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STATE OF NEBRASKA, APPELLEE, V. BERNARD ESCAMILLA, APPELLANT.
227 N. W. 2d 852

Filed April 10, 1975. No. 39756.

1. **Rape: Evidence: Trial.** In a prosecution for rape, after the prosecutrix has testified to the commission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made.
2. ———: ———: ———. The testimony concerning such complaint should, on direct examination, be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded for a new trial.

James T. Hansen, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

Heard before SPENCER, McCOWN, and NEWTON, JJ., and HAMILTON, District Judge, and KUNS, Retired District Judge.

NEWTON, J.

The defendant was charged with rape and convicted of an assault with intent to commit rape. Error is assigned on the ground that the evidence is insufficient to sustain the verdict, the erroneous admission of evidence, and an excessive sentence. We reverse the judgment of the District Court.

The only assignment meriting serious consideration is the one pertaining to the erroneous admission of evidence. The evidence reflects that at one time the defendant and the prosecuting witness had lived together.

This relationship had been discontinued for some time. They met again in a bar and prosecutrix stated defendant forcibly removed her from the tavern, took her to an abandoned house across the street, and had intercourse with her by force and threats. That same evening the police found several buttons from her shirt at the scene. The dust-covered floor showed one area where the dust had been disturbed and her clothing was dust-covered. After the incident mentioned, they went to another tavern or bar where defendant finally passed out. Prosecutrix had been given the defendant's jacket to wear due to her torn clothing and in the pocket was a gun. When defendant passed out, prosecutrix ran out and stopped a police patrol car. She related what had happened to the two officers who then immediately arrested the defendant. Both the prosecutrix and the officers were permitted to testify as to the details of her complaint wherein she stated that she had the defendant's gun and that he had raped her. Other officers testified to later statements to the effect that she had been dragged out of a bar, taken to a vacant house, and raped by the defendant. This was not a part of the res gestae.

We adhere to the general rules set out in State v. Chaney, 184 Neb. 734, 171 N. W. 2d 787, as follows: "In a prosecution for rape, after the prosecutrix has testified to the commission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made.

"The testimony concerning such complaint should, on direct examination, be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae."

We have in some instances found that minor violations of the foregoing rules were not prejudicial and constituted only harmless error. In the present instance the State deliberately violated these principles time after time and the constant reiteration of the prosecutrix' statements tended to lend force and credence to her story. Notwithstanding that she could well have been corroborated by admissible facts pertaining to the defendant's immediate arrest, the finding of the buttons from her shirt, and the condition of her clothing and of the floor of the vacant house, we are constrained to find that reversible error occurred.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

CHARLES S. REED, APPELLEE, V. NICE-PAK PRODUCTS, INC., A CORPORATION, ET AL., APPELLANTS.
227 N. W. 2d 854

Filed April 10, 1975. No. 39790.

1. **Contracts: Evidence.** The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of their contract, and should be given great, if not controlling, influence, and the courts should ordinarily enforce such construction.
2. **Trial: Summary Judgments: Records.** The summary judgment statute, section 25-1332, R. R. S. 1943, requires the record before the court to show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
3. **Contracts: Principal and Agent.** Generally an agent acting for a disclosed principal is not liable for the contracts of the principal.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with directions.

George A. Thompson of Stern, Harris, Feldman, Becker & Thompson, for appellants.

Philip H. Robinson, Jr., for appellee.

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

WHITE, C. J.

In this action for attorney's fees, the District Court held that there was no genuine issue of fact and granted a summary judgment to plaintiff Reed, in the sum of $6,241.28 against both defendants on the basis of an express contingent fee contract between the parties. We reverse and remand the cause for a new trial on the factual issue of the reasonable value of the plaintiff's services.

Unipac, Inc., of Nebraska, became insolvent and defaulted on a contract (purchase order No. 1015) to purchase 5 million alcohol swabs for $31,060 from defendant Nice-Pak Products, Inc., a New York corporation. Defendant Levitt, its New York attorney, accepted Reed's written proposal to represent Nice-Pak against Unipac, "on a fee basis of 20% of the amount *collected* without litigation, and 1/3 of the amount *collected* if litigation is necessary." (Emphasis supplied.)

The pertinent evidence is undisputed. Reed filed suit against Unipac for Nice-Pak on September 17, 1970. This suit never was tried and no money was ever collected from the insolvent Unipac.

A new and unforeseen series of events developed. Midland Medical Supply Company of Lincoln, Nebraska, purchased part or all of Unipac's inventory and on October 23, 1970, placed an unsolicited order for 100,000 swabs and told Nice-Pak that it was assuming Unipac's purchase order No. 1015 for 5 million swabs. Levitt was not satisfied and wanted the whole debt paid at once. Midland and Nice-Pak negotiated, Reed participating for Nice-Pak. The settlement failed. On Levitt's instruc-

tions, Reed filed suit for Nice-Pak against Midland. Midland began placing regular 6-week swab orders, the suit against Midland abated, and Midland, paying cash in advance of each order, subsequently in 1971 and 1972 fully performed Unipac's original purchase order No. 1015.

During the negotiations with Midland for a complete settlement, prior to their resuming performance, Reed, on request from Levitt, advised that "if the matter was settled [with Midland] *as outlined*, my fee would be $1,000.00." On November 1, 1972, just prior to Midland's completed performance, Levitt again inquired of Reed as to his fee. Reed responded, on November 7, 1972, "In due course I will send you a bill. I want to do some thinking about the *time* I spent on the matter." (Emphasis supplied.)

Subsequently, Reed submitted a bill to Nice-Pak for $6,241.28 based on the original contingent fee contract for collection and suit against Unipac. The District Court entered judgment for this amount.

The original contingent fee contract was unenforceable. Nothing was or could be collected from Unipac. Reed was never entitled to a fee because it depended on the recovery of money from Unipac. Nevertheless, Levitt directed Reed to negotiate concerning litigation under an entirely new and unforeseen assumption contract by Midland. Contrary to Reed's contention, we find nothing in the record before us that Reed, Nice-Pak, and Levitt ever agreed or had a "meeting of the minds" that Midland would be substituted for Unipac as a modification of the original fee contract. The evidence clearly indicates the opposite. When Reed was asked what his fee would be if *Midland* and Nice-Pak settled, he replied his fee would be $1,000, a flat sum unrelated to a 33 percent contingent fee, and clearly based on the new situation and the reasonable or quantum meruit value of his services. Confirming this position, Reed, at the end of Midland's performance in November 1972, was again

asked about his fee, responded that he wanted to do some thinking about the *time* he spent on the matter. The time spent by counsel was irrelevant in their original contingent fee contract. Thus Reed's own conduct and interpretation was not only contrary to the express contract obligation, but confirmatory of his own understanding that he would be paid for *time* and value of services.

The interpretation given a contract by the parties themselves while *engaged in the performance* of it is one of the best indications of the *true intent of their contract,* and should be given great, if not controlling influence, and the courts should ordinarily *enforce such construction.* Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448; McLeod v. Crawford, 176 Neb. 513, 126 N. W. 2d 663. Section 25-1332, R. R. S. 1943, requires the record before the court to show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Storz Brewing Co. v. Kuester, 178 Neb. 135, 132 N. W. 2d 341.

Accordingly, we hold that Reed is entitled to quasi-contractual or quantum meruit recovery only for time and value of services performed. The extent of this recovery is a genuine issue of material fact which must be resolved on remand by a trial on the merits.

Since a retrial is necessary, we determine the issue of defendant Levitt's personal liability. The District Court also entered a summary judgment against him. It is undisputed that at all times Levitt was acting as an attorney for and as agent contracting on behalf of a disclosed principal, Nice-Pak. Levitt so contends. Generally an agent acting for a disclosed principal is not liable for the contracts of the principal. Imhoff v. House, 36 Neb. 28, 53 N. W. 1032; State Securities Co. v. Svoboda, 172 Neb. 526, 110 N. W. 2d 109; 3 Am Jur. 2d, Agency, § 294, p. 654. Consequently, the defendant Levitt should be dismissed from the action.

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

REVERSED AND REMANDED WITH DIRECTIONS.

GENEVIEVE HENRICKSON, APPELLANT, V. EUGENE W. DOOLEY, APPELLEE.
227 N. W. 2d 613

Filed April 10, 1975. No. 39815.

Equity: Appeal and Error. 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.

Appeal from the District Court for Cedar County: JOSEPH E. MARSH, Judge. Affirmed.

Lyle B. Gill, for appellant.

Burbridge & Burbridge and Deutsch & Hagen, for appellee.

Heard before SPENCER, NEWTON, CLINTON, and BRODKEY, JJ., and WARREN, District Judge.

CLINTON, J.

This is an action in equity to set aside two deeds, the execution and delivery of which is alleged to have been obtained by the exercise of undue influence and duress upon the plaintiff grantor, Genevieve Henrickson, by the defendant grantee, Eugene W. Dooley. Each deed reserved to the grantor a life estate in the property therein described. The trial judge found that the plaintiff had failed to sustain her burden of proving that the conveyances were the result of undue influence and duress and denied the relief prayed for. We affirm.

The evidence received and upon which the trial judge based his findings is conflicting in some material respects. Although this matter in equity is triable de

novo here, we are assisted by the principle that when credible evidence on material questions of fact is in conflict, the reviewing 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. Shirk v. Schmunk, 192 Neb. 25, 218 N. W. 2d 433.

