute, under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other. In the matter of child support while the father has the primary responsibility to support his children, the trial court should not ignore the ability of the mother. It has the responsibility of adjusting the equities between the parties. Kockrow v. Kockrow ---------- 657

15. The determination of alimony, division of property, and child support rests in the sound discretion of the trial court and will not be disturbed on appeal unless there is a clear abuse of discretion by the trial court, or it is clearly against the weight of the evidence. Peery v. Peery ---------- 782

Parks and Public Grounds.

A patron of a public park using an area of the park open to the public where such use is in conformity with valid park regulations is generally a licensee and the possessor of the park owes to him the duty to warn of traps and concealed hazards. Cortes v. State ---------- 795

Parties.

1. The words "unavoidably prevented" refer to circumstances beyond the control of the party desiring to file a pleading in our courts. The law requires diligence on the part of clients and attorneys and the mere neglect of either will not entitle a party to relief on that ground. Community Credit Co. v. Gillham -- 198
2. A creditor who has innocently received payment of a debt from a third party is under no duty to make restitution to the third party if it is later discovered that the third party had no responsibility to make the payment and payment was made solely because of the third party's mistake. Federated Mut. Ins. Co. v. Good Samaritan Hospital ---------- 212
3. An individual stockholder may bring an action in his own name to recover for a breach of a stockholders control agreement when he has sustained a loss separate and distinct from that of the other stockholders. An individual stockholder may not bring an action in his own name to recover for wrongs done to the corporation or its property. Henderson v. Joplin ---------- 827

Paternity.

1. Legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and the testimony or declaration of a husband or wife is not competent to bastardize a child born during wedlock. Ford v. Ford ---------- 548
2. The uncorroborated testimony of the mother shall not alone be sufficient to support a verdict or finding that the alleged father is actually the father. Wade v. Hicks ---------- 847
3. Under our statute a defendant cannot be found guilty in a paternity action upon the wholly unsupported testimony of the mother. If she testifies positively and consistently to the facts involving conception, other evidence of opportunity and disposition on the part of defendant to participate in a sexual relationship will furnish sufficient corroboration. Wade v. Hicks ---------- 847
4. It is not essential that the mother be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances

which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. Wade v. Hicks 847

Payment.

1. A creditor who has innocently received payment of a debt from a third party is under no duty to make restitution to the third party if it is later discovered that the third party had no responsibility to make the payment and payment was made solely because of the third party's mistake. Federated Mut. Ins. Co. v. Good Samaritan Hospital ---------- 212
2. The trustee of a spendthrift trust is not entitled to a charge on a beneficiary's interest in the trust estate for overpayments made to said beneficiary in accordance with the provisions of the trust. The trustee's rights under these circumstances are no greater than those of any other unsecured creditor of the beneficiary. O'Shea v. O'Shea ---------- 217
3. The question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered as full satisfaction is a question of fact. Schulze v. Jensen ---------- 253

Pedestrians.

Ordinarily, the failure of a pedestrian with the right-of-way to see an approaching car within the limit of danger is not contributory negligence as a matter of law. Swartz v. Topping ---------- 41

Pensions.

The city council of the city of Omaha acts quasi-judicially in processing applications for a full salary disability pension under section 7.36.195 of the Omaha municipal code. Schmitt v. City of Omaha ---------- 608

Physicians and Surgeons.

1. Proceedings of the medical staff committee of a hospital are privileged in the absence of a showing of good cause arising from extraordinary circumstances. Oviatt v. Archbishop Bergan Mercy Hospital ------ 224
2. In a malpractice action against a physician, the statute of limitations does not commence to run until the time the act of malpractice with resulting injury was, or by the use of reasonable diligence could have

been, discovered. Toman v. Creighton Memorial St. Josephs Hosp., Inc. ---------- 751

3. A patient who has an unexpected result from surgery has used reasonable diligence within the meaning of the discovery rule where she does not discover an act of alleged malpractice and resulting injury during the post-operative period because of the surgeon's repeated assurances of recovery combined with repeated recommendations for therapy to aid in that recovery. Toman v. Creighton Memorial St. Josephs Hosp., Inc. ---------- 751

Pleadings.

1. The words "unavoidably prevented" refer to circumstances beyond the control of the party desiring to file a pleading in our courts. The law requires diligence on the part of clients and attorneys and the mere neglect of either will not entitle a party to relief on that ground. Community Credit Co. v. Gillham 198
2. The purpose of a pretrial conference is to simplify the issues; amend the pleadings, when necessary; and avoid unnecessary proof of facts at the trial. O'Shea v. O'Shea ---------- 217
3. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the District Court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief. State v. Fincher ---------- 446
4. In the absence of a bill of exceptions, the only issue on appeal is the sufficiency of the pleadings to support the judgment. Rhodes v. Johnstone ---------- 552
5. A motion to amend the pleadings to conform to the evidence, made at the close of all evidence, rests within the sound judicial discretion of the trial court either to permit amendment of the pleadings in furtherance of justice, or to refuse the right of amendment. § 25-852, R. R. S. 1943. State Securities Co. v. Corkle ---------- 578
6. Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or matter to avoid, will be treated as admitted, although the answer also contains a general denial. State Securities Co. v. Corkle ---------- 578

7. In the absence of a bill of exceptions, no questions regarding the evidence presented in the trial court will be considered, and under such circumstances the only issue on appeal is the sufficiency of the pleadings to support the judgment. Elm Creek State Bank v. Department of Banking ---------- 584
8. Permission to file a counterclaim on remand for a new trial rests within the sound discretion of the trial court. Wisnieski v. Coufal ---------- 598
9. The requirement that a plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified within the time specified is mandatory and jurisdictional. Schmitt v. City of Omaha ---------- 608
10. Section 14-804, R. R. S. 1943, provides all claims against the city must be filed with the city comptroller. This filing is mandatory. Schmitt v. City of Omaha ---------- 608
11. A general demurrer admits all the allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from the facts which are well pleaded. Kuester v. State ---------- 680
12. An order of the District Court requiring a petition to be made more definite and certain will be sustained on appeal unless it clearly appears that the court abused its discretion. Vodehnal v. Grand Island Daily Independent ---------- 836

Police Officers and Sheriffs.

1. A police officer who is called to investigate a burglary on premises and is injured as a consequence of a condition upon a portion of the premises not open to the public has the status of a licensee. The occupier of the premises owes to the licensee the duty to warn, if an opportunity is afforded, of hidden dangers known to the occupier but unknown to and not readily observable by the licensee. The means by which or the person from whom notice comes to the officer or the police department of the need for the

officer's services is immaterial to a determination of his status. Nared v. School Dist. of Omaha ---- 376
2. The conduct by the police, at whatever time, of identification procedures must not be so unnecessarily suggestive and conducive to a substantial likelihood of irreparable mistaken identification as to be a denial of due process of law. State v. Sanchell ---- 505
3. It is the general rule that police officers will not be enjoined from performing their proper duties, but that the threatened continued repetition of illegal acts may be enjoined, where under the circumstances an action for damages is not an adequate remedy. The courts should be slow in issuing injunctions against police officers and an injunction should not be issued on the mere apprehension that the officer will commit an unlawful act. Kuester v. State ---- 680

Post Conviction.

1. For post conviction relief on the ground of ineffective assistance of counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Henry ------ 27
State v. Cortez ---------- 800
2. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Henry ---------- 27
3. An issue which has been fully litigated by direct appeal cannot be relitigated by a motion for post conviction relief. State v. Moss ---------- 36
4. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the defendant such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Moss ---------- 36
5. In the absence of a violation of a constitutional right, no relief may be had under the Post Conviction Act. State v. Blackwell ---------- 155
6. When counsel has advised a defendant to plead guilty, a defendant who has heeded such advice may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases. State v. Krider ---------- 285
7. The requirement that a guilty plea must be intelligently made is not a requirement that all advice

offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing. State v. Krider ---------- 285

8. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the District Court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief. State v. Fincher ---------- 446

Powers.

The right of an owner to use his property is subject to reasonable regulations, restrictions, and control by the State in the legislative exercise of the police power of the State. Kuester v. State ---------- 680

Pretrial.

1. The purpose of a pretrial conference is to simplify the issues; amend the pleadings, when necesasry; and avoid unnecessary proof of facts at the trial. O'Shea v. O'Shea ---------- 217

2. An order of a pretrial conference when duly entered by the trial court controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. O'Shea v. O'Shea ---------- 217

3. Permission to amend a pretrial order at the trial or before final submission to the court should ordinarily not be granted when such amendment will result in a delay of the trial, except when relevant matters have arisen after the pretrial conference, or when matters existing at the time of that hearing were not discovered until afterwards and the attorney was not negligent in failing to obtain the information earlier. O'Shea v. O'Shea ---------- 217

Principal and Surety.

When a contractor's performance bond requires that notice of default by the contractor be given to the surety within a reasonable time and the failure to give such notice results in prejudice or damage to the surety, the principal cannot recover on the bond. R. C. Walters Co., Inc. v. DeBower ---------- 544

Probable Cause.

1. Probable cause justifying an arrest without warrent exists if the facts and circumstances known to the arresting officer warrant a prudent man in believing the offense has been committed and that the defendant committed it. State v. Irwin ---------- 169
2. The existence of probable cause must be determined by a practical and not by any technical standard. State v. Irwin ---------- 169
3. A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony. § 29-404.02, R. S. Supp., 1972. State v. Irwin ---------- 169

Probation and Parole.

1. 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 convincing evidence. State v. Parker - 263
2. The determination of whether to grant probation to one convicted of a crime is a matter within the sound discretion of the trial court; and the denial of probation will not be disturbed on appeal in the absence of a showing of abuse of judicial discretion. State v. Ward ---------- 421

Process.

1. Section 48-183, R. R. S. 1943, relating to service of the petition on appeal after a rehearing before the full Workmen's Compensation Court is directory and not jurisdictional. Bourn v. James ---------- 635
2. The term "all parties bound by the award" as used in section 76-715.01, R. R. S. 1943, and upon whom notice of appeal must be served refers: (1) In case the condemner is the appealing party, to the condemnee or condemnees from the award in favor of whom the condemner desires to take his appeal; or (2) in case a condemnee is the appealing party, it refers to the condemner. An appealing condemnee need not serve notice of appeal upon other condemnees. Grace Land & Cattle Co. v. Tri-State G. & T. Assn., Inc. ---------- 663

Property.

1. It is not necessary for a lease of nonhomestead land to be acknowledged in order for it to be good

as between the parties. Neither is it necessary for a lease to be recorded to take effect against a subsequent purchaser with notice. Grand Island Hotel Corp. v. Second Island Development Co. ---- 98

2. A purchaser is charged with notice of a tenant's rights when the tenant is in actual possession of the real estate. Grand Island Hotel Corp. v. Second Island Development Co. ---------- 98

3. Possession of the land is notice to the world of the possessor's rights therein and of all possessory interests of which inquiry of the possessor would elicit knowledge. Grand Island Hotel Corp. v. Second Island Development Co. ---------- 98

4. A judgment is not a lien upon the judgment debtor's equitable interest in real estate until the commencement of the creditor's bill to subject the equitable interest to the payment of the judgment or until execution is levied upon the interest of a judgment creditor who is in possession of the real estate in which he has the equitable interest. Action Realty Co., Inc. v. Miller ---------- 381

5. A lien of a judgment does not attach to the mere legal title of a judgment debtor where the equitable and beneficial interest is in another. Action Realty Co., Inc. v. Miller ---------- 381

6. The interest of a vendee under the contract to purchase where no deed has been delivered is an equitable one which may be subjected to the judgment of a creditor of the vendee by appropriate proceedings. Action Realty Co., Inc. v. Miller --- 381

7. The statutory provision which permits a petition to condemn to be filed in the county court of the county where "some part" of the property is situated has reference to a tract some part of which lies in both counties. Grace Land & Cattle Co. v. Tri-State G. & T. Assn., Inc. ---------- 663

8. The right of an owner to use his property is subject to reasonable regulations, restrictions, and control by the State in the legislative exercise of the police power of the State. Kuester v. State ----- 680

9. Self-help, relating to the repossession of real estate has long been contrary to the public policy of Nebraska and is not to be condoned. Bass v. Boetel & Co. ---------- 733

10. A landlord otherwise entitled to possession, must, on the refusal of the tenant to surrender the leased

premises, resort to the remedy given by law to secure it; otherwise he would be liable in damages for using force or deception to regain possession. Bass v. Boetel & Co. ---------- 733

Prosecuting Attorneys.

1. The provisions of section 29-1606, R. R. S. 1943, are construed to include the requirement of approval by the trial court before an information may be dismissed. An agreement by a prosecuting attorney to dismiss an information against a defendant conditioned upon his "passing" a polygraph examination may not be enforced in the absence of approval by the court either of the agreement or of a dismissal requested by the prosecutor pursuant thereto. State v. Sanchell ---------- 505
2. The authority vested in a prosecuting attorney to determine whether a child under 16 years of age who has committed a crime shall be prosecuted in the juvenile or criminal court is not violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States or Article I, section 3, Constitution of Nebraska. State v. Grayer ---------- 523
3. The discretion vested in a prosecuting attorney to determine in which court a minor shall be prosecuted is not violative of Article II, section 1, of the Constitution of Nebraska, as an unlawful delegation of legislative power. State v. Grayer ---- 523
4. Due process does not require a prosecuting attorney to hold an adversary hearing prior to determining the manner in which a minor offender shall be proceeded against. State v. Grayer ---------- 523

Public Policy.

Public policy in matters within the legislative powers of government is for the Legislature to determine. City of Lincoln v. Nebraska P. P. Dist. ---------- 556

Public Service Commissions.

1. The Nebraska Public Service Commission is without jurisdiction or authority to fix rates and charges for motor vehicle carriers engaged in the transportation of livestock in intrastate commerce. Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn. ---------- 1

2. Before the Nebraska Power Review Board may approve an agreement between suppliers of energy under the provisions of section 70-1002.01, R. R. S. 1943, it must have before it evidence which will support affirmative finding that under the terms of the agreement it can be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the area and customers to be served. City of Lincoln v. Nebraska P. P. Dist. ---------- 556

3. The statutory provision requiring determination by the Nebraska Power Review Board of whether the "proposed agreement or amendment can reasonably be expected to provide a reliable wholesale power supply at a reasonable cost for the area" is a sufficiently definite standard to guide the Nebraska Power Review Board in the exercise of the delegated legislative power of determining the facts on which approval of agreements under section 70-1002.01, R. R. S. 1943, are to be founded. Accordingly the delegation in this instance is not unconstitutional. City of Lincoln v. Nebraska P. P. Dist. 556

4. Where a carrier, holding a certificate of public convenience and necessity for hauling commodities generally or a generic class of commodities over irregular routes, does not perform a portion of such service through no fault of his own, but is ready, able, and willing to do so, the question of dormancy becomes a question of fact under all the circumstances of the case. Dahlsten v. Harris ---------- 714

5. Where commission approval of a transfer of authority is requested under section 75-318, R. R. S. 1943, and an issue of dormancy is properly raised, the Nebraska Public Service Commission must determine both the fact of dormancy and on the basis of the evidence whether the public convenience and necessity require the transfer. Dahlsten v. Harris ---- 714

6. The power of the Nebraska Public Service Commission to regulate common carriers is derived from Article IV, section 20, of the Constitution of Nebraska. Such powers are plenary and self-executing in the absence of specific legislation on the subject. Dahlsten v. Harris ---------- 714

7. Where the Legislature enacts specific legislation implementing Article IV, section 20, of the Constitution of Nebraska, the Nebraska Public Service

Commission is subject to and governed by the provisions of such enactment. Dahlsten v. Harris -- 714

8. On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. Dahlsten v. Harris ---------- 714

9. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Nebraska Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene. Dahlsten v. Harris ---------- 714

10. "Willful failure to perform a service" and "dormancy" cannot in all cases be equated. The same evidence which might support a finding of willful failure in the case of a regular route authority does not necessarily support such a finding in a case of irregular route authority authorizing carriage of commodities generally or a generic class of commodities where the demand for service is the critical factor and where the evidence shows an ability and willingness to serve. Dahlsten v. Harris -------- 714

11. The protestant to the transfer of an authority who alleges dormancy has the burden of proving it and the applicant had the burden of showing that despite dormancy the transfer was required by the present and future public convenience and necessity. Dahlsten v. Harris ---------- 714

Public Utilities.

1. Before the Nebraska Power Review Board may approve an agreement between suppliers of energy under the provisions of section 70-1002.01, R. R. S. 1943, it must have before it evidence which will support affirmative finding that under the terms of the agreement it can be reasonably expected to provide a reliable wholesale power supply at a reasonable cost for the area and customers to be served. City of Lincoln v. Nebraska P. P. Dist. -- 556

2. The statutory provision requiring determination by the Nebraska Power Review Board of whether the "proposed agreement or amendment can reasonably

be expected to provide a reliable wholesale power supply at a reasonable cost for the area" is a sufficiently definite standard to guide the Nebraska Power Review Board in the exercise of the delegated legislative power of determining the facts on which approval of agreements under section 70-1002.01, R. R. S. 1943, are to be founded. Accordingly the delegation in this instance is not unconstitutional. City of Lincoln v. Nebraska P. P. Dist. ---------- 556

Receivers.

1. The District Court shall have full power to liquidate the assets and business of a corporation: "(1) In an action by a shareholder when it is established: * * * (b) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent." Hockenberger v. Curry ---------- 404
2. The Nebraska Business Corporation Act has given to the courts the power to relieve minority shareholders from oppressive acts of the majority, but the remedy of liquidation is so drastic that it must be invoked with extreme caution. The ends of justice would not be served by too broad an application of the statute, for that would merely eliminate one evil by substituting a greater one—oppression of the majority by the minority. Hockenberger v. Curry ---------- 404
3. When payment of a dividend is deferred by reason of an unsuccessful contest of an alleged setoff, the creditor so delayed should be allowed interest on the dividend to put that creditor on an equality with the other creditors in his class. Colburn v. Ley ---------- 427

Records.

1. No judgment is rendered until the pronouncement thereof is noted on the trial docket. Fritch v. Fritch ---------- 29
2. The District Court may permit inspection of a presentence report or examination of parts of the report by the offender or his attorney or other person having a proper interest whenever the court finds it is in the best interest of the offender. State v. Richter ---------- 34
3. Should the court in the exercise of its discretion permit inspection of all or part of a presentence

report, it may at the request of defendant hold an in camera hearing. State v. Richter ---------- 34

4. It is not necessary for a lease of nonhomestead land to be acknowledged in order for it to be good as between the parties. Neither is it necessary for a lease to be recorded to take effect against a subsequent purchaser with notice. Grand Island Hotel Corp. v. Second Island Development Co. ---------- 98

5. Where a real estate mortgage is acknowledged by some mortgagors, but not all, the mortgage is entitled to be recorded and upon recording is constructive notice of the interest of those persons who acknowledged the instrument. Prudential Ins. Co. v. Holliday ---------- 144

6. When property subject to security interest perfected in another state is removed to Nebraska, secured party has 4 months to locate property and perfect his security interest in Nebraska, and if he fails to file in Nebraska within 4 months, protection of the security interest ceases and his interest is thereafter subject to be defeated like any other unperfected security interest. Community Credit Co. v. Gillham ---------- 198

7. Where property subject to security interest perfected in another state is removed to Nebraska, subsequent purchaser during 4-month period of statutory protection which secured party had to perfect its interest in Nebraska is not retroactively given superior title, although secured party fails to perfect its interest in Nebraska. Community Credit Co. v. Gillham ---------- 198

8. Proceedings of the medical staff committee of a hospital are privileged in the absence of a showing of good cause arising from extraordinary circumstances. Oviatt v. Archbishop Bergan Mercy Hospital ---- 224

9. The inclusion of evidence in a bill of exceptions is the only vehicle for bringing evidence before this court on appeal. Evidence not included in the bill of exceptions may not be considered. Dilsaver v. Pollard ---------- 241

10. The mere fact that the records of an insurer list premiums due from an insured pursuant to premium notices previously sent him as "account receivable" is not conclusive upon the question of whether the insured intended to and did waive a forfeiture of

the policy because of prior nonpayment of premiums. Tighe v. Security Nat. Life Ins. Co. ---------- 271

11. Any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions. Rhodes v. Johnstone 552

12. In the absence of a bill of exceptions, the only issue on appeal is the sufficiency of the pleadings to support the judgment. Rhodes v. Johnstone --- 552

13. Proceedings in error are brought to determine if the final order of the inferior tribunal is in accordance with law. Such proceedings are based on the record of the proceedings before the tribunal; and new evidence may not be introduced to show errors of law before the tribunal. Rhodes v. Johnstone ---------- 552

14. The requirement that a plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified within the time specified is mandatory and jurisdictional. Schmitt v. City of Omaha ---------- 608

15. Section 76-238, R. R. S. 1943, is designed to protect a subsequent purchaser even though there was a prior conveyance or transaction concerning the property, provided the subsequent purchaser recorded his title first, and provided further that the subsequent purchaser was a bona fide purchaser without notice of any other claims to the property. Karmann v. Haase ---------- 839

Reformation of Instruments.