A detailed recital of all the evidence would serve no useful purpose. We simply state such of the background as is useful to an understanding of the situation and then set forth in a somewhat conclusory way the possible factual determinations and inferences which may be deduced from each party's version of the events involved.

Plaintiff, aged 63, and the defendant, aged 48, are cousins. Plaintiff never married, had been diabetic most of her life, and blind for about 15 years, and also suffered from asthma. She lived with her parents until their deaths and thereafter lived principally with relatives. She received by way of inheritance or deed from her parents two contiguous tracts of farmland and a residence in the town of Wausa. In 1971 she was living with the defendant's parents, Mr. and Mrs. Wesley Dooley. While living there, Mrs. Dooley administered plaintiff's insulin shots and prepared her special diabetic diet. Wesley Dooley died in December of 1971 and thereafter Mrs. Dooley and the plaintiff moved from the Dooley home to the residence owned by the plaintiff. In 1972 because of failing eyesight and an unsteady hand, Mrs. Dooley found it difficult to care for the plaintiff. At that time the defendant and his family, consisting of his wife and six children, were living upon a 120-acre tract of farmland belonging to the plaintiff which the defendant leased from her and which is one of the tracts involved in this action. Because of the elder Mrs. Dooley's problems in administering the insulin injections, plaintiff arranged for the defendant's wife, Marguerite, to come 6 miles from the farm to give these ministrations

daily. The arrangement continued for only a brief time as on some occasions defendant's wife was unable to make the trip. In January 1972 the plaintiff moved in with the defendant and his family although defendant and his wife were reluctant to have her do so, the house being inadequate because, among other reasons, it had only three bedrooms. Nonetheless the plaintiff moved in and brought with her a reclining chair and used this as her bed. Thereafter Marguerite prepared the plaintiff's special diabetic meals and injected the insulin and performed other services for which the plaintiff paid her $100 per month. After the plaintiff came to live with the defendant and his family, she terminated the farm lease on another 160-acre tract of farmland which she owned and leased it to the defendant. This second tract is described in one of the deeds. In September of 1972 because of the poor corn crop the defendant's wife contemplated getting a job and told the plaintiff that they might not be able to keep her any longer. The plaintiff then offered to pay $150 a month if the defendant's wife would continue to take care of her. This was done.

If the trial court had accepted the plaintiff's version of events which led to the execution of the deeds, he could have concluded as follows: In the spring of 1972 the defendant and his wife let the plaintiff know that they wanted her land when she died; that the defendant told one of his brothers that he expected "to get something out of this." In order to accomplish the purpose of inheriting plaintiff's land the Dooleys put pressure on the plaintiff by threatening to put her in a rest home and not to take care of her. They mistreated her in other ways. They suggested that a real estate man be called to make a will for the plaintiff. The plaintiff refused to have it done in this way but wanted a lawyer to do it. Finally in June of 1973 the plaintiff yielded to the importunations of the defendant and his wife and dictated to the defendant what is referred to as a "will."

This instrument was received in evidence, and its authenticity is not in dispute. While it is in part illegible, parts having been marked out apparently at the time of dictation, it appears to contemplate that the defendant "take care of [plaintiff] through all sickness to the time of death and internment. . . . Without pay for services Rendered." It names "Eugene W. Dooley, Heir, to all the land . . . that I own at the time of my death." It was unsigned. After the dictation of this instrument, the plaintiff had the defendant's wife take her to the office of a lawyer plaintiff had chosen. Neither the plaintiff nor the Dooleys had any previous acquaintance with the attorney. However the attorney's father, also a lawyer, had handled the probate of the estates of the plaintiff's parents and his name was thus known to her. This lawyer, Paul Robinson, was not in his office when the plaintiff arrived as they had made no appointment. Nonetheless the plaintiff left instructions with the lawyer's secretary. The plaintiff's testimony was as follows: "Q When you went to the office was Paul Robinson there? A No, his secretary was there and I told her what I wanted. Q Did you know her? A No, I told her I wanted the will copied and then I wanted the deeds made out. Q So you left the paper with Paul Robinson's secretary? A Yes." At that time the plaintiff left with Robinson's secretary the "will" and the deeds by which she had acquired the land from her parents. She told Robinson's secretary that she wanted Eugene Dooley's name on the deeds. The plaintiff's version of what occurred next is that, although she had no interim contact with Robinson whatever, she was later advised by him that the instruments were ready. The Dooleys then took her to the lawyer's office where the deeds in question and a will, naming the defendant as the beneficiary of plaintiff's estate, were presented to the plaintiff for signature. The plaintiff protested that the deeds were not made out the way she wanted, but that she signed them anyway when she interpreted remarks of defendant and

his wife to mean that they would walk out of the lawyer's office and leave her there if she did not sign them. After plaintiff executed the deeds, she paid Robinson for his services and took the deeds to the courthouse and caused them to be recorded, paying the filing fees and the documentary stamp costs by check.

As already noted, the trial court accepted the defendant's version of facts from which, insofar as that version differs from that of the plaintiff, the court could have concluded as follows: While the plaintiff was still living with the defendant's parents she came to him and urged him to lease the 120-acre tract of land, which he did. "She told me if I were to stay on the farm, take care of it and live there that one day that farm would belong to me." The defendant's wife, Marguerite, testified that, after some occasions when bad roads prevented her traveling to Wausa to administer plaintiff's insulin, the plaintiff proposed that she come to live with them. Marguerite testified: "I told her I had six children and the house really wasn't a very fit place to live and I didn't think that would work out. Q What did she say that she would do? A She said she didn't want to go to a nursing home and that she would enjoy very much living with us. She liked children and she said I'm coming over." The defendant and his family took care of the plaintiff and did not mistreat her, except that on one occasion the defendant's wife slapped the plaintiff out of sheer frustration when the plaintiff refused to respond to repeated inquiries as to whether she had taken her pills. This action defendant's wife immediately regretted, made apology, and attempted to make amends. On only one occasion was it suggested that plaintiff go to a rest home to live and that only as a temporary expedient because defendant's wife was ill. Another suggested alternative was temporarily living with other relatives.

Neither the defendant nor his wife suggested that the plaintiff see an attorney. This was her idea. They did

not know the attorney in question. That, contrary to the plaintiff's version, three trips were made to the attorney's office. The first was as described by the plaintiff. On the second occasion the plaintiff went to the attorney's office at his suggestion and pursuant to appointment. Both defendant and his wife accompanied her at that time. On this occasion various possible ways of accomplishing the plaintiff's purposes were discussed by the plaintiff and Robinson and agreed upon. Later the instruments were prepared. When that had been done the plaintiff went in a third time in order to execute them. On both occasions the full significance of the instruments was explained by Robinson and plaintiff fully understood their effect. At one point during the last conference the plaintiff became agitated and uncertain. Robinson then told her that he would not let her sign the instruments unless she understood them and desired their execution. After further explanation and discussion, plaintiff executed the instruments. Based upon Robinson's testimony the court could have concluded the plaintiff knew that under the deeds she would receive the income for life, but could not sell or mortgage the land without the joinder of the defendant; that this is what she fully intended to do when she executed the instruments; and that the motivations for the disposition were to avoid a fight over her property after her death and apparently to induce the defendant and his wife to give her a home. There can be from the evidence no suggestion whatever that the defendant and his wife communicated with Robinson except in the plaintiff's presence and there is no support for any inference that they participated in the discussions or the decision as to how the plaintiff's intentions should be implemented. About a month after the deeds were recorded on June 15, 1973, the plaintiff went to visit other relatives. She did not return to live with the defendant thereafter, and without further contact commenced this action. She also caused to be served upon the defendant

an eviction notice with which he complied. The trial court could conclude that after she left the defendant's home she changed her mind and sought to avoid what she had done.

The general legal principles applicable to the determinations of controversies of this type have been stated by this court on numerous occasions. The most recent statement was in Guill v. Wolpert, 191 Neb. 805, 218 N. W. 2d 224. We will not reiterate those propositions here.

AFFIRMED.

C. R. BUTTNER ET AL., DOING BUSINESS AS ACTION, INC., APPELLANTS, V. OMAHA PUBLIC POWER DISTRICT, A POLITICAL SUBDIVISION, APPELLEE.

227 N. W. 2d 862

Filed April 17, 1975. No. 39534.

1. **Torts: Trial: Political Subdivisions.** Section 23-2406, R. R. S. 1943, requires that actions under the Political Subdivisions Tort Claims Act shall be heard without a jury but otherwise determined in the same manner as other suits. The action is similar to a law action in which a jury has been waived and is governed by the same rules.
2. **Appeal and Error: Trial.** It is not within the province of this court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court will review the judgment rendered, will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed on appeal unless clearly wrong.
3. ———: ———. The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong.
4. **Torts: Trial: Political Subdivisions.** On an appeal to this court of an action under the Political Subdivisions Tort Claims Act the findings of the trial court will not be disturbed unless clearly wrong.

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

William M. Lamson, Jr., and Charles M. Caldwell of Kennedy, Holland, DeLacy & Svoboda, for appellants.

Stephen G. Olson of Fraser, Stryker, Veach, Vaughn & Meusey, for appellee.

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

NEWTON, J.

This is an action brought under the Nebraska Political Subdivisions Tort Claims Act to recover for fire damage to an apartment building. During a storm an electric conductor or line broke and was blown on to plaintiffs' apartment house. A fire ensued which plaintiffs attribute to the downed conductor. Plaintiffs allege negligence in that defendant failed to install a fuse on the tap leading from the main line to the apartment building and in incorrectly setting relays on the circuit breakers in the substation. On trial to the court, judgment was entered for the defendant. We affirm the judgment of the District Court.