1. When a soliciting agent of an insurance company and the insured mutually agree upon the terms and conditions of the insurance contract, and the policy, later issued by the company, omits one of the essential elements of the contract, which is not discovered by the insured until after a loss occurs, he may then have the policy reformed so as to express the real agreement of the parties. Parry v. State Farm Mut. Auto. Ins. Co. ---------- 628

2. In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. To sustain that burden of proof, evidence that is plain and convincing beyond reasonable controversy is required. A mere

preponderance of the evidence is not sufficient. Parry v. State Farm Mut. Auto. Ins. Co. ---------- 628

Release.

1. To avoid a written release of damages for personal injuries on grounds of mutual mistake of the parties, the mistake must relate to facts that are material to the contract of settlement and not to an opinion as to future conditions as the result of present known facts. Swartz v. Topping ---------- 41
2. A party who has the capacity and opportunity to read a release of claims for personal injuries but fails to do so is estopped by his own negligence from claiming that the release is not binding on him. Swartz v. Topping ---------- 41
3. Mere inadequacy of consideration alone is generally not considered to be a ground upon which a release may be avoided. It is a factor which may be considered along with other circumstances. Swartz v. Topping ---------- 41

Replevin.

Property which cannot be returned in a replevin action is to be valued as of the time of trial. Community Credit Co. v. Gillham ---------- 198

Restitution.

A creditor who has innocently received payment of a debt from a third party is under no duty to make restitution to the third party if it is later discovered that the third party had no responsibility to make the payment and payment was made solely because of the third party's mistake. Federated Mut. Ins. Co. v. Good Samaritan Hospital ---------- 212

Retrocession.

The State of Nebraska never intended to and did not abandon jurisdiction over crimes committed on the Omaha Indian Reservation prior to 12:01 a.m., EST, October 25, 1970. State v. Goham ---------- 639

Right to Counsel.

1. In the context of this case where it is possible that the questioning officer took the defendant's remark that "maybe I should talk to an attorney" not as a request that the interrogation cease but as a

passing remark, there was no denial of counsel under Miranda. State v. Irwin ---------- 169
2. There is no right to counsel at a pretrial photographic identification. State v. Huerta ---------- 280
3. The constitutional right of an accused to the presence and assistance of legal counsel does not apply as a matter of absolute right to a lineup or showup conducted by the police previous to the initiation of adversary judicial criminal proceedings. State v. Sanchell ---------- 505
4. When it appears that minor children in a divorce action may have interests, independent of the parents, in the outcome of the litigation, the District Court should ordinarily appoint counsel to represent them under section 42-358, R. S. Supp., 1972. Ford v. Ford ---------- 548

Rules of Court.

1. Rule 20. State v. Detweiler ---------- 33
State v. Jones ---------- 538
2. A right to a cross-appeal exists only by virtue of Rule 1 d, Revised Rules of the Supreme Court, 1971, and in order to perfect a cross-appeal the appellee need comply only with Rule 8 b 3, Revised Rules of the Supreme Court, 1971. Edquist v. Commercial Sav. & Loan Assn. ---------- 618

Sales.

The holder of a security interest in an automobile which was perfected pursuant to the laws of a nontitle state, who had no knowledge of its removal to this state, has priority over a Nebraska purchaser without knowledge of the security interest who purchases the automobile with a clear Nebraska title within 4 months of its arrival in Nebraska. Community Credit Co. v. Gillham ---------- 198

Schools and School Districts.

1. An action to enjoin a merger of a school district or a part thereof under the provisions of sections 79-801 and 79-801.02, R. R. S. 1943, consequent upon an annexation of territory by a city of the first class under the provisions of sections 16-117 and 16-118, R. R. S. 1943, is barred by the statute of limitations provided in section 18-1717, R. R. S. 1943, unless it is brought within 1 year from the

effective date of the annexation ordinance. School Dist. No. 127 v. Simpson ---------- 164

2. Land in a nonaccredited Class I school district, which is also included within the boundaries of an accredited Class VI school district, may be transferred to an accredited Class III school district under subsection (1) of section 79-403, R. R. S. 1943, as amended in 1971, if all other applicable requirements of the statute are satisfied. Elson v. Harbert 228

Security Interests.

1. A chattel mortgage may serve both as a "security agreement" and a "financing statement" under the Nebraska Uniform Commercial Code, provided it complies with the requirements for said instruments, and contains the necessary information, as set out in the Uniform Commercial Code. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. ---------- 74
2. Under section 9-402, U. C. C., there are two formal requisites of a "financing statement," i. e., (1) the signatures and addresses of both parties; and (2) a description of the collateral by type or item. A financing statement substantially complying with the requirements of the section is effective even though it contains minor errors which are not seriously misleading. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. -------- 74
3. The address of the secured party to be set out in the financing statement under section 9-402, U. C. C., must be such an address as to enable one interested in searching the records to contact the party in question for the purpose of obtaining information concerning the security interest. An address must be sufficiently complete to enable a prudent person using reasonable care to locate the secured party. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. ---------- 74
4. The question of the sufficiency of the address of the secured creditor required under section 9-402, U. C. C., is a question of fact. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. 74
5. Where, under the evidence, the chattel mortgage filed as a "security agreement" and "financing statement" is deficient as to address of secured party, it does not put subsequent purchaser on notice of

outstanding security interest. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. ---------- 74

6. When property subject to security interest perfected in another state is removed to Nebraska, secured party has 4 months to locate property and perfect his security interest in Nebraska, and if he fails to file in Nebraska within 4 months, protection of the security interest ceases and his interest is thereafter subject to be defeated like any other unperfected security interest. Community Credit Co. v. Gillham ---------- 198
7. Where property subject to security interest perfected in another state is removed to Nebraska, subsequent purchaser during 4-month period of statutory protection which secured party had to perfect its interest in Nebraska is not retroactively given superior title, although secured party fails to perfect its interest in Nebraska. Community Credit Co. v. Gillham ---------- 198
8. The holder of a security interest in an automobile which was perfected pursuant to the laws of a non-title state, who had no knowledge of its removal to this state, has priority over a Nebraska purchaser without knowledge of the security interest who purchases the automobile with a clear Nebraska title within 4 months of its arrival in Nebraska. Community Credit Co. v. Gillham ---------- 198

Sentences.

1. A sentence within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. State v. Johnson ---------- 26
   State v. Brown ---------- 61
   State v. Sheets ---------- 153
   State v. Zeigler ---------- 322
   State v. Brown ---------- 713
2. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. State v. Henry ---------- 27
3. 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 on appeal unless there appears to be an abuse of such discretion. State v. McCowin ---------- 31

State v. Moore ---------- 596
State v. Cano ---------- 709

4. Where the punishment of an offense is left to the discretion of a court to be exercised within certain statutorily prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Johnson ---------- 54
5. On direct appeal this court has the power to remand the cause for a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself invoked appellate jurisdiction for the correction of errors. State v. Gaston ---- 121
6. If the evidence warrants a finding by the trial court that a defendant is a sexual sociopath and would not be benefited by treatment he should be committed in accordance with the sexual sociopath act for an indefinite period in the Nebraska Penal and Correctional Complex. State v. Irwin ---------- 169
7. The sexual sociopath act, sections 29-2901 to 29-2910, R. S. Supp., 1972, is constitutional. We construe the act to provide that when a defendant who has been committed under the indefinite commitment provisions thereof is found to be no longer a sexual sociopath, any sentence which the court may impose for the original conviction may not exceed the maximum sentence for the sexual crime of which he was found guilty less any time the defendant has been committed under the provisions for indefinite commitment. State v. Irwin ---------- 169
8. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise. State v. Waldrop ---------- 434
9. When a legislative act, adopted after one has been convicted and sentenced for a crime but while the cause is still pending on a motion for new trial or on appeal, serves to mitigate the sentence imposed, this court will either amend the sentence to conform to the legislative intent or will remand the cause to the District Court for resentencing in conformity with the statute. State v. Waldrop ---------- 434
State v. White ---------- 772

10. A sentence imposed by the trial court in a criminal case will not be disturbed on appeal in the absence of a showing of an abuse of discretion by the District Court. State v. Clay ---------- 654

Sexual Sociopaths.

1. If the evidence warrants a finding by the trial court that a defendant is a sexual sociopath and would not be benefited by treatment he should be committed in accordance with the sexual sociopath act for an indefinite period in the Nebraska Penal and Correctional Complex. State v. Irwin ---------- 169
2. The sexual sociopath act, sections 29-2901 to 29-2910, R. S. Supp., 1972, is constitutional. We construe the act to provide that when a defendant who has been committed under the indefinite commitment provisions thereof is found to be no longer a sexual sociopath, any sentence which the court may impose for the original conviction may not exceed the maximum sentence for the sexual crime of which he was found guilty less any time the defendant has been committed under the provisions for indefinite commitment. State v. Irwin ---------- 169

Sheriffs.

A county sheriff serving a distress warrant and levying on personal property is not a trespasser in a prosecution under section 28-729.01, R. S. Supp., 1972. State v. Wingate ---------- 388

Signs.

1. It is the duty of a contractor, engaged in construction work on a public highway, to erect barricades or signs, or otherwise adequately warn the traveling public if the highway is dangerous to travel. Huber v. Cornhusker Paving Co. ---------- 108
2. It is elementary that the public may assume that those charged with the maintenance of highways have performed their duty. Huber v. Cornhusker Paving Co. ---------- 108
3. A failure to so warn the traveling public of a dangerous condition caused by the contractor on a highway is continuing negligence as distinguished from a condition, and if reasonable minds could conclude from the evidence that such negligence proximately caused an accident, then the issue should

be submitted to a jury for its determination. Huber v. Cornhusker Paving Co. ---------- 108

Specific Performance.

1. An action for specific performance is triable de novo on appeal to this court. Friehe Farms, Inc. v. Haberman ---------- 292
2. An executory contract for the sale of nonhomestead land in which the husband of the vendor has not joined is specifically enforceable against the vendor to the extent of her interest, but not as to the marital interest of her husband in the land. Fudge v. Byrom ---------- 363
3. The discretionary remedy of specific performance together with abatement of purchase price should not be granted by a court of equity if it operates with injustice and oppression. Fudge v. Byrom --- 363
4. Specific performance of a parol contract will be enforced by a court of equity where one party has wholly and the other party partly performed it, and its nonfulfillment on the one hand would amount to a fraud on the party who has fully performed it. Pinney v. Hill ---------- 844

Spendthrifts.

The trustee of a spendthrift trust is not entitled to a charge on a beneficiary's interest in the trust estate for overpayments made to said beneficiary in accordance with the provisions of the trust. The trustee's rights under these circumstances are no greater than those of any other unsecured creditor of the beneficiary. O'Shea v. O'Shea ---------- 217

States.