It is clear that the fire was started by the electrical conductor. The evidence is conflicting as to whether or not negligence on the part of defendant caused the fire and ensuing damage. The evidence is sufficient to support a finding by the court that the facts are as hereinafter set forth. A three-phase tap or branch line served the apartment and the Richman Gordman mercantile establishment. Two services supplied the apartment complex, one a three phase and the other a single phase or line. One of the three-phase lines broke during a storm as the result of the storm and of ice formation. The wind blew the broken line on to the apartment roof. For a time the end of the line blew in the wind occasionally contacting the side of the building near the ground. It broke a second time a considerable period

before the fire occurred but the remaining portion remained on the roof and the fire eventually resulted. The roof was of asphalt or asbestos and wet. It was not grounded. Under such conditions the current flowing from the line due to the fault would be impossible to measure or assess and was probably minimal in character. It was not sufficient to trip the circuit-breaker relays in the nearby substation. A small amount of fault current, under 50 amperes, could start the fire and did exist. This would have been too small to trip the relays and deenergize the line even though set as low as plaintiffs assert they should have been. It would also be too small to have burnt out a 100-ampere fuse which plaintiffs contend should have been installed on the tap from the main line. Such a fuse requires 200 amperes to blow it and cut off the power. The failure of plaintiffs to establish by a preponderance of the evidence the amount of current flowing from the downed conductor was fatal to their contentions. They failed to prove to the satisfaction of the trial court that a proximate cause of the fire was the absence of the fuse or the setting of the relays as the court may well have found from the evidence that the fire would have resulted even had the precautions plaintiffs advocate been taken. Furthermore, the court could reasonably have found that the setting of the relays and the failure to fuse the tap were not in violation of industry standards and did not constitute negligence.

Section 23-2406, R. R. S. 1943, requires that actions of this nature shall be heard without a jury but otherwise determined in the same manner as other suits. The action is similar to a law action in which a jury has been waived and is governed by the same rules.

"It is not within the province of this court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court will review the judgment rendered, will presume the controverted facts were decided by the trial court in favor of the

successful party, and the findings will not be disturbed unless clearly wrong. * * *

"The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong." Stauffer v. Wilson, 182 Neb. 129, 153 N. W. 2d 454. See, also, McBride v. Fort Kearney Hotel, Inc., 185 Neb. 518, 176 N. W. 2d 911.

As we have heretofore held: "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, 191 Neb. 795, 218 N. W. 2d 214. See, also, Craig v. Gage County, 190 Neb. 320, 208 N. W. 2d 82.

In view of the contradictory and inconclusive nature of the evidence, we are unable to find error on the part of the trial court and the judgment is affirmed.

AFFIRMED.

CLINTON, J., concurring in result.

I concur in the result because on the record there existed a disputed question of fact as to whether industry standards would require the setting of the relays and fusing of the tap in such a manner as to have prevented the arcing which may have caused the fire. The trial court would therefore have been justified in finding, as the majority opinion notes, that such failure was not negligence.

OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT, V. NATKIN & COMPANY, A CORPORATION, ET AL., APPELLEES.

226 N. W. 2d 864

Filed April 17, 1975. No. 39566.

1. **Contracts: Indemnity.** 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.

2. **Contracts: Parties.** When there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it.
3. ———: ———. The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract.
4. **Judgments.** Where a second action is on the same cause of action and between the same parties as a first action, the judgment in the former action ordinarily is conclusive in the second action as to every question which was or might have been presented and determined in the former.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

L. J. Tierney and T. J. Stouffer of Cassem, Tierney, Adams & Henatsch, for appellant.

Joseph R. Moore, for appellees.

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

SPENCER, J.

This appeal is from the dismissal of a declaratory judgment action brought by Omaha Public Power District (OPPD) against Natkin & Company and its insurers, Royal Globe Indemnity Company and Globe Indemnity Company, to determine the rights of the parties under a contract. OPPD, acting as its own contractor, subcontracted with Natkin for the installation of certain piping and mechanical equipment in a new addition to its North Omaha power plant. Pursuant to the contract Natkin provided OPPD with a certificate of insurance from defendants Royal Globe and Globe Indemnity. A Natkin employee recovered a substantial judgment against OPPD for injuries sustained on the job. The question involved is whether the contract required Natkin to furnish insurance which covered this particular liability. We affirm.

The contract was drawn by OPPD. The only part involved herein is Article VI. This same provision was

in every one of the contracts OPPD made with its other subcontractors. It required Natkin to provide workmen's compensation insurance and public liability and property damage insurance that would protect both Natkin and OPPD from claims arising from the operation of the contract. The public liability and property damage provision, so far as material herein, reads as follows: "(b) Public Liability and Property Damage Insurance - The Contractor shall take out and maintain during the life of this Contract, such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this Contract, and the District from claims for damages for personal injury, including wrongful death, as well as claims for property damages, which may arise from operations under this Contract, whether such operations be by himself or by any subcontractor, or anyone directly or indirectly employed by either of them. One (1) certificate of such insurance must be filed with the District."

OPPD received an insurance certificate certifying that the Royal Globe and the Globe Indemnity issued various policies to Natkin, including general liability coverage and automatic blanket contractual liability coverage. This certificate certified to the coverage afforded Natkin. OPPD was not included in the coverage. It was limited solely to Natkin. There is nothing in the record to indicate that OPPD questioned this certificate in any way before the action which is the basis for this proceeding. The contract provided: "3. INSURANCE - Contractor shall not commence work under this Contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the District, nor shall the Contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved." OPPD was its own contractor and Natkin was a subcontractor on the project.

On February 9, 1967, Albert Simon, while working on the job as an employee of Natkin, carrying a pipe which was to be installed by Natkin, fell through an unguarded hole in the floor and was injured. The opening through which Simon fell was not fabricated by Natkin, nor was the floor on which he was walking prior to the fall. This work had been done by another subcontractor. Simon brought an action against OPPD for the injuries sustained. OPPD called upon Natkin and its insurers, Globe companies, to assume the defense of the claim. They declined. OPPD then defended the action and cross-claimed against Natkin for indemnity as to any amount adjudged against it in favor of Simon.

A jury trial resulted in a verdict against OPPD and specific findings that the negligence of OPPD and its architect was the proximate cause of the accident. The jury also specifically found that Natkin had not been negligent in any of the particulars set forth by OPPD. Simon v. Omaha P. P. Dist. (1972), 189 Neb. 183, 202 N. W. 2d 157.

OPPD instituted the present action, alleging that the contract required Natkin to provide it with insurance against claims such as those raised in the Simon case. Essentially, OPPD contends the contract required Natkin to furnish insurance covering claims against OPPD for OPPD's negligence. It further alleged that either Natkin had provided the insurance as required under Article VI and its insurers were liable to OPPD for the judgment and expenses incurred in its defense of the Simon case, or if Natkin had failed to provide OPPD with such coverage then Natkin itself would be liable to OPPD's insurer.

OPPD procured its own liability insurance. The record shows that it paid one-half of the Simon judgment and was reimbursed for this payment by its insurer, using the device of payment under a loan receipt. The judgment was against both OPPD and its architect.

The pleadings indicate the architect paid the other one-half.

The District Court dismissed OPPD's petition. It held that Article VI created an indemnity agreement between OPPD and Natkin. It further held Article VI lacked the express or clear and unequivocal language necessary to show the intention of the parties to require Natkin to indemnify OPPD against OPPD's own negligence, relying on Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc. (1974), 191 Neb. 50, 213 N. W. 2d 731. In that case we held: "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." The District Court further found there was no causal relationship between Simon's accident and the work performed under the Natkin contract. On appeal, OPPD challenges the District Court's findings: (1) That Article VI created an indemnity agreement rather than a contract to provide insurance; and (2) that Simon's injury did not arise from the operation of the contract.

In the view we take of the present action, it is not necessary to consider either of OPPD's two challenges to the findings of the District Court. Rather, we deal with OPPD's contentions that the contract required Natkin to furnish coverage for OPPD's negligence and that if it failed to do so, Natkin is the insurer.

The pertinent language of the contract is in subparagraph (b) set out heretofore. Natkin is referred to as the contractor, although in effect it was a subcontractor. Can this portion of the contract be construed to require Natkin to furnish liability insurance to OPPD, which would protect OPPD against its own negligence? Applying the test of Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc., *supra,* to do so the contract must contain express language to that effect or contain clear

and unequivocal language to show that is the intention of the parties.

The contract provides: "The Contractor shall take out * * * Public Liability * * * Insurance as shall protect him and any subcontractor performing work covered by this Contract, and the District from claims for damages for personal injury, including wrongful death, * * * which may arise from operations under this Contract, whether such operations be by him or by any subcontractor, or anyone directly or indirectly employed by either of them." We must construe the word "subcontractor" as used in this context as any subcontractor specifically working under Natkin, and not to include all subcontractors who might be working under OPPD. The language of the contract is: "which may arise from operations under this contract." OPPD's contracts with other subcontractors would cover activities under their contracts.

Definitely the contract does not contain express language to the effect that Natkin would furnish insurance to cover OPPD's negligence. We then must consider whether or not the contract contains clear and unequivocal language that was the intention of the parties. Reading the language without analysis one might argue such coverage is afforded. At best, however, if that was the intention of the parties, it is ambiguous.