1. When property subject to security interest perfected in another state is removed to Nebraska, secured party has 4 months to locate property and perfect his security interest in Nebraska, and if he fails to file in Nebraska within 4 months, protection of the security interest ceases and his interest is thereafter subject to be defeated like any other unperfected security interest. Community Credit Co. v. Gillham _ 198
2. Where property subject to security interest perfected in another state is removed to Nebraska, subsequent purchaser during 4-month period of statutory protection which secured party had to perfect its in-

terest in Nebraska is not retroactively given superior title, although secured party fails to perfect its interest in Nebraska. Community Credit Co. v. Gillham 198

3. The holder of a security interest in an automobile which was perfected pursuant to the laws of a non-title state, who had no knowledge of its removal to this state, has priority over a Nebraska purchaser without knowledge of the security interest who purchases the automobile with a clear Nebraska title within 4 months of its arrival in Nebraska. Community Credit Co. v. Gillham ---------- 198

Statutes.

1. In the construction of a statute, courts must consider the preexisting law and any other laws relating to the same subject. Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn. ----- 1
2. Courts should not give an interpretation to a statute which would have the effect of nullifying another statute when obviously that was not the clear legislative intent. Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn. ---------- 1
3. It is a cardinal principle that statutes pertaining to the same subject matter should be construed together, as if they were one law, and effect given to every provision. Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn. ---------- 1
4. Section 29-2011.01, R. S. Supp., 1972, held constitutional. State v. Rhodes ---------- 131
5. The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it. Doolittle v. County of Lincoln ---------- 159
6. An unambiguous statute is not open to construction. Doolittle v. County of Lincoln ---------- 159
7. Amendments to statutes which are procedural in nature generally are applicable to pending cases which have not been tried. Oviatt v. Archbishop Bergan Mercy Hospital ---------- 224
8. Legislative intent is the cardinal rule in the construction of statutes. Pettigrew v. Home Ins. Co. -- 312
9. In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed,

in its plain, ordinary, and popular sense, should be taken into account in order to determine the legislative will. Pettigrew v. Home Ins. Co. ---------- 312

10. In construing a statute to determine legislative intent, the courts may consider the history of its passage. Pettigrew v. Home Ins. Co. ---------- 312

11. The statutory provision providing for forfeiture of right-of-way because of unlawful speed was expressly repealed by the 1969 Legislature. Epperson v. Utley ---------- 413

12. The previous statutory provision providing for forfeiture of right-of-way by unlawful speed was limited by the statute and by case law interpretation to forfeiture of directional right-of-way. Epperson v. Utley ---------- 413

13. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise. State v. Waldrop ---------- 434

14. When a legislative act, adopted after one has been convicted and sentenced for a crime but while the cause is still pending on a motion for new trial or on appeal, serves to mitigate the sentence imposed, this court will either amend the sentence to conform to the legislative intent or will remand the cause to the District Court for resentencing in conformity with the statute. State v. Waldrop ---------- 434
State v. White ---------- 772

15. The Nebraska obscenity statutes are in full compliance with the criteria and standards required by recent United States Supreme Court decisions including Miller v. California. State v. Little Art Corp. ---------- 448

16. Courts should give statutory language its plain and ordinary meaning. State v. One 1970 2-Door Sedan Rambler ---------- 462

17. If legislation violates no constitutional provision the courts have no authority to declare it void because they might doubt its wisdom. City of Lincoln v. Nebraska P. P. Dist. ---------- 556

18. In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal con-

struction which will best effect its purpose rather than one which will defeat it. State v. Goham ---- 639

19. The intention of the Legislature when ascertained will prevail over the literal sense of the words used and this is especially true when the strict letter of the law would lead to injustice or absurdity. State v. Goham ---- 639

20. In interpreting a statute the legislative intent may be found from the reason of the enactment. State v. Goham ---- 639

21. 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. State v. Goham ---- 639

22. The rationale involved in the rule of construing legislative intent does not mean the court is substituting its judgment for that of the legislative body. Rather, it is attempting to ascertain the legislative intent. It will presume the Legislature intended a sensible, just, and reasonable result rather than the opposite. State v. Goham ---- 639

23. To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is a traditional and appropriate function of the courts. State v. Goham ---- 639

24. The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself. The 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. Neeman v. Nebraska Nat. Resources Commission - 672

25. It is a general rule that a statute must be reasonably clear and definite to be valid. But a statute which is otherwise valid will not be held void or unintelligible and meaningless unless it is so imperfect and deficient in its terms as to render it impossible of execution and enforcement. Neeman v. Nebraska Nat. Resources Commission ---- 672

26. Where the Legislature enacts specific legislation implementing Article IV, section 20, of the Con-

stitution of Nebraska, the Nebraska Public Service Commission is subject to and governed by the provisions of such enactment. Dahlsten v. Harris --- 714

27. The offense of failing to carry an operator's license when operating a motor vehicle on the public highways is a traffic violation for which two points are to be assessed under section 39-7,128, R. R. S. 1943. Coffey v. Sullivan ---------- 781

Streets.

An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway or street. Danish Vennerforning & Old Peoples Home v. State ---------- 774

Strict Liability.

1. A manufacturer of goods has a duty to use reasonable care in their design to protect those who will use them from unreasonable risk of harm while they are being used for their intended purpose or for any purpose which could be reasonably expected. Friedrich v. Anderson ---------- 724
2. The subjection of an automobile to accidental collision with another automobile or object while being used for its intended purpose is a use which a manufacturer could reasonably expect. Friedrich v. Anderson ---------- 724

Summary Judgments.

1. Motion for summary judgment is to be granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Grantham v. General Tel. Co. --------- 21
2. The meaning of an ambiguity in a contract is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment. Grantham v. General Tel. Co. -- 21
3. It is error to sustain a motion for summary judgment when there is any genuine issue of material fact. Nine v. Lurz ---------- 605
4. The purpose of a summary judgment is not to serve as a substitute for a trial. Nine v. Lurz ---------- 605
5. In considering a motion for summary judgment the court should view the evidence in the light most

favorable to the party against whom it is directed. Nine v. Lurz ---------- 605

6. Where all the evidence relating to the claimed duty of a manufacturer in the design of a product is before the court and undisputed and is not sufficient that reasonable minds could properly find that a defectively designed product created a foreseeable and unreasonable risk of harm, the court is justified in granting summary judgment in favor of the manufacturer. Friedrich v. Anderson ---------- 724

Taxation.

1. Under section 77-2108, R. R. S. 1943, estate taxes will be equitably apportioned in accordance with statutory rules unless there is a clear and unambiguous direction to the contrary. Ambiguities are to be resolved in favor of apportionment. Nielsen v. Sidner ---------- 324
2. The burden of Nebraska inheritance taxes will be imposed upon the individual beneficiaries of the decedent in accordance with the statutory pattern unless there is a clear and unambiguous direction to the contrary in the will or other governing instrument. Ambiguities will be resolved in favor of the statutory pattern. Nielsen v. Sidner ---------- 324
3. When financial burdens are imposed upon property owners through an exercise of judicial power pursuant to specific terms of a statute, due process of law requires notice and an opportunity to be heard. State ex rel. Meyer v. Peters ---------- 330
4. Where an increase in the assessed valuation of any classes of property as returned by any county or counties is made by the State Board of Equalization and Assessment without notice to such county or counties and without affording sufficient opportunity to be heard, such increase amounts to confiscation of property without due process, and is therefore a void increase of assessment. State ex rel. Meyer v. Peters ---------- 330
5. The true principle of taxation, the one enjoined by our Constitution, is that of uniformity as to persons and property within the particular district for which the tax is imposed. State ex rel. Meyer v. Peters ---------- 330
6. Under the provisions of Article VIII, section 1, of the Constitution of Nebraska, the taxation of per-

sonal property, except as otherwise authorized by such provision, must be uniform not only as to the rate of taxation, but as to the valuation of the property as well. State ex rel. Meyer v. Peters --- 330

7. There can be no difference in the method of valuation or the rate of tax to be imposed unless the separate classification rests on some reasonable public policy, some substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. State ex rel. Meyer v. Peters ---------- 330

8. The assessed value of property for tax purposes, in and of itself, is generally not admissible as direct evidence of value for purposes other than taxation. Lienemann v. City of Omaha ---------- 442

9. The burden of proof is upon a taxpayer to establish by clear and convincing evidence his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Nash Finch Co. v. County Board of Equalization ---------- 645

10. The law imposes the duty of valuing and equalizing of property for taxation purposes upon the county assessor and the county board of equalization. In reviewing the actions of tribunals created by law for ascertaining the valuation and equalization of property for taxation purposes, courts will not usurp the functions of such tribunals. It is only where such assessed valuations are not in accordance with law or it is made to appear that they were made arbitrarily or capriciously, that courts will interfere. Nash Finch Co. v. County Board of Equalization -- 645

11. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. Nash Finch Co. v. County Board of Equalization ---------- 645

Tender.

An unqualified renunciation of an executory contract before time for performance by one party excuses tender of performance by the other party at the time set for performance. Friehe Farms, Inc. v. Haberman ---------- 292

Time.

1. In computation of the statutory period of 6 months within which the State must bring an accused to trial, periods of delay because of motions for change of venue and for a continuance granted at the request, or with the consent, of defense counsel are excluded. State v. Ogden ---------- 7
2. In a criminal prosecution the court will grant a new trial on timely application of defendant for the reason of newly discovered evidence material for the defendant, provided, the reason materially affects his substantial rights and he could not with reasonable diligence have discovered and produced the evidence at the trial. State v. Atkinson ---------- 9
3. Ordinarily, failure to make a motion to strike or timely objection to proffered evidence in the trial court waives the right to complain of the admission of such evidence on appeal. Laun v. Roach ------ 11
4. The District Court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. State v. Gascoigen -- 15
5. When property subject to security interest perfected in another state is removed to Nebraska, secured party has 4 months to locate property and perfect his security interest in Nebraska, and if he fails to file in Nebraska within 4 months, protection of the security interest ceases and his interest is thereafter subject to be defeated like any other unperfected security interest. Community Credit Co. v. Gillham ---------- 198
6. Where property subject to security interest perfected in another state is removed to Nebraska, subsequent purchaser during 4-month period of statutory protection which secured party had to perfect its interest in Nebraska is not retroactively given superior title, although secured party fails to perfect its interest in Nebraska. Community Credit Co. v. Gillham 198

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8. Property which cannot be returned in a replevin action is to be valued as of the time of trial. Community Credit Co. v. Gillham ---------- 198
9. Amendments to statutes which are procedural in nature generally are applicable to pending cases which have not been tried. Oviatt v. Archbishop Bergan Mercy Hospital ---------- 224
10. If a qualified voter who will be absent from the county of his domicile on the day of an election fails to make application either in writing or in person at least "three clear days" before the election as required by section 32-803, R. S. Supp., 1972, he is not entitled to receive an absentee ballot, and if one is issued to him in violation of the statute a vote cast thereon is illegal and void. Dilsaver v. Pollard ---------- 241
11. The period of "three clear days" is determined by excluding both the day of the election and the day of the request. Dilsaver v. Pollard ---------- 241
12. In the absence of agreement, rent is not due until the expiration of the term. First Nat. Bank v. Omaha Nat. Bank ---------- 249
13. Rent, as such, is not payable until it falls due under the terms of a lease, and no suit can be brought for future rent in the absence of a clause permitting acceleration. First Nat. Bank v. Omaha Nat. Bank 249
14. The District Court has power to retain jurisdiction and grant further relief where it has entered a declaratory judgment declaring the rights of the parties under a contract. First Nat. Bank v. Omaha Nat. Bank ---------- 249
15. A forfeiture or lapse of an insurance policy for nonpayment of a premium generally takes effect from the time the premium is due and unpaid. Tighe v. Security Nat. Life Ins. Co. ---------- 271
16. An unqualified renunciation of an executory contract before time for performance by one party excuses tender of performance by the other party

at the time set for performance. Friehe Farms, Inc. v. Haberman ---------- 292

17. The terms "immediate" or "as soon as practicable" in referring to the notice required in an insurance policy mean with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances of each particular case. Ach v. Farmers Mut. Ins. Co. ---------- 407

18. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise. State v. Waldrop ---------- 434

19. When a legislative act, adopted after one has been convicted and sentenced for a crime but while the cause is still pending on a motion for new trial or on appeal, serves to mitigate the sentence imposed, this court will either amend the sentence to conform to the legislative intent or will remand the cause to the District Court for resentencing in conformity with the statute. State v. Waldrop ---------- 434
State v. White ---------- 772

20. The absolute requirement of section 28-4,135, R. S. Supp., 1972, that a forfeiture complaint be filed within 5 days after seizure with provision for notice and hearing meets the test of due process. State v. One 1970 2-Door Sedan Rambler ---------- 462

21. If the intention to rob is formed either antecedent to or contemporaneously with the acts which result in the death, the homicide is committed in the perpetration of the robbery. State v. Montgomery --- 470

22. The constitutional right of an accused to the presence and assistance of legal counsel does not apply as a matter of absolute right to a lineup or showup conducted by the police previous to the initiation of adversary judicial criminal proceedings. State v. Sanchell ---------- 505

23. An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification. Bryant v. Bryant ---------- 539

24. The word immediate in referring to the notice re-

quired in an insurance policy means with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances of each particular case. R. C. Walters Co., Inc. v. DeBower ---------- 544

25. When a contractor's performance bond requires that notice of default by the contractor be given to the surety within a reasonable time and the failure to give such notice results in prejudice or damage to the surety, the principal cannot recover on the bond. R. C. Walters Co., Inc. v. DeBower ---------- 544

26. Any person appealing an order of the Director of the Department of Motor Vehicles must execute and file the required bond within 20 days of the date of the final order complained of, and such filing is a jurisdictional requirement and a condition precedent to the initiation of the appellate process. Buettner v. Sullivan ---------- 592

27. When a bank or savings institution is found to be liable for the unauthorized withdrawal of funds from a depositor's account, the depositor is entitled to interest from the date of the unauthorized withdrawals to date of judgment. Edquist v. Commercial Sav. & Loan Assn. ---------- 618

28. Section 42-349, R. S. Supp., 1972, which imposes a 1-year residency requirement for dissolution of marriage, unless the marriage was solemnized in Nebraska and one party has resided in Nebraska continuously, is constitutional. Ashley v. Ashley ---- 824

Torts.

1. On an appeal to this court of an action under the State Tort Claims Act the findings of the trial court will not be disturbed unless clearly wrong. Cortes v. State ---------- 795

2. A patron of a public park using an area of the park open to the public where such use is in conformity with valid park regulations is generally a licensee and the possessor of the park owes to him the duty to warn of traps and concealed hazards. Cortes v. State ---------- 795

3. A body of water, natural or artificial, does not constitute a concealed, dangerous condition. Cortes v. State ---------- 795

Trespass.

A county sheriff serving a distress warrant and levying on personal property is not a trespasser in a prosecution under section 28-729.01, R. S. Supp., 1972. State v. Wingate ---------- 388

Trial.

1. In computation of the statutory period of 6 months within which the State must bring an accused to trial, periods of delay because of motions for change of venue and for a continuance granted at the request, or with the consent, of defense counsel are excluded. State v. Ogden ---------- 7
2. Ordinarily, failure to make a motion to strike or timely objection to proffered evidence in the trial court waives the right to complain of the admission of such evidence on appeal. Laun v. Roach ------- 11
3. The meaning of an ambiguity in a contract is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment. Grantham v. General Tel. Co. --- 21
4. When a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, interpretation of the contract is a matter of law. Grantham v. General Tel. Co. ---------- 21
5. No judgment is rendered until the pronouncement thereof is noted on the trial docket. Fritch v. Fritch 29
6. The District Court may permit inspection of a presentence report or examination of parts of the report by the offender or his attorney or other person having a proper interest whenever the court finds it is in the best interest of the offender. State v. Richter ---------- 34
7. Should the court in the exercise of its discretion permit inspection of all or part of a presentence report, it may at the request of defendant hold an in camera hearing. State v. Richter ---------- 34
8. The findings of a court in an ordinance violation have the same weight as a verdict of a jury. State v. Brown ---------- 63
9. In personal injury cases where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary. Eiting v. Godding ---------- 88

10. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. Eiting v. Godding ---------- 88
11. When symptoms from which personal injury may be inferred are subjective only, medical testimony is required. Eiting v. Godding ---------- 88
12. It is the duty of the trial court to rule upon the admissibility of evidentiary facts when they are offered in evidence. Their relevancy should then appear or the court should be informed as to the connection in which they will become relevant. Ritzau v. Wiebe Constr. Co. ---------- 92
13. There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced. Ritzau v. Wiebe Constr. Co. ---- 92
14. The opinion of a qualified witness as to the value of services is admissible to prove such value when his testimony will aid the jury. Ritzau v. Wiebe Constr. Co. ---------- 92
15. A failure to so warn the traveling public of a dangerous condition caused by the contractor on a highway is continuing negligence as distinguished from a condition, and if reasonable minds could conclude from the evidence that such negligence proximately caused an accident, then the issue should be submitted to a jury for its determination. Huber v. Cornhusker Paving Co. ---------- 108
16. Where the recovery is not a mere matter of computation, it will not be interfered with unless so excessive or so grossly inadequate as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or unless it appears to have been based on an oversight, mistake, misconception, or misrepresentation, or on a consideration of elements not within the scope of the action. Huber v. Cornhusker Paving Co. ---------- 108
17. Where an information charges former convictions which give rise to enhanced punishment under the

habitual criminal statute, a plea of nolo contendere or guilty to the information confesses the prior convictions and no hearing for proof of the convictions is required under section 29-2221(2), R. S. Supp., 1972. State v. Youngstrom ---------- 112

18. The fact that the previous offenses at the time of their commission and at the time of conviction thereof were felonies and have since been by statute reduced to misdemeanors will not preclude their use under the habitual criminal statute to enhance punishment. State v. Youngstrom ---------- 112

19. For relief on the ground of ineffective assistance of counsel, it must appear that assistance of trial counsel was so grossly inept as to shock the conscience of the court. State v. Garza ---------- 118

20. Section 29-1301.01, R. R. S. 1943, permits the trial court to proceed either in the county where the offense is committed or in any county into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense. State v. Garza ---------- 118

21. 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. State v. Rhodes ------ 131
State v. Cortez ---------- 800

22. Where a witness has refused to answer questions before trial, and during the trial his testimony is compelled under section 29-2011.01, R. S. Supp., 1972, the defendant may request a continuance to interview the witness. State v. Rhodes ---------- 131

23. Where a witness for the State, who has previously refused to answer questions, is compelled to testify under section 29-2011.01, R. S. Supp., 1972, and the defendant's objection and request for a continuance are denied, all the circumstances must be considered in determining whether there has been an abuse of discretion and the defendant was prevented from properly preparing for trial. State v. Rhodes ---- 131

24. Testimony which is relevant and admissible on independent grounds is not inadmissible solely because it tends to show immoral or illegal conduct by the defendant. State v. Rhodes ---------- 131

25. When, upon a jury trial, defendant, at the conclusion of plaintiff's evidence, moves for a dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to the plaintiff, and she is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom. Bohling v. Farm Bureau Ins. Co. ---------- 141

26. Circumstantial evidence is insufficient to warrant a recovery in a civil case unless the circumstances proved are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom. Conjecture, speculation, or choice of possibilities is not proof. There must be something more which would lead a reasoning mind to one conclusion rather than another. Bohling v. Farm Bureau Ins. Co. ---------- 141

27. In every jury case, at the conclusion of plaintiff's evidence, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the plaintiff, upon whom the burden of proof is imposed. Bohling v. Farm Bureau Ins. Co. ---------- 141

28. When evidence is conflicting regarding a motion for the suppression of evidence, the decision upon the motion is for the court and will not be reversed on appeal in the absence of an abuse of discretion. State v. Batchelor ---------- 148

29. A motion for directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Melia v. Svoboda ---------- 150

30. 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. Melia v. Svoboda ---------- 150

31. A finding of fact by the trial court, either the Workmen's Compensation Court en banc or the Dis-

trict Court on direct appeal from the order by one judge of the compensation court, against the party with the burden of proof will be set aside only if the evidence compels a finding for that party. Kuethe v. State ---------- 167

32. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and in so doing we will look to the totality of the circumstances. State v. Irwin ---------- 169

33. The determination by the trial court of the admissibility of a confession by a preponderance of the evidence is not inconsistent with the mandate of proof of guilt beyond a reasonable doubt. State v. Irwin ---------- 169

34. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed unless a clear abuse of discretion is shown. State v. Irwin 169

35. When the defense invites a responsive rebuttal argument which might otherwise be prejudicial, it cannot complain. State v. Irwin ---------- 169

36. Where an award in a workmen's compensation case is supported by reasonable competent evidence and the medical testimony is uncontradicted that future medical examinations, treatment, and medicines will be necessary, the employer shall be liable for reasonable medical and hospital services and medicines as and when needed, subject to the approval of the Workmen's Compensation Court. Quincy v. J & S of Nebraska, Inc. ---------- 208

37. The purpose of a pretrial conference is to simplify the issues; amend the pleadings, when necessary; and avoid unnecessary proof of facts at the trial. O'Shea v. O'Shea ---------- 217

38. An order of a pretrial conference when duly entered by the trial court controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. O'Shea v. O'Shea ---------- 217

39. Permission to amend a pretrial order at the trial or before final submission to the court should ordinarily not be granted when such amendment will result in a delay of the trial, except when relevant matters have arisen after the pretrial conference,

or when matters existing at the time of that hearing were not discovered until afterwards and the attorney was not negligent in failing to obtain the information earlier. O'Shea v. O'Shea ---------- 217