Analyzing the contract in this light, we are met with the reason for and operation of paragraph 3 set out above. It specifically provides that Natkin could not commence work until it obtained all the insurance required under the contract and until such insurance had been approved by OPPD. Natkin furnished OPPD with an insurance certificate to meet this provision of the contract. OPPD did not question the insurance coverage, but permitted Natkin to commence work on the project under the contract. This would indicate that OPPD approved the certificate as complying with the contract. If OPPD had questioned the insurance at

that stage, it could have prevented Natkin from commencing work until insurance satisfactory to it had been furnished.

At this late stage, it does not appear that Natkin has the insurance which OPPD now says is required by the contract. While OPPD does not agree, certainly the certificate of insurance in the file does not so indicate. The policies are not in evidence, so we must assume that the only insurance furnished pursuant to the contract is that covered by the insurance certificate.

OPPD now contends that the failure of Natkin to furnish the insurance required by the contract makes Natkin the insurer. In some situations that might be true. This, however, is not one of them even if OPPD's interpretation of the contract is the correct one.

OPPD argues the certificate of insurance furnished by Natkin covered all obligations undertaken by Natkin under the contract. It argues from this that the insurance companies are estopped to now contend there is no coverage for OPPD's negligence. The certificate plainly states that it is issued as a matter of information only and confers no rights on the holder and imposes no liability upon the insurance company. Natkin is the only named insured. We find no basis on which to interpret the contract in the light contended for by OPPD.

Returning to the effect of paragraph 3 of Article VI on the construction of subparagraph (b), we cannot ignore the fact that OPPD drew the contract. When there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it. Abboud v. Cir Cal Stables (1973), 190 Neb. 396, 208 N. W. 2d 682. OPPD accepted the certificate Natkin provided and permitted Natkin to commence work in the belief that it had furnished the coverage required by the contract.

In the construction of questioned provisions in a contract, the rule has long been established in this jurisdiction that the interpretation given to a contract by

the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract. Ordinarily, such a construction of the contract should be enforced. See Simon v. Omaha P. P. Dist. (1972), 189 Neb. 183, 202 N. W. 2d 157. This is a rule of justice and equity, and we apply it herein. To hold otherwise would permit OPPD to take advantage of its own omissions and permit it to interpret the contract of the parties contrary to its own actions.

While it is not necessary to consider the question of issue preclusion because it has not been raised by the briefs or the pleadings, we note that OPPD had only one possible cause of action against Natkin. This was its claim to indemnification, reimbursement, or to be insured for damages for failure to be insured. Its cross-action against Natkin in Simon v. Omaha P. P. Dist., *supra,* was premised on that cause of action. It was grounded on the contract, although on a different provision, but the end result sought here and there was the same. The precise issue it raises here could have been raised there. The rule is that where the second action is on the same cause of action and between the same parties as the first action, the judgment in the former action ordinarily is conclusive in the second action as to every question which was or might have been presented and determined in the former. State Fire Marshal v. Village of Dorchester (1973), 189 Neb. 464, 203 N. W. 2d 160.

For the reasons given, we affirm the judgment.

AFFIRMED.

Y MOTEL, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

227 N. W. 2d 869

Filed April 17, 1975. No. 39591.

1. **Eminent Domain: Damages.** Ordinarily the entire property involved in an eminent domain proceeding is to be valued and damages to it assessed as a whole.
2. ———: ———. Where, in eminent domain proceedings, the property is clearly divisible from the standpoint of use and adaptability, presenting different factors and elements of damage, it definitely is not error to permit such division. In determining whether the property is to be considered as a whole or as units, usually unity of use is given greater emphasis, and has been called the controlling and determining factor.
3. **Eminent Domain: Damages: Motels.** In the valuation of a motel property gross room rental may be a substantial factor in making a comparison of comparable properties.
4. ———: ———: ———. The evidence on gross room rental was admissible herein because: (1) It was one of the items by which the jury could gauge comparability of the sales relied upon for comparison; (2) it was an item to which prospective buyers gave substantial consideration; and (3) the property was adapted to only one use.
5. **Eminent Domain: Damages.** In an eminent domain proceeding, anticipated profits from the continued carrying on of a business in an established location cannot be considered in estimating the damages, and the profits of a business cannot be shown for the purpose of proving the value of the property.
6. ———: ———. Evidence of the use of federal funds in a state road project is not admissible in an eminent domain proceeding.
7. **Eminent Domain: Damages: Witnesses.** The fact that an expert witness uses sales of properties in other states as a basis of comparison in determining value rather than comparable sales in the vicinity of the property condemned goes to the foundation for, and the weight to be given to, the expert's testimony.
8. **Eminent Domain: Damages: Witnesses: Trial.** The admissibility of expert testimony is ordinarily within the discretion of the trial court and its ruling will be upheld on appeal unless an abuse of discretion is shown.

9. **Attorneys at Law: Fees.** The allowance of a reasonable attorney's fee for necessary services performed by an attorney will not be reversed on appeal in the absence of a showing of an abuse of discretion by the trial court in making the allowance.

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

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and Royce N. Harper, for appellant.

Rollin R. Bailey of Davis, Bailey, Polsky, Huff & Denney, for appellees.

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

SPENCER, J.

The State prosecutes this appeal from the award to the plaintiffs in an eminent domain proceeding. The State alleges 27 assignments of error. In affirming the judgment we consider only those we deem material enough for comment.

Y Motel, Inc., is a family corporation owned by Vernon and Elaine Strauch. The corporation is the owner of a tract of 12.8 acres at the juncture of U. S. Highways Nos. 77 and 6. The tract is somewhat triangular in shape due to Highway No. 6 running in a northeasterly to southwesterly direction. Located on the south 4.83 acres is a modern motel facility known as the Colonial Inn, consisting of 64 units, a restaurant, swimming pool, and lounge. The motel faced old Highway No. 77 which has been abandoned in this area and now is a city street. The balance of the land, referred to as the north 8 acres, was zoned commercial and was not used in connection with the motel. It was acquired by the Strauchs for investment purposes. It was vacant and unimproved except for a barn.

Relocated Highway No. 77, with four lanes, approximately 100 feet wide, cuts across the north 8 acres in a northwesterly to southeasterly direction, leaving two tri-

angular tracts. Both Highway No. 6 and Highway No. 77, after the relocation of Highway No. 77, have center islands and controlled access. All driveways on old Highway No. 77 remain open. There are four, one being located near the south point of the triangle. There were formerly two driveways on Highway No. 6. The State condemned the right of ingress and egress to and from the motel to Highway No. 6 on the south except for one driveway located at the far easterly edge of the motel property. The motel improvements are all located to the west of this entrance.

A small strip of land along the south boundary line of the motel tract lying next to Highway No. 6 was also condemned, and 607.4 square feet of the motel site was temporarily taken for construction of the driveway. Another strip, 2.23 acres, across the north 8-acre tract was permanently condemned. This is the new portion of Highway No. 77 which divided the area into two triangular tracts.

Plaintiffs' witnesses fix the damage to the 8-acre tract from $82,938 to $97,000, and damage to the motel area from $132,500 to $150,000. The State's witness fixed the damage to both areas at $50,200. The county court appraisers assessed plaintiffs' damage at $82,693. The jury verdict, which is being appealed herein, was for $120,079.40. This is below the damages fixed by the plaintiffs' witnesses and considerably more than the figure given by the State's witness.

Plaintiffs, in presenting their evidence, divided the two tracts. They used one of the owners and two qualified real estate appraisers as to the north 8 acres. They used a licensed real estate broker and appraiser who was a motel expert, and one of the owners as to the motel area. The State used one expert witness to testify to the damage to the north 8 acres and also to the damage to the motel area. He added them together to arrive at his total damage figure.

The State objects to the procedure used by the plain-

tiffs in permitting their witnesses to value the 8-acre tract and the motel area separately. Ordinarily, this might be error. Here, however, the two tracts were separate and divisible. From the standpoint of use and adaptability they were totally unrelated and presented entirely different factors influencing the element of damages. This is evident from the method pursued by the State's appraiser for the two tracts. The State's assignment is patently frivolous. Ordinarily, the entire property involved in an eminent domain proceeding is to be valued and damages to it assessed as a whole. See Frank v. State (1964), 176 Neb. 759, 127 N. W. 2d 300. Where, however, it is clearly divisible from the standpoint of use and adaptability, presenting different factors and elements of damage, it definitely is not error to permit such division. In determining whether the property is to be considered as a whole or as units, usually unity of use is given greater emphasis, and has been called the controlling and determining factor. 29A C. J. S., Eminent Domain, § 140, p. 591.

One of the chief complaints of the State is that plaintiffs' motel expert was permitted to consider gross income from room rentals in arriving at the valuation of the motel portion of the property. The evidence in question goes only to the determination of damages measured by the difference in the value of the motel property before and after the taking. In this respect we are concerned with the temporary easement of the motel property during construction, the taking of a small strip of land along the south boundary line of the motel, and the limitation of access, that is, ingress and egress to the motel property after the taking. The balance of the taking was the 100 foot wide strip cutting the 8-acre tract into two triangular parcels which will be considered hereafter.

Plaintiff's motel expert has operated his own business of motel sales and appraisals throughout an 11-state midwestern area since 1965. Since 1970, he has handled

motel sales of over $20 million. He deals exclusively in motels and is considered to be the largest motel broker in the midwest in number of motels sold. The motels he used for comparison purposes were motels actually sold by him. In addition to being a motel broker he also operates motels in Lincoln, Nebraska, and other areas. For comparison purposes, he confined his market area for motels to the plains states west of the Mississippi River and east of the Rockies, exclusive of resort areas such as Denver, Colorado Springs, the Ozarks, and the lake country. He arrived at the before taking value of the motel property in question by comparing it with sales of what he considered comparable motel properties in the market area within a reasonable time before the taking. These motels were located in Nebraska, Kansas, Missouri, Arkansas, Oklahoma, and Texas.

In determining whether such properties were comparable, plaintiffs' expert considered location, size (number of units), nature of clientele (percentage of commercial and tourist), age of improvements, nature of their construction, condition, facilities such as living quarters, meeting rooms, restaurant, lounge, annual gross room rentals, and future prospects for the motel property as related to its current situation. He testified that prospective buyers of motels consider all these factors. The gist of his testimony was that gross room rental was the substantial factor considered by prospective purchasers. It was his further testimony that management is not a dominant factor in the consideration of the valuation of a motel. Management, at best, would not show more than a 10 percent variation up, to 15 percent variation down from the average property with exceptionally good or exceptionally poor management. He considered the Strauchs to be good managers.

We are in agreement with plaintiffs' expert that gross room rentals as it relates to the size of the property

could clearly be a substantial factor. The exclusion of the testimony of gross room rentals as a factor of comparability would have the anomalous effect of permitting the expert to consider it, but preventing a disclosure of this portion of the basis of his opinion.

We are dealing with a specialized type of property. Expenses in most instances can be more or less controlled by management. The gross rental revenue could furnish a prospective buyer a better criteria for comparison purposes with other motels than net income. The evidence is undisputed, gross room rental is a major factor which motel buyers consider, along with other elements of comparability. It would be a miscarriage of justice to sustain the State's contention. The proposed Nebraska Rules of Evidence would make the evidence admissible. Our present holdings do not exclude it except by analogy to net profits. This analogy is clearly inappropriate and inapplicable.

We also note it seems evident that a limitation of access would affect the use of the property by diminishing gross room rentals. This would certainly affect market value.

To arrive at his value, the expert compared the selling price of the comparable properties with the gross room rentals and arrived at a factor which he called the gross room rental multiplier. This multiplier varied from 2.77 to 4.56, or an average of 3.85. He arrived at the market value of the Colonial Inn Motel before the taking by adjusting the multiplier to what he considered proper in light of the comparison of all the factors with the comparable motels. The multiplier he used was three. He multiplied the gross room rental by this figure to arrive at a market value before the taking of $537,500. In his opinion, the after-taking value was $405,000. This difference he attributed primarily to limitation of ingress and egress because that item most directly affected gross room rentals. It also

included the temporary easement and the small strip of land taken along the south border of the motel.

In Kohler v. Ford Motor Co. (1971), 187 Neb. 428, 191 N. W. 2d 601, we said: " 'The expert has * * * a power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of expert testimony, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.' "

We determine the challenged evidence was admissible because: (1) It was one of the items by which the jury could gauge the comparability of the sales relied upon for comparison. In each case the expert stated the gross room rental of each of the comparables as well as the number of units and the sale price. The jury was thus better able to judge the validity of the multiplier which the witness used. (2) It was an item to which prospective buyers gave substantial consideration—and thus comes within the general rule that in determining market value of property an expert and a jury are entitled to consider whatever a willing buyer would consider. (3) The property was adapted to only one use—and the limitation of access directly affected that use and value.

The State urges as error the court's order excluding its expert witness' method of capitalizing income to assist in arriving at a value of the motel tract. The State's expert testified that to assist him in arriving at the value of the motel property he was going to utilize a capitalization of net income from the operation of the motel, restaurant, and lounge, using typical income and typical expenses without knowing or using the financial operations of the motel, restaurant, or lounge.

To phrase it another way, he was starting with a gross income *estimate* from which he deducted all his *estimated* operational expenses, thereby coming up with an *estimated* net income which he in turn capitalized into the value of the improvements. The following questions are typical: "And now, I don't want you to mention any figures, have you obtained a typical net income that could be an index to this business for the restaurant? A- Have I obtained? I have estimated one. Q- Estimated? A- Yes. Q- Okay. Have you estimated a typical income for the lounge? A- Yes." The trial court properly sustained an objection to this approach.

There is no such thing as typical income or expenses for the operation of a restaurant, motel, or lounge. To permit a person, even a qualified one, to appraise a tract of land on the basis of capitalization of income by an estimate of the operation of a typical business would be guesswork at every stage.

The State relies upon Iske v. Metropolitan Utilities Dist. (1968), 183 Neb. 34, 157 N. W. 2d 887, and contends that the method used by its expert was a proper method for determining the value of the improvements. In the Iske case the witness capitalized royalty income from minerals in place and rental income to be received from the property after the minerals had been removed. In this case the testimony was based upon assumed or estimated gross income and estimated operational expense to come up with an estimated net income which was to be used to capitalize the value of the improvements.

This type of testimony would require the property owner to introduce his actual income and expense figures to prove market value or to discredit the testimony of the witness. This he is not permitted to do. As we said in Verzani v. State (1972), 188 Neb. 162, 195 N. W. 2d 762: "In an eminent domain proceeding, anticipated profits from the continued carrying on of a business in an established location cannot be considered in esti-

mating the damages, and the profits of a business cannot be shown for the purpose of proving the value of the property."

The State argues that the procedure used by the plaintiffs' expert witness was in effect a capitalization of profits. We disagree. Plaintiff's expert used the actual gross income figures, and without relation to the actual profits compared those figures with the gross income in 10 actual sales of comparable properties. He then adjusted the other comparables and obtained a multiplier. This is the scientific or technical method used by motel appraisers.

The State complains about the overruling of its objection to a question of its project engineer as to whether federal funds were involved in the project. It appears to be the majority rule that evidence of the use of federal funds in a state road project is not admissible in an eminent domain proceeding. The evidence was not required to comply with sections 39-1329 or 39-1330, R. R. S. 1943, as the State was clearly the condemning party. We are convinced, however, that on the record in this case the error could not have been prejudicial.

The State argues the trial court erred in permitting plaintiff's motel expert to use as comparable properties the sales which he had made in Oklahoma, Kansas, Missouri, Arkansas, and Texas. There is no merit to this assignment. We are dealing with a type of property that ordinarily would not have too many comparable sales in the immediate area of the property to be appraised. The fact that an expert witness uses sales of properties in other states as a basis of comparison in determining value rather than comparable sales in the vicinity of the property condemned goes to the foundation for, and the weight to be given to, the expert's testimony. The admissibility of expert testimony is ordinarily within the discretion of the trial court and its ruling will be upheld on appeal unless an abuse of dis-

cretion is shown. Dovey v. Sheridan (1972), 189 Neb. 133, 201 N. W. 2d 245.

The final assignment of error we consider is the State's challenge to the allowance by the trial court of a $15,000 attorney's fee under section 76-720, R. R. S. 1943. It is unnecessary to detail the factors involved in the determination of a reasonable attorney's fee. They are set out in Jensen v. State (1969), 184 Neb. 802, 172 N. W. 2d 607. The allowance of a reasonable attorney's fee for necessary services performed by an attorney will not be reversed on appeal in the absence of a showing of an abuse of discretion by the trial court in making the allowance. Jensen v. State, *supra*. While the fee is very adequate, when all the circumstances and the applicable rules of law involved are considered, we can find no abuse of discretion in the allowance made.

For the reasons stated, the judgment of the District Court is correct and is affirmed.

AFFIRMED.

NEWTON, J., dissenting.

I dissent. The primary question deals with the valuation by plaintiffs' expert on the basis of gross income from room rentals. The gross was then compared with that of other motels sold throughout the midwest and prices paid.

As stated in Annotation, 7 A. L. R. 163, and in 27 Am. Jur. 2d, Eminent Domain, § 285, p. 83, and § 431, p. 338, American jurisdictions have held with remarkable unanimity that evidence of profits derived from a business conducted on property is too speculative, uncertain, and remote to be considered as a basis for ascertaining the market value of property taken in eminent domain proceedings. Nebraska adheres to this rule. See, Verzani v. State, 188 Neb. 162, 195 N. W. 2d 762, pertaining to a racetrack; Bickels v. State, 178 Neb. 825, 135 N. W. 2d 872, involving a grocery store. There is a generally recognized exception to this rule in regard to rental properties where the income is derived directly from

the use of the real property as distinguished from a business. See, Annotation, 65 A. L. R. 455; 27 Am. Jur. 2d, Eminent Domain, § 433, p. 342. In the case of business income much depends on such factors as management, available capital, advertising, business connections, the times, etc. In 5 Nichols on Eminent Domain (3d Ed.), § 19.3 (1), it is stated in regard to commercial property: "If the owner of property uses it himself for commercial purposes, the amount of his profits from the business conducted upon the property depends so much upon the capital employed and the fortune, skill and good management with which the business is conducted, that it furnishes no test of the value of the property." Nichols states in vol. 5, § 19.21, that: "Although existing rents have been held admissible as *evidence* of market value, they are not generally accepted as the *sole criterion of market value.* * * *

"In considering evidence of existing rents as an element in the determination of market value care must be taken to distinguish between gross rentals and net rentals. It is the latter which is ordinarily considered as an evidentiary factor in the valuation process."