40. Amendments to statutes which are procedural in nature generally are applicable to pending cases which have not been tried. Oviatt v. Archbishop Bergan Mercy Hospital ---------- 224

41. The exercise by a trial court of its discretion in ruling on admission or rejection of evidence will not be disturbed on appeal unless the trial court clearly or plainly abused its discretion. Duffy v. Physicians Mut. Ins. Co. ---------- 233

42. To sustain a charge of discrimination where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions. Duffy v. Physicians Mut. Ins. Co. ---------- 233

43. The burden of proof is on complainant to prove a discriminatory pay differential by reason of her sex. Duffy v. Physicians Mut. Ins. Co. ---------- 233

44. Where evidence supporting the District Court findings of fact is substantial, the findings will not be disturbed on appeal. Duffy v. Physicians Mut. Ins. Co. ---------- 233

45. In an election contest the burden of proving the facts which may make a vote illegal is upon the party so contending. He also has the burden of proving how the alleged illegal vote affected the election and so must show how it was cast. Dilsaver v. Pollard ---------- 241

46. In an election contest appealed to this court the cause is heard de novo. Dilsaver v. Pollard ------ 241

47. The District Court has power to retain jurisdiction and grant further relief where it has entered a declaratory judgment declaring the rights of the parties under a contract. First Nat. Bank v. Omaha Nat. Bank ---------- 249

48. 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. Schulze v. Jensen ------ 253

49. Where the evidence adduced to sustain an issue, although conflicting, is so conclusive that reason-

able minds can draw but one conclusion therefrom, it is the court's duty to decide the question as a matter of law, rather than submit it to a jury. Exchange Bank of Gibbon v. Ashley ---------- 259
50. When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given. Exchange Bank of Gibbon v. Ashley ---------- 259
51. 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 convincing evidence. State v. Parker - 263
52. In a "trial de novo" in the Supreme Court, it is settled law that this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Schuller v. Schuller ---------- 266
53. There is a presumption that the court, trying a case without a jury, in arriving at a decision, will consider such evidence only as is competent and relevant, and the Supreme Court will not reverse a case so tried because other evidence was admitted, when there is material, competent, and relevant evidence admitted sufficient to sustain a judgment of the trial court. Schuller v. Schuller ---------- 266
54. Generally, the admission of incompetent or irrelevant evidence is not reversible error, where the cause is tried to the court without a jury. Schuller v. Schuller ---------- 266
55. Upon a trial de novo in the Supreme Court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objection by the adverse party, will be disregarded by this court. Schuller v. Schuller ---------- 266
56. The failure to object promptly to an offer of evidence waives the objection. State v. Huerta ----- 280
57. In determining whether or not photographic identification procedures have been impermissibly suggestive, the question must be determined by an evaluation of all the surrounding circumstances. State v. Huerta ---------- 280
58. Each case must be considered on its own facts and a conviction based on eyewitness identification at trial, following pretrial identification by photograph, will be set aside on that ground only if the photo-

graphic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. State v. Huerta ---------- 280

59. Even though an in-court identification may have been tainted by an impermissibly suggestive out-of-court photographic identification, the in-court identification may properly be received if it has an independent source. State v. Huerta ---------- 280

60. Cases may be consolidated for trial if the offenses charged are based on the same act or transaction. State v. Shiller ---------- 291

61. A ruling on a motion for consolidation will not be disturbed on appeal in the absence of an abuse of discretion. State v. Shiller ---------- 291

62. An action for specific performance is triable de novo on appeal to this court. Friehe Farms, Inc. v. Haberman ---------- 292

63. Error in the admission of evidence is not grounds for reversal if no substantial miscarriage of justice occurred. State v. Russ ---------- 300

64. In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party and every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom. Schmidt v. Knox - 302

65. When the proponent has secured the verdict of the jury, in reviewing the evidence it must be considered in the light most favorable to the proponent, every controverted fact must be resolved in proponent's favor, and the proponent must have the benefit of every inference that can reasonably be deduced therefrom. Urbanovsky v. Foral ------- 308

66. An objection to argument and a motion for a mistrial may be made at the close of argument. Graham v. Simplex Motor Rebuilders ---------- 320

67. A failure to ask for a mistrial is ordinarily a waiver of the misconduct. Graham v. Simplex Motor Rebuilders ---------- 320

68. In cases involving child custody, the finding of the trial court both as to the evaluation of the evidence and as to the matter of custody will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Carner v. Anderson ---------- 341

69. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law. Schmidt v. Richman Gordman, Inc. ---------- 345
70. In an action for damages, where the law furnishes no legal rule for measuring them, the amount rests largely in the sound discretion of the jury, and the courts are reluctant to interfere with a verdict rendered by the jury. Schmidt v. Richman Gordman, Inc. ---------- 345
71. There is a presumption that the court, trying a case without a jury, in arriving at a decision, will consider such evidence only as is competent and relevant and the Supreme Court will not reverse a case so tried because other evidence was admitted, where there is material, competent, and relevant evidence admitted sufficient to sustain the judgment of the trial court. Christensen v. Christensen --- 355
72. Upon a trial de novo in this court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objection by the adverse party will be disregarded by this court. Christensen v. Christensen ---------- 355
73. A ruling of a trial judge on a motion to disqualify himself is immaterial where the cause is an action triable de novo in this court. Christensen v. Christensen ---------- 355
74. An appeal from a finding and judgment of the District Court by authority of Chapter 43, article 2, R. R. S. 1943, that a child is neglected or dependent is disposed of in this court by trial de novo upon the record. State v. Kinkner ---------- 367
75. In a will contest where undue influence is alleged, that issue should be submitted to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude that the will was not the free and voluntary act of testatrix but the result of undue influence exercised upon her. Spinar v. Wall ---------- 395
76. The trial court may and ordinarily should hold a conference before or during the trial with reference to the preparation of proposed instructions. At the conference on instructions each counsel should aid

the trial court by stating any specific objection that he has on any instruction proposed to be given. Anderson v. Farmer Brown's Steak House, Inc. -- 410

77. Discretion is vested in the District Court in the admission of lay opinion testimony when it is rationally based upon the perception of the witness, and could be helpful for a clear understanding by the jury of the facts. Epperson v. Utley ------- 413

78. Where voluntary statements or confessions are not offered or received in evidence, the foundational requirements for such are not relevant and, on objection or motion, should be excluded or stricken if they are not otherwise relevant to the issues. State v. Garrett ---------- 439

79. Where error is established in the admission of evidence of value in a condemnation case, and there is no contention in brief or argument that the error was not prejudicial, the error will be presumed to be prejudicial unless it clearly appears from the record that it did not affect unfavorably the party against whom it was admitted. Lienemann v. City of Omaha ---------- 442

80. Ordinarily, when an objection to, or motion to strike, improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice resulting. State v. Dittrich ---------- 475

81. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent. State v. Dittrich ---------- 475

82. In a trial de novo in the Supreme Court, it is settled law that this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Seybold v. Seybold ---- 480

83. In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in favor of the nonmoving party, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. Anstine v. Briggs ---------- 489

84. Ordinarily a failure to object waives any error in the admission of evidence. Miller v. Arends ----- 494
85. Where the undisputed physical facts demonstrate the collision out of which the injuries arose was not caused by the negligence of the defendant, the evidence will not support a verdict for the plaintiff. Miller v. Arends ---------- 494
86. Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it. State v. Sanchell ---------- 505
87. Even though an identification procedure may have been suggestive, the in-court identification may be allowed to go to the jury if under the totality of the circumstances it is determined to be reliable because it has an origin independent of the taint. State v. Sanchell ---------- 505
88. If identification procedures are such as to violate due process, the denial of a proper and timely motion to suppress and the admission of the in-court identification constitutes reversible error unless this court can say beyond a reasonable doubt that the error was harmless. State v. Sanchell ---------- 505
89. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together, must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. State v. Earlywine ---------- 533
90. Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. State v. Earlywine ---------- 533
91. It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury when Article I, section 6, of the Constitution of Nebraska, is not violated. State v. Johnson -- 535
92. Where a defendant is charged with a violation of a city ordinance, with a maximum authorized penalty of 6 months incarceration, he is not entitled to a jury trial under the federal Constitution. State v. Johnson ---------- 535
93. Proceedings in error are brought to determine if

the final order of the inferior tribunal is in accordance with law. Such proceedings are based on the record of the proceedings before the tribunal; and new evidence may not be introduced to show errors of law before the tribunal. Rhodes v. Johnstone -- 552

94. An administrative agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their offices. City of Lincoln v. Nebraska P. P. Dist. ---------- 556

95. An expert witness may usually give his expert opinion on the basis of facts within his own knowledge and to which he has testified. City of Lincoln v. Nebraska P. P. Dist. ---------- 556

96. An action brought to foreclose a mortgage on personal property and for a deficiency judgment is an action in equity and a trial by jury is not required by section 25-1104, R. R. S. 1943. State Securities Co. v. Corkle ---------- 578

97. A motion to amend the pleadings to conform to the evidence, made at the close of all evidence, rests within the sound judicial discretion of the trial court either to permit amendment of the pleadings in furtherance of justice, or to refuse the right of amendment. § 25-852, R. R. S. 1943. State Securities Co. v. Corkle ---------- 578

98. Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or matter to avoid, will be treated as admitted, although the answer also contains a general denial. State Securities Co. v. Corkle ---------- 578

99. In a proceeding instituted by a state bank under the provisions of section 8-195, R. R. S. 1943, the bank has the burden of going forward with the evidence to establish that a declaration of insolvency made and filed by the Director of Banking under the provisions of section 8-194, R. R. S. 1943, was erroneous. In the absence of a contrary showing, this court will presume that the Director of Banking complied with the law. Elm Creek State Bank v. Department of Banking ---------- 584

100. A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable ruling. Wisnieski v. Coufal ------ 598

101. Generally, the action of the trial court in exclud-

ing testimony of a witness during his direct examination may not be reviewed on appeal in the absence of an offer to prove what it is claimed the testimony would show. Wisnieski v. Coufal ------ 598

102. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. Nine v. Lurz ---------- 605

103. In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusions of the trial court as to such reliability will be carefully regarded by the Supreme Court on review. Reisig v. Reisig ------ 612

104. In every case before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed. Edquist v. Commercial Sav. & Loan Assn. ---------- 618

105. In an action for reformation of a written instrument, the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the written instrument. To sustain that burden of proof, evidence that is plain and convincing beyond reasonable controversy is required. A mere preponderance of the evidence is not sufficient. Parry v. State Farm Mut. Auto. Ins. Co. - 628

106. The burden of proof is upon a taxpayer to establish by clear and convincing evidence his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Nash Finch Co. v. County Board of Equalization ---------- 645

107. In a case tried to the court, either in law or in equity, the presumption obtains that the trial court in arriving at decision considered only such evidence as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment. Kockrow v. Kockrow ---------- 657