In view of the foregoing, to what extent is the gross income of a business, as distinguished from net income or profits, affected by similar considerations? In the present instance the gross income from the lounge and restaurant business were not considered. They were apparently thought to be either inadmissible or of no consequence. Plaintiffs' expert witness figured valuation in the case of motels by multiplying gross room rentals by a factor of three to four. This factor was fixed by considering other elements such as condition of buildings, modernity, furnishings, rates, competition, location, type of business, and presence of a lounge and restaurant for service to customers, etc.

It must be conceded that the room rentals received by a motel are not essentially derived from the direct use or inherent value or productivity of the real estate. On

the contrary, there are many other elements involved, such as the cleanliness, modernity, furnishings, rates, and general attractiveness of the rooms, the availability of restaurant, lounge, and convention facilities, and management, advertising, business connections referring business as in the case of Holiday and Ramada Inns, etc. In other words, many of the same factors which render net business income inadmissible are also present in regard to gross room rentals. There are not many cases dealing directly with this subject but the majority rule appears to be that such a method of determining valuation is not proper or admissible.

In regard to a radio station, it was held that gross income was inadmissible. See Johnson County Broadcasting Corp. v. Iowa State Highway Commission, 256 Iowa 1251, 130 N. W. 2d 707.

In Wilson v. Iowa State Highway Commission, 249 Iowa 994, 90 N. W. 2d 161, it was held that the gross income from a cafe was inadmissible to prove value.

In City of Chicago v. Central Nat. Bank in Chicago, 5 Ill. 2d 164, 125 N. E. 2d 94, it was held that evidence of gross receipts from a restaurant offered to show rental value of the condemned property was inadmissible to prove market value.

In City of Bonner Springs v. Coleman, 206 Kan. 689, 481 P. 2d 950, the admission of gross income from a farm machinery business for the purpose of estimating the value of the realty was held to be prejudicially erroneous.

In May v. Dewey, 201 Va. 621, 112 S. E. 2d 838, it was held that evidence of rent paid by a tenant to a landlord was admissible to prove the value of land, but evidence as to gross sales or percentage thereof from which rent was computed was not admissible.

In Commonwealth, Department of Highways v. Fister (Ky. App.), 373 S. W. 2d 720, it was held that gross income from a motel business was incompetent on the question of value.

In State ex rel. State Highway Commission v. Flynn (Mo. App.), 263 S. W. 2d 854, it was held that evidence of rental income from unfurnished apartments was admissible, but not rental income from furnished apartments which reflected not only value of the realty but also of personal property.

In Brinsfield v. Baltimore City, 236 Md. 66, 202 A. 2d 335, it was held that experts may arrive at value of property condemned by considering gross sales but they may not reveal amount of gross sales so considered, at least not on direct examination, nor may they arrive at fair market value by capitalizing gross sales. The case dealt with a retail store business.

In Regents of University of Minnesota v. Irwin, 239 Minn. 42, 57 N. W. 2d 625, it was held in a condemnation case: "The rental value of furnished premises may be considered in determining reasonable market value, provided a proper deduction for value of furnishings is taken into consideration."

In Commonwealth, Department of Highways v. York (Ky. App.), 390 S. W. 2d 190, it was held that an expert witness could not compute the value of a motel solely on the basis of income.

There are a few cases where formulas such as were here used have met with approval. See, Standard Oil Co. v. Commonwealth, Department of Highways (Ky. App.), 414 S. W. 2d 570; State ex rel. Department of Highways v. Bowles (Okla.), 472 P. 2d 896. They represent a minority view. A person buying a business, together with the property upon which it is located, is, of course, interested in the volume of business done and the gross and net profits. This definitely affects the price he will pay for such a business and property. The difficulty is that a business is not a compensable property and the amount paid for it cannot be separated from the value of the property. The use of formulas based upon either gross or net profits necessarily includes compensation for the business as well as the prop-

erty. It appears that experts in the field of motel sales use the gross income formula heretofore mentioned. As heretofore pointed out, that formula deals not with the value of the real property but with the value of the business as a whole. I conclude that evidence of net profits from the motel business was properly excluded and that evidence of value based on a system of multiplying gross room rents was erroneously admitted.

It is asserted that management has a minimal effect on the gross income of a motel. This is obviously incorrect. A manager who operates a motel in the highest motel tradition cannot be compared with a manager who operates a rundown, filthy motel with a lack of those desirable facilities found in the better operated institutions. It is apparent that the latter type of manager can take over a first-class motel and run it into the ground in a comparatively short period of time. Had we such a manager in the Y Motel who had permitted its business and consequently its gross income to deteriorate, plaintiffs' expert would necessarily, under his formula, have had to reduce his estimate of the value of the property by thousands of dollars due solely to the type of business operation. Notwithstanding this factor, the essential value of the real estate would remain unchanged. This clearly demonstrates that using such a criterion, the value of the real estate and the value of the business cannot be separated. The majority opinion inadvertently recognizes this factor when it states: "To permit a person, even a qualified one, to appraise a tract of land on the basis of capitalization of income by an estimate of the operation of a typical business would be guesswork at every stage."

Actually this is exactly what the plaintiffs seek to do, to capitalize the gross income of the motel.

BOSLAUGH, J., joins in this dissent.

JESS F. WALKER, APPELLEE, V. RUBY L. WALKER, APPELLANT.
227 N. W. 2d 878

Filed April 17, 1975. No. 39599.

1. **Divorce: Alimony.** Under section 42-365, R. R. S. 1943, 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.
2. ———: ———. Awards of property jointly to divorced parties requiring divided management and financial control are not generally commended.

Appeal from the District Court for Keith County: KEITH WINDRUM, Judge. Affirmed as modified.

McGinley, Lane, Mueller, Shanahan & McQuillan and John A. Gale, for appellant.

Padley & Dudden, for appellee.

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

WHITE, C. J.

The respondent wife, Ruby, appeals from a divorce decree, and her chief complaints are the insufficiency of the open-end alimony award of $100 a month for 6 months, and $50 per month thereafter until further order of the court, and that part of the property division granting the husband their home property subject to her life estate. We affirm the decree of the District Court as modified.

The parties are in their late forties, are childless, have been married 13 years, and the wife presently is in poor health. The petitioner, Jess, is a livestock trucker and the bulk of the assets are the capital and operating equipment of that business. They own a home which is worth about $17,500, subject to mortgage indebtedness of about $4,500. There is no serious dispute as to the court's finding that their net worth is about $24,000.

Jess' business assets have a net worth of only $10,000, the equipment being mortgaged. His net income is about $14,000 per year. She makes $600 to $1,000 per year.

The principal difficulty is the home. The mortgage payments are about $100 per month, with only $4,500 due on the mortgage. The home is large and there is testimony that it will produce a rental income of $125 per month in addition to furnishing Ruby a home. But, under the District Court's decree, the expenses, maintenance, insurance, etc., fall on Ruby during the period of her life estate and Jess retains remainder ownership paying only the mortgage payments on the $4,500 balance. Ruby has the burden of managing and renting the rooms in the home and her present health is poor and its future uncertain. Ruby asserts that awards of property jointly to divorced parties requiring divided management and financial control are not generally commended. See, Schwarck v. Schwarck, 175 Neb. 560, 122 N. W. 2d 489; Upah v. Upah, 175 Neb. 606, 122 N. W. 2d 507; Wetzel v. Wetzel, 35 Wis. 2d 103, 150 N. W. 2d 482; Dorfman v. Dorfman, 457 S. W. 2d 417 (Tex. Civ. App., 1970). We agree. This is particularly true here because the management and maintenance responsibilities in the court's scheme fall on a woman who is in poor health. Consequently we direct that the property be sold, either by agreement of the parties within 90 days of judgment on the mandate, or if the parties cannot agree, that it be sold at public auction under supervision of the District Court. The net proceeds shall be divided equally.

Ruby asserts that the alimony of $100 per month for 6 months and $50 a month thereafter, open-ended, is insufficient. Due to Ruby's present health her capacity to earn is uncertain. Her health may improve and she may be capable of supporting herself. The District Court wisely retained jurisdiction to review the matter. It is apparent that Ruby needs sufficient funds to withstand

the impact of the dissolution of marriage, combined with her condition of health, and that Jess should contribute a reasonable monthly sum during her rehabilitation. He is able to do so. Considering the traditional standards governing awards of alimony (§ 42-365, R. R. S. 1943, Albrecht v. Albrecht, 190 Neb. 392, 208 N. W. 2d 669), Ruby is awarded alimony in the sum of $200 per month for a period of 1 year, and $100 a month thereafter, subject to the further order of the District Court. An attorney's fee of $500 is allowed to Ruby for services of her attorney in this court.

Except as herein modified, the decree of the District Court is affirmed.

AFFIRMED AS MODIFIED.

MARY D. REIS, APPELLEE, V. DOUGLAS COUNTY HOSPITAL, APPELLANT.
227 N. W. 2d 879

Filed April 17, 1975. No. 39624.

1. **Workmen's Compensation.** An injury, to be the basis of a cause of action within the provisions of the Workmen's Compensation Act, must be one caused by an accident arising out of and in the course of the employment. § 48-101, R. R. S. 1943.
2. **Workmen's Compensation: Words and Phrases.** The phrases "in the course of" and "arising out of" are not synonymous, and where they are used conjunctively, as they are in the Workmen's Compensation Act of this state, a double condition is imposed and both must exist to bring a case within the act.
3. ———: ———. Even where it is established that an injury is one "arising out of" the employment, the right to recover benefits under the Workmen's Compensation Act must fail where there is no evidence indicating that the injury occurred "in the course of" the employment.
4. ———: ———. The words "in the course of" as used in section 48-101, R. R. S. 1943, refer to the time, place, and circumstances of the accident, and claimant must establish that there was a temporal and space nexus to the employment.

Appeal from the District Court for Douglas County: PATRICK LYNCH, Judge. Reversed and dismissed.

Donald L. Knowles and William T. Ginsburg, for appellant.

Patrick L. Cooney of McCormack, Cooney & Mooney, for appellee.

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

BRODKEY, J.

Plaintiff, Mary D. Reis, sued to recover benefits under the Workmen's Compensation Act. In her petition filed in the Workmen's Compensation Court on September 6, 1973, she alleged that she was employed by the Douglas County Hospital as a registered nurse, earning $255 per week, and that on or about January 24, 1973, and while so employed, she suffered a myocardial infarction as a result of an accident arising out of and in the course of her employment, for which she claimed compensation. Defendant admitted her employment as a nurse in the hospital, but denied that the alleged accident and injury arose out of and in the course of her employment. A hearing was had before the Workmen's Compensation Court on October 9, 1973, and on November 14, 1973, the judge who heard the case issued an order of dismissal, finding the plaintiff had failed to maintain her burden of proof that she sustained an accident and received an injury which arose out of and in the course of her employment. Plaintiff petitioned for a rehearing of that decision to the Workmen's Compensation Court sitting en banc, as provided by law; and a rehearing was held on December 11, 1973, before a three judge panel of that court, which found that plaintiff had suffered a myocardial infarction as the result of an accident arising out of and in the course of her employment, and awarded her benefits of $62 per week for 28 2/7 weeks, as temporary total disability covering two separate periods of time. The court also awarded her medical and hospital

expenses, and set aside the original order of dismissal entered by the single judge on November 14, 1973. Defendant Douglas County Hospital appealed that decision to the District Court for Douglas County, which upheld the decision of the Workmen's Compensation Court en banc, and in addition awarded plaintiff's attorney $1,250 as an attorney's fee. Defendant has appealed to this court from the judgment of the District Court. We reverse and dismiss.

Defendant hospital assigns as error that the plaintiff did not meet her burden of establishing and proving by the evidence: (1) Any "accident or occupational disease" that was recoverable under the Nebraska Workmen's Compensation Act, section 48-101, R. R. S. 1943; (2) any "accident or occupational disease" arising "out of and in the course of" her employment which contributed substantially to her heart disease; and (3) that, as a matter of fact, her employment contributed causally to her heart disease. Defendant also alleges that an allowance of $1,250 for attorney's fees was excessive.

The only witnesses who testified in this proceeding were the plaintiff, Mary D. Reis, and her physician, Dr. Edward J. Smith. The defendant produced no witnesses and adduced no evidence, although we feel it would have been a great assistance to the court in this case had defendant done so. However, there is evidence in the record establishing the following facts, or, from which the trier of facts would be justified in finding such facts and conclusions to be established: Plaintiff, Mary D. Reis, is a registered nurse and has been employed by the Douglas County Hospital since October of 1964 in various nursing capacities. In April of 1971 she became staffing coordinator for the hospital. In that position she became responsible for the personnel at the hospital, consisting of about 620 people. Her duties included interviewing and hiring personnel and she had the responsibility to make sure the hospital had nursing coverage 24 hours a day. This required the preparation

of numerous schedules a considerable period of time in advance of the actual service. She sometimes faced hostilities from the employees who objected to her scheduling on weekends, nights, etc., for various reasons, and there is evidence in the record that she was faced with some racial hostility because of her duty assignments. Sometimes she was frustrated by her lack of authority to back up her own decisions, and there was also pressure because of deadlines. She testified that she worked from 50 to 70 hours per week, although she was supposed to work only 40 hours per week. There is evidence that on occasions she took work home from the hospital, and frequently was called at home from the hospital.

In the fall of 1972 she noticed that she was becoming kind of agitated, nervous, and having problems sleeping, "especially if I had taken a lot of work home with me and worked late." In October of 1972 she saw Dr. Smith for her annual physical examination and he prescribed a mild tranquilizer for her, to be taken on "bad days." She next saw Dr. Smith on January 24, 1973. She had been having some pains in her chest and also had developed a cough. Dr. Smith gave her two prescriptions, one for an antibotic, and one for cough medication. He suggested that she should get some rest at home and told her not to go back to work until she felt better. She returned to work on February 5, 1973. Although she felt better, she was still having some chest pains. Within 10 days thereafter, the pain from her chest radiated to her left shoulder and left arm. She called Dr. Smith about her condition on February 16th and he admitted her to Doctor's Hospital on that day. Dr. Smith ordered an electrocardiogram and lab work; and after the results of the tests were obtained, he treated her for myocardial infarction and prescribed bed rest and medication. She was released from the hospital on February 26th, but returned to her home to rest and recuperate, and did not return to work until August

21, 1973. When she returned to work on August 21st, she was employed on an entirely different job, that of physican and patient representative; and only worked 24 hours a week at the beginning, which was later increased to 32 hours a week. She testified that she was married, had two children, a son 20 years of age and a daughter 18 years of age. 'Her son was in the army, stationed in Thailand, but at the time of the alleged infarction, was stationed at Fort Leonard Wood, Missouri. Her daughter was a freshman at college; and her husband, after an army career, was a butcher at Baker's Super Market, with considerable job security because of seniority. On cross-examination, plaintiff also testified that around January of 1973, she had chest pains for several weeks and that a cough developed. Close to February she started having pains in her shoulder, arms, and neck. She also had an unusual amount of tiredness, weakness, and shortage of breath, and a choking sensation at times. She also had a pain in her jaw.

Plaintiff's doctor and treating physician, Dr. Edward J. Smith, testified on plaintiff's behalf. Dr. Smith is a graduate of the Nebraska Medical School and had practiced in Omaha for over 20 years, when he became a medical consultant for the Nebraska State Welfare Department. We note, in passing, that although in its brief defendant objects to the testimony of Dr. Smith on the ground that he is not a heart specialist, we believe his qualifications are such as to entitle him to testify as an expert witness, with his credibility and the weight to be given to his testimony being a matter for the consideration of the trier of facts.

Dr. Smith testified that he had known the plaintiff for about 5 years and that she came to his office in January of 1973. He took a history from her at that time and she told him that, other than childbearing, she had had no real illnesses of import. At that time her complaints were of chest pain and shortness of breath.

His diagnosis at that time was an upper respiratory infection with viral pneumonia associated with it. He had previously started her on an antibiotic and something for a cough before seeing her. Although he suggested she go to the hospital, she preferred to go to her home for rest and continued medication. His next contact with plaintiff was the evening she entered Doctor's Hospital, at which time he gave her something for cough and pain and ordered a series of laboratory and X-ray procedures, including also an electrocardiogram. He stated that the electrocardiogram showed changes consistent with a myocardial infarction, which he defined in layman's language as a tiny area of death of tissue in part of the heart muscle caused by a cessation of blood flow to it, even on a temporary basis. This slowing down might be caused by a constriction or an occlusion, such as a thrombosis, or also by cholesterol building up deposits on the inside of the blood vessels. A temporary occlusion may be caused by stress or strain, cigarettes, high blood pressure, obesity, etc. As soon as he determined from the electrocardiogram that Mrs. Reis had evidence of an infarction, he started her on vasodilator drugs, to which she responded, but continued to have some chest pain over the next 5 to 10 days. He then sent her home with instructions to get as much rest as she could and to continue with the vasodilator. He saw her during the intervening period until she returned to work in August and also saw the results of an EKG which was taken in September of 1973 at the Douglas County Hospital. He testified that the electrocardiogram showed evidence of an old myocardial infarction, but did not testify as to how old it might have been. Dr. Smith testified that in his opinion the stress and strain of Mrs. Reis' employment was the direct cause of her myocardial infarction.

The following statutes are involved in this case. Section 48-101, R. R. S. 1943, provides as follows. "When personal injury is caused to an employee by accident or

occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury." Section 48-151, R. R. S. 1943, provides in part: "Throughout this act, the following words and phrases as used therein shall be considered to have the following meaning, respectively, unless the context shall clearly indicate a different meaning in the construction used: * * * (2) The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment. * * * (4) The terms injury and personal injuries shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The terms shall include disablement resulting from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in said employment. The terms shall include an aggravation of preexisting occupational disease, the employer being liable only for the degree of aggravation of the preexisting occupational disease. The terms shall not be construed to include disability or death due to natural causes but occurring while the employee is at work, nor to mean an injury, disability or death that is the result of a natural progression of any preexisting condition."