108. If persons to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent. LaPuzza v. Prom Town House Motor Inn, Inc. ---------- 687
109. An antenuptial agreement cannot absolutely limit the amount of an award of alimony, although it should be considered by the court with other evidence on that point. Krejci v. Krejci ---------- 698
110. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Ray ------- 702
111. Abstracts of convictions covering void judgments or erroneous or fraudulent records may be challenged at an evidentiary hearing provided for in the District Court on a de novo review of the director's order revoking a driver's license. Baker v. Sullivan ---------- 707
112. The credibility of the witnesses and the weight of the evidence in a criminal case are for the jury and a verdict will not be set aside on appeal if the evidence sustains some rational theory of guilt. State v. Cano ---------- 709
113. The protestant to the transfer of an authority who alleges dormancy has the burden of proving it and the applicant has the burden of showing that despite dormancy the transfer was required by the present and future public convenience and necessity. Dahlsten v. Harris ---------- 714
114. It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which it should take into consideration in arriving at its verdict, otherwise the jury may be confused and misled. Bass v. Boetel & Co. ---- 733
115. Loss of past earnings is a separate and distinct element of damage from loss or impairment of future earning capacity, and an instruction which in a proper case submits both elements of damage is not

erroneous on the ground that the instruction permits duplicate recovery. Siciunas v. Checker Cab Co., Inc. ---------- 766

116. The admission of a prior consistent statement after a witness has been impeached with a prior inconsistent statement is largely a matter within the discretion of the trial court, and absent an abuse of that discretion will not be disturbed on appeal. Siciunas v. Checker Cab Co., Inc. ---------- 766

117. There is reversible error if the record affirmatively shows that defendant has been prejudiced by private communication between the trial court and jurors, and a new trial should be granted where the record is silent as to a possibility of prejudice, although reversal is not required if the record affirmatively shows communication had no tendency to influence the verdict. State v. White ---------- 772

118. In a prosecution for uttering and publishing a forged instrument, knowing it to be forged, a conviction cannot be sustained without proof of the forgery. State v. Addison ---------- 792

119. To sustain a conviction for forgery it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority. State v. Addison 792

120. The doubt referred to in the requirement that a hearing on the competency of a defendant to stand trial is required when a reasonable doubt as to this issue is raised refers to a doubt arising in the mind of the trial judge. State v. Cortez ---------- 800

121. The one attacking an instrument on the ground that its execution was procured by undue influence has the burden resting on him to establish that fact. However, the circumstances under which it was made, the condition of the grantor at the time, and the injustice to her and her heirs, if it is upheld, may be such as to cast upon the grantee the burden of going forward with the evidence to show that it is not tainted with undue influence but is the deliberate and bona fide act of the grantor. Guill v. Wolpert ---------- 805

122. It is impossible to lay down any hard and fast rule as to when a presumption of undue influence arises. The rule must, of necessity, be applied according to the particular facts and circumstances of each

case in which the question arises. Generally, it may be said that if the facts and circumstances show such confidential, fiduciary, or trust relationship that it would be inequitable to sustain the deed in question, then such presumption arises, and the burden of going forward with the evidence rests upon the grantee to show bona fides thereof. Guill v. Wolpert ---------- 805

123. Where the validity of an alleged gift between persons occupying a confidential relationship is attacked, the burden of proving that a confidential relationship existed between the parties rests on the one attacking the gift. Guill v. Wolpert ---- 805

124. Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence. Guill v. Wolpert ---------- 805

125. The mere existence of a confidential relationship between grantor and grantee does not of itself show undue influence where the deed is made by the grantor with full knowledge of its nature and effect, and because of the deliberate desire of the grantor. Guill v. Wolpert ---------- 805

126. The court, in determining whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only to determine whether it was the voluntary act of the grantor. The fact that the grantor has others who were so related to him who were proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance. Guill v. Wolpert ---------- 805

127. The uncorroborated testimony of the mother shall not alone be sufficient to support a verdict or finding that the alleged father is actually the father. Wade v. Hicks ---------- 847

128. Under our statute a defendant cannot be found guilty in a paternity action upon the wholly unsupported testimony of the mother. If she testifies positively and consistently to the facts involving conception, other evidence of opportunity and disposition on the part of defendant to participate in a sexual relationship will furnish sufficient corroboration. Wade v. Hicks ---------- 847

129. It is not essential that the mother be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient

if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. Wade v. Hicks ---------- 847

Trusts.

The trustee of a spendthrift trust is not entitled to a charge on a beneficiary's interest in the trust estate for overpayments made to said beneficiary in accordance with the provisions of the trust. The trustee's rights under these circumstances are no greater than those of any other unsecured creditor of the beneficiary. O'Shea v. O'Shea ---------- 217

Undue Influence.

1. In a will contest upon the ground of undue influence, the burden is upon the contestants to prove by a preponderance of the evidence: That the testatrix was susceptible to undue influence; that opportunity to exercise it existed; that there was a disposition to exercise it; and that the result clearly appears to be the effect of such influence. Spinar v. Wall _ 395
2. In a will contest where undue influence is alleged, that issue should be submitted to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude that the will was not the free and voluntary act of testatrix but the result of undue influence exercised upon her. Spinar v. Wall ---------- 395
3. Where a will contains a bequest due to undue influence, the will may stand as to other bequests not so procured. Spinar v. Wall ---------- 395
4. Undue influence exercised by anyone, whether he or another gains by its exercise, renders the will or part thereof thus procured worthless. Spinar v. Wall ---------- 395
5. A case of undue influence is made out, in case of a deed, where it is shown by clear and satisfactory evidence (1) that the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. Guill v. Wolpert ------- 805
6. The undue influence which will avoid a deed is an

unlawful or fraudulent influence which controls the will of the grantor. Guill v. Wolpert ---------- 805

7. The one attacking an instrument on the ground that its execution was procured by undue influence has the burden resting on him to establish that fact. However, the circumstances under which it was made, the condition of the grantor at the time, and the injustice to her and her heirs, if it is upheld, may be such as to cast upon the grantee the burden of going forward with the evidence to show that it is not tainted with undue influence but is the deliberate and bona fide act of the grantor. Guill v. Wolpert ---------- 805

8. It is impossible to lay down any hard and fast rule as to when a presumption of undue influence arises. The rule must, of necessity, be applied according to the particular facts and circumstances of each case in which the question arises. Generally, it may be said that if the facts and circumstances show such confidential, fiduciary, or trust relationship that it would be inequitable to sustain the deed in question, then such presumption arises, and the burden of going forward with the evidence rests upon the grantee to show bona fides thereof. Guill v. Wolpert ---------- 805

9. Where the validity of an alleged gift between persons occupying a confidential relationship is attacked, the burden of proving that a confidential relationship existed between the parties rests on the one attacking the gift. Guill v. Wolpert ---- 805

10. Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence. Guill v. Wolpert ---------- 805

11. The mere existence of a confidential relationship between grantor and grantee does not of itself show undue influence where the deed is made by the grantor with full knowledge of its nature and effect, and because of the deliberate desire of the grantor. Guill v. Wolpert ---------- 805

12. The court, in determining whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only to determine whether it was the voluntary act of the grantor. The fact that the grantor has others who were so related to him who were proper subjects to receive his bounty can be considered by the court

only as it bears upon the validity of the conveyance. Guill v. Wolpert ---------- 805

Uniform Commercial Code.

1. A chattel mortgage may serve both as a "security agreement" and a "financing statement" under the Nebraska Uniform Commercial Code, provided it complies with the requirements for said instruments, and contains the necessary information, as set out in the Uniform Commercial Code. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. ---------- 74
2. Under section 9-402, U. C. C., there are two formal requisites of a "financing statement," i. e., (1) the signatures and addresses of both parties; and (2) a description of the collateral by type or item. A financing statement substantially complying with the requirements of the section is effective even though it contains minor errors which are not seriously misleading. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. ---------- 74
3. The address of the secured party to be set out in the financing statement under section 9-402, U. C. C., must be such an address as to enable one interested in searching the records to contact the party in question for the purpose of obtaining information concerning the security interest. An address must be sufficiently complete to enable a prudent person using reasonable care to locate the secured party. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. ---------- 74
4. The question of the sufficiency of the address of the secured creditor required under section 9-402, U. C. C., is a question of fact. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. ---------- 74
5. Where, under the evidence, the chattel mortgage filed as a "security agreement" and "financing statement" is deficient as to address of secured party, it does not put subsequent purchaser on notice of outstanding security interest. Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc. ---------- 74

Usury.

An industrial loan and investment company computing

interest at the maximum rate, on the basis of a 360-day year, does not contract for and receive an annual return in excess of that allowed by sections 8-435 and 8-441, R. R. S. 1943. State Securities Co. v. Corkle ---------- 578

Vendor and Purchaser.

An executory contract for the sale of nonhomestead land in which the husband of the vendor has not joined is specifically enforceable against the vendor to the extent of her interest, but not as to the marital interest of her husband in the land. Fudge v. Byrom ---------- 363

Venue.

1. Section 29-1301.01, R. R. S. 1943, permits the trial court to proceed either in the county where the offense is committed or in any county into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense. State v. Garza 118
2. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed unless a clear abuse of discretion is shown. State v. Irwin 169
3. The statutory provision which permits a petition to condemn to be filed in the county court of the county where "some part" of the property is situated has reference to a tract some part of which lies in both counties. Grace Land & Cattle Co. v. Tri-State G. & T. Assn., Inc. ---------- 663

Verdicts.

1. 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. Melia v. Svoboda ---------- 150
2. In testing the sufficiency of the evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference

that can reasonably be deduced therefrom. Mid-States Equipment Co. v. Evans ---------- 230
3. The verdict of a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Cook v. Nordahl ---------- 424
4. In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in favor of the nonmoving party, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. Anstine v. Briggs ---------- 489
5. The amount of a verdict of a jury will not be disturbed on appeal unless it has been shown to be so excessive that it is the result of passion or prejudice. Siciunas v. Checker Cab Co., Inc. ---------- 766

Waiver.

1. As a general rule, a mere demand for overdue premiums by an insurer does not amount to a waiver if the insured does not comply with the demand. Tighe v. Security Nat. Life Ins. Co. ---------- 271
2. An extension of credit for the payment of premiums by an insurer to the insured may under certain circumstances constitute a waiver or estoppel, but whether credit was so extended is a question of fact. Tighe v. Security Nat. Life Ins. Co. ------ 271
3. The mere fact that the records of an insurer list premiums due from an insured pursuant to premium notices previously sent him as "account receivable" is not conclusive upon the question of whether the insured intended to and did waive a forfeiture of the policy because of prior nonpayment of premiums. Tighe v. Security Nat. Life Ins. Co. ---------- 271
4. The failure to object promptly to an offer of evidence waives the objection. State v. Huerta ---- 280
5. An unqualified renunciation of an executory contract before time for performance by one party excuses tender of performance by the other party at the time set for performance. Friehe Farms, Inc. v. Haberman ---------- 292
6. A failure to ask for a mistrial is ordinarily a waiver of the misconduct. Graham v. Simplex Motor Rebuilders ---------- 320

7. Ordinarily a failure to object waives any error in the admission of evidence. Miller v. Arends -- 494

Warranty.

1. A manufacturer of goods has a duty to use reasonable care in their design to protect those who will use them from unreasonable risk of harm while they are being used for their intended purpose or for any purpose which could be reasonably expected. Friedrich v. Anderson ---------- 724
2. The subjection of an automobile to accidental collision with another automobile or object while being used for its intended purpose is a use which a manufacturer could reasonably expect. Friedrich v. Anderson ---------- 724
3. An automobile manufacturer is not an insurer that its product is, from a design viewpoint, incapable of producing injury. Friedrich v. Anderson ------ 724

Waters.

1. The term "any waters within the territorial limits of Nebraska" as used in section 81-815.02 (4), R. R. S. 1943, includes private as well as public waters. Kuester v. State ---------- 680
2. A body of water, natural or artificial, does not constitute a concealed, dangerous condition. Cortes v. State ---------- 795

Wills.

1. When the proponent has secured the verdict of the jury, in reviewing the evidence it must be considered in the light most favorable to the proponent, every controverted fact must be resolved in proponent's favor, and the proponent must have the benefit of every inference that can reasonably be deduced therefrom. Urbanovsky v. Foral -------- 308
2. A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument and same was not procured by undue influence. Urbanovsky v. Foral ---------- 308
3. Under section 77-2108, R. R. S. 1943, estate taxes

will be equitably apportioned in accordance with statutory rules unless there is a clear and unambiguous direction to the contrary. Ambiguities are to be resolved in favor of apportionment. Nielsen v. Sidner ---------- 324

4. The burden of Nebraska inheritance taxes will be imposed upon the individual beneficiaries of the decedent in accordance with the statutory pattern unless there is a clear and unambiguous direction to the contrary in the will or other governing instrument. Ambiguities will be resolved in favor of the statutory pattern. Nielsen v. Sidner ----- 324
5. In a will contest upon the ground of undue influence, the burden is upon the contestants to prove by a preponderance of the evidence: That the testatrix was susceptible to undue influence; that opportunity to exercise it existed; that there was a disposition to exercise it; and that the result clearly appears to be the effect of such influence. Spinar v. Wall ---------- 395
6. In a will contest where undue influence is alleged, that issue should be submitted to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude that the will was not the free and voluntary act of testatrix but the result of undue influence exercised upon her. Spinar v. Wall ---------- 395
7. Where a will contains a bequest due to undue influence, the will may stand as to other bequests not so procured. Spinar v. Wall ---------- 395
8. Undue influence exercised by anyone, whether he or another gains by its exercise, renders the will or part thereof thus procured worthless. Spinar v. Wall ---------- 395

Witnesses.

1. Standards relating to the privilege against self-incrimination are not affected by the circumstance that the witness is called by the defense and not by the State. State v. Richter ---------- 34
2. In personal injury cases where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary. Eiting v. Godding ------ 88

3. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. Eiting v. Godding ---------- 88
4. When symptoms from which personal injury may be inferred are subjective only, medical testimony is required. Eiting v. Godding ---------- 88
5. Where a witness has refused to answer questions before trial, and during the trial his testimony is compelled under section 29-2011.01, R. S. Supp., 1972, the defendant may request a continuance to interview the witness. State v. Rhodes ---------- 131
6. Where a witness for the State, who has previously refused to answer questions, is compelled to testify under section 29-2011.01, R. S. Supp., 1972, and the defendant's objection and request for a continuance are denied, all the circumstances must be considered in determining whether there has been an abuse of discretion and the defendant was prevented from properly preparing for trial. State v. Rhodes ---------- 131
7. On the appeal of an action in equity, when credible evidence on material questions of fact is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Mehling v. Deines ---------- 287
8. Discretion is vested in the District Court in the admission of lay opinion testimony when it is rationally based upon the perception of the witness, and could be helpful for a clear understanding by the jury of the facts. Epperson v. Utley ---------- 413
9. An expert witness may usually give his expert opinion on the basis of facts within his own knowledge and to which he has testified. City of Lincoln v. Nebraska P. P. Dist. ---------- 556
10. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausability of explana-

tions, or weigh the evidence. Such matters are for the jury. State v. Cano ---------- 709

11. The credibility of the witnesses and the weight of the evidence in a criminal case are for the jury and a verdict will not be set aside on appeal if the evidence sustains some rational theory of guilt. State v. Cano ---------- 709

12. The admission of a prior consistent statement after a witness has been impeached with a prior inconsistent statement is largely a matter within the discretion of the trial court, and absent an abuse of that discretion will not be disturbed on appeal. Siciunas v. Checker Cab Co., Inc. ---------- 766

13. Where the evidence is irreconcilable and in direct conflict, this court will consider the trial court's observation of the witnesses and their manner of testifying, and that the court must have accepted one version of the evidence rather than the opposite. Karmann v. Haase ---------- 839

14. Actions in equity on appeal to the Supreme Court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Pinney v. Hill ---------- 844

15. The uncorroborated testimony of the mother shall not alone be sufficient to support a verdict or findthat the alleged father is actually the father. Wade v. Hicks ---------- 847

16. Under our statute a defendant cannot be found guilty in a paternity action upon the wholly unsupported testimony of the mother. If she testifies positively and consistently to the facts involving conception, other evidence of opportunity and disposition on the part of defendant to participate in a sexual relationship will furnish sufficient corroboration. Wade v. Hicks ---------- 847

17. It is not essential that the mother be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony

as to the principal fact, the inference of guilt may be drawn. Wade v. Hicks ---------- 847

Words and Phrases.

1. Under a statute making a willful failure to return to custody a crime, the word "willful" only means "intentional" and not accidental or involuntary. State v. Gascoigen ---------- 15
2. A lessee of real estate under a written lease for a term of 25 years, notice of which is duly recorded, is an "assignee" within the meaning of section 76-208, R. R. S. 1943, and may enforce covenants of title involving possessory rights contained in a prior conveyance of the real estate to his lessor. Grand Island Hotel Corp. v. Second Island Development Co. ---------- 98
3. The words contiguous and adjacent in section 16-117, R. R. S. 1943, are used synonymously. Doolittle v. County of Lincoln ---------- 159
4. The words "unavoidably prevented" refer to circumstances beyond the control of the party desiring to file a pleading in our courts. The law requires diligence on the part of clients and attorneys and the mere neglect of either will not entitle a party to relief on that ground. Community Credit Co. v. Gillham ---------- 198
5. The period of "three clear days" is determined by excluding both the day of the election and the day of the request. Dilsaver v. Pollard ---------- 241
6. We hold that the language "as defined by law," in Article VIII, section 2, of the Nebraska Constitution, referred to extant law in a descriptive and limitational manner. State ex rel. Meyer v. Peters ---- 330
7. A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child. State v. Kinkner ------ 367
8. The terms "immediate" or "as soon as practicable" in referring to the notice required in an insurance policy mean with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances

of each particular case. Ach v. Farmers Mut. Ins. Co. ---------- 407
9. "Transport" means to carry or convey from one place or station to another. State v. One 1970 2-Door Sedan Rambler ---------- 462
10. The word immediate in referring to the notice required in an insurance policy means with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances of each particular case. R. C. Walters Co., Inc. v. DeBower ---------- 544
11. The term "all parties bound by the award" as used in section 76-715.01, R. R. S. 1943, and upon whom notice of appeal must be served refers: (1) In case the condemner is the appealing party, to the condemnee or condemnees from the award in favor of whom the condemner desires to take his appeal; or (2) in case a condemnee is the appealing party, it refers to the condemner. An appealing condemnee need not serve notice of appeal upon other condemnees. Grace Land & Cattle Co. v. Tri-State G. & T. Assn., Inc. ---------- 663
12. The statutory provision which permits a petition to condemn to be filed in the county court of the county where "some part" of the property is situated has reference to a tract some part of which lies in both counties. Grace Land & Cattle Co. v. Tri-State G. & T. Assn., Inc. ---------- 663
13. The term "any waters within the territorial limits of Nebraska" as used in section 81-815.02 (4), R. R. S. 1943, includes private as well as public waters. Kuester v. State ---------- 680
14. A body of water, natural or artificial, does not constitute a concealed, dangerous condition. Cortes v. State ---------- 795

Work and Labor.

1. There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced. Ritzau v. Wiebe Constr. Co. 92
2. The opinion of a qualified witness as to the value of services is admissible to prove such value when his testimony will aid the jury. Ritzau v. Wiebe Constr. Co. ---------- 92

Workmen's Compensation.

1. A finding of fact by the trial court, either the Workmen's Compensation Court en banc or the District Court on direct appeal from the order by one judge of the compensation court, against the party with the burden of proof will be set aside only if the evidence compels a finding for that party. Kuethe v. State ---------- 167
2. In workmen's compensation cases related to recreational or social activities one test of compensability is whether the employer derives substantial, direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreational and social life. Kuethe v. State ---------- 167
3. Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Quincy v. J & S of Nebraska, Inc. ---- 208
4. On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. Quincy v. J & S of Nebraska, Inc. ------- 208
   Sopher v. Nebraska P. P. Dist. ---------- 402
5. Where an award in a workmen's compensation case is supported by reasonable competent evidence and the medical testimony is uncontradicted that future medical examinations, treatment, and medicines will be necessary, the employer shall be liable for reasonable medical and hospital services and medicines as and when needed, subject to the approval of the Workmen's Compensation Court. Quincy v. J & S of Nebraska, Inc. ---------- 208
6. In a claim for compensation under section 48-121 (3), R. S. Supp., 1969, it is immaterial whether an industrial disability is present or not. Sopher v. Nebraska P. P. Dist. ---------- 402
7. The District Court is authorized to modify an award of the Workmen's Compensation Court upon an appeal from a rehearing before the full compensation court if the findings of fact are not supported by the record. Behrens v. Ken Corp. ---------- 625
8. When an employee is unable to perform the work

for which he has previous training or experience as a result of an injury covered by the Workmen's Compensation Act, he is entitled to vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment. Behrens v. Ken Corp. ---------- 625

9. Section 48-183, R. R. S. 1943, relating to service of the petition on appeal after a rehearing before the full Workmen's Compensation Court is directory and not jurisdictional. Bourn v. James ---------- 635

10. A workman may not recover benefits under the Workmen's Compensation Act unless the injury arose out of the employment. In order to recover there must be a causal connection between the injury and the employment. Bourn v. James ---------- 635

11. In determining under the Workmen's Compensation Act whether a risk arises out of employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard. Bourn v. James ---------- 635