In Simon v. Standard Oil Co., 150 Neb. 799, 36 N. W. 2d 102 (1949), this court stated: "An injury to be the

basis of a cause of action within the provisions of the Workmen's Compensation Act must be one caused by an accident arising out of and in the course of the employment. In many instances an injury which occurs in the course of the employment is also one which arises out of it. This is not always true. The compensation law does not make the employer an insurer against all injuries suffered by his employees in the course of their employment, but it does limit recovery of disability benefits to injuries received both in the course of and out of the employment. The phrases 'in the course of' and 'arising out of' are not synonymous, and where they are used conjunctively, as they are in the compensation law of this state, a double condition is imposed and both must exist to bring a case within the act. § 48-109, R. S. 1943; Weitz v. Johnson, 143 Neb. 452, 9 N. W. 2d 788; Gale v. Krug Park Amusement Co., 114 Neb. 432, 208 N. W. 739, 46 A. L. R. 1213; 58 Am. Jur., Workmen's Compensation, § 210, p. 717. The right of recovery is statutory, and unless the case has been brought within the conditions imposed by the statute, it must fail. Whether an accident arises out of and in the course of employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. Hopper v. Koenigstein, 135 Neb. 837, 284 N. W. 346; Conzuello v. Teague, 123 Neb. 574, 243 N. W. 779; 58 Am. Jur., supra." As stated in the above-cited opinion, the right of recovery is statutory, and unless the case has been brought within the conditions *imposed by the statute*, it must fail. Not every heart attack is compensable under our Workmen's Compensation Act. Compensation has been granted in some cases and denied in others. Strict fulfillment of the requirements of the statute is necessary. The combination of employment and a heart attack is insufficient in itself to entitle one to workmen's compensation benefits.

Assuming arguendo, under the facts of this case, the

myocardial infarction sustained by the plaintiff constituted an "accident," as defined in the Workmen's Compensation Act, and also that the accident "arose out of her employment," it is necessary, under the terms of the above statute, that plaintiff also establish by a preponderance of the evidence that the accident arose "in the course of her employment." In Appleby v. Great Western Sugar Co., Inc., 176 Neb. 102, 125 N. W. 2d 103 (1963), we stated that the words "arising out of" and "in the course of" the employment are used conjunctively in the statute and both conditions must be established to satisfy the requirement of the Workmen's Compensation Act. The accident must occur not only in the course of the employment, but the causative danger must also arise out of it. In that case this court also stated that the words "arising out of" referred to the origin or cause of the accident and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances of the accident. As stated in 32 Journal of the American Trial Lawyers Assn., 440: "The heart attack may be attributable to work-connected exertion, stress-and-strain and hence be deemed to have arisen out of the employment. * * * Under the 'in course of' requirement, we are not concerned with whether the risk that ensued was work-connected; rather it must be demonstrated that there was a temporal and space nexus to the employment." See, also, Johnson v. Hahn Bros. Constr., Inc., 188 Neb. 252, 196 N. W. 2d 109 (1972). We think in this case the plaintiff has clearly failed to sustain her burden of proving that her accident occurred "in the course of her employment." In prior heart cases decided by this court, the problem has usually not arisen because under the facts of each particular case it is clear from the evidence that the heart attack or myocardial infarction or traumatic event occurred on the job and while the employee was performing services for the employer, usually involving unusual exertion. See, for example, Atkinson

v. Little Audrey's Transfer Co., Inc., 190 Neb. 738, 212 N. W. 2d 350 (1973); Conn v. ITL, Inc., 187 Neb. 112, 187 N. W. 2d 641 (1971); Beck v. State, 184 Neb. 477, 168 N. W. 2d 532 (1969); McCauley v. Harris, 164 Neb. 216, 82 N. W. 2d 30 (1957); Ruderman v. Forman Bros., 157 Neb. 605, 60 N. W. 2d 658 (1953); Pixa v. Grainger Bros. Co., 143 Neb. 922, 12 N. W. 2d 74 (1943); Brown v. City of Omaha, 141 Neb. 587, 4 N. W. 2d 564 (1942); Feeney v. City of Omaha, 140 Neb. 497, 300 N. W. 571 (1941); Schirmer v. Cedar County Farmers Tel. Co., 139 Neb. 182, 296 N. W. 875 (1941). See, also, Brokaw v. Robinson, 183 Neb. 760, 164 N. W. 2d 461. In the instant case there is a dearth of evidence as to where and when the "accident" occurred. Dr. Smith did testify that the plaintiff had suffered her damage when she saw him at his office on January 24, 1973. There is also the evidence of the plaintiff that she suffered additional heart pains and discomfiture while resting at her home after he saw her, but she did not even know she had had a heart attack until approximately 1 month after she first saw Dr. Smith in his office. Nowhere have we been able to find any testimony indicating that plaintiff had suffered any myocardial infarction or chest pains at her place of employment, or while performing services for her employer. This, we believe, is a fatal deficiency. We have held that if an inference favorable to claimant in an action for recovery under the Workmen's Compensation Law may be reached only by speculation or conjecture, an award may not be allowed. Ruderman v. Foreman Bros., *supra*. See, also, Wengler v. Grosshans Lumber Co., 173 Neb. 839, 115 N. W. 2d 415 (1962).

In order to recover on a workmen's compensation claim, the claimant has the burden to establish that the accident which allegedly resulted in her injury, arose "in the course of her employment" as well as "out of her employment." It may be, and has been, argued that a rigid insistence upon the separate satisfaction of the "in course of" requisite could lead to a dismal denial of

relief. See 32 Journal of the American Trial Lawyers Assn., 427, 440. This has frequently posed a dilemma for the courts, particularly in cases where the claimant suffers a heart attack sometime after working hours. Notwithstanding this fact, we cannot ignore the clear mandate of the statutes, nor can we by judicial fiat legislate out the requirement that the claimant prove the accident occurred in the course of his or her employment. While the result may on occasions appear to be unjust, we do not believe that this court is the proper forum in which to correct the matter.

In view of what we have stated above, we conclude that there was no reasonable competent evidence before the District Court to support a very material element of plaintiff's claim and therefore the judgment of the District Court must be reversed, and the cause dismissed. Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285 (1971). Under section 48-125, R. R. S. 1943, the award of an attorney's fee to plaintiff's attorney is not permitted, and, therefore, must be denied.

REVERSED AND DISMISSED.

JOHN J. STONES ET AL., APPELLANTS, V. PLATTSMOUTH, NEBRASKA, AIRPORT AUTHORITY, A GOVERNMENTAL SUBDIVISION, ET AL., APPELLEES.
228 N. W. 2d 129

Filed April 17, 1975. No. 39654.

1. **Airports: Administrative Law.** It is the duty of the Nebraska Aeronautics Commission to designate the locations and sites of airports in this state.
2. ———: ———. The selection of a site for a public improvement is an exercise of a power which is legislative in nature and the requirements of due process that apply to judicial or quasi-judicial proceedings are not applicable.
3. **Zoning: Administrative Law.** A comprehensive development plan is merely a policy statement that may be implemented

by a zoning resolution. It is the zoning resolution which has the force of law.

4. ———: ———. If there is a conflict between a comprehensive plan and a zoning ordinance, the zoning ordinance contains the controlling provisions when questions of a citizen's property rights are at issue.

5. **Airports: Administrative Law.** An airport authority has broad powers to include all facilities necessary or convenient in constructing an airport project.

Appeal from the District Court for Cass County: WALTER H. SMITH, Judge. Affirmed.

Blevens, Bartu, Blevens & Jacobs, for appellants.

Herbert J. Elworth, Francis M. Casey, and James F. Begley, for appellees.

Heard before WHITE, C. J., BOSLAUGH, NEWTON, CLINTON, and BRODKEY, JJ., HASTINGS, District Judge, and KUNS, Retired District Judge.

BOSLAUGH, J.

This case arises out of a controversy concerning the construction of an airport by the Airport Authority of the City of Plattsmouth, Nebraska.

The plaintiffs owned a half section of land near Plattsmouth, Nebraska, upon which a part of the airport was to be constructed. This action was commenced to enjoin the airport authority and the other defendants from proceeding with the airport project. The trial court found generally for the defendants and dismissed the action. The plaintiffs have appealed.

The plaintiffs' contentions may be grouped into three categories. The first category relates to the selection of the site for the Plattsmouth airport. The substance of this contention is the plaintiffs were entitled to notice and an opportunity to be heard before their property was selected as a part of the site for the Plattsmouth airport.

It is the duty of the Nebraska Aeronautics Commission to designate the locations and sites of airports in

this state. § 3-104, R. R. S. 1943. The meetings of the commission are open to the public but there is no formal requirement of notice and an opportunity to be heard in such matters that would apply to the plaintiffs.

The selection of a site for a public improvement is an exercise of a power which is legislative in nature and the requirements of due process that apply to judicial or quasi-judicial proceedings are not applicable. The matter before the Nebraska Aeronautics Commission in this case was not a "contested case" within the meaning of section 84-901 (3), R. R. S. 1943, so far as the plaintiffs were concerned.

The plaintiffs also contend there was no compliance with the Airport and Airway Improvement Act of 1970 which requires an "opportunity" for public hearings for the purpose of considering the economic, social, and environmental effects of the airport location before the project may be approved for federal participation. See 49 U. S. C. A., § 1716 (d) (1). The record indicates a notice of an opportunity for public hearing was published in a local newspaper on August 24, 1970. It is unnecessary to consider whether there was compliance with the federal act because, at the most, it would affect only federal participation in the project.

The second category relates to the zoning of the property. The plaintiffs complain that the comprehensive development plan for Cass County, dated September 1968, showed a proposed location for the airport which was north and west of the plaintiffs' land. A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. § 23-114.01 (2), R. R. S. 1943. It is the zoning resolution which has the force of law. § 23-114, R. R. S. 1943.

A comprehensive plan is a guide to community development rather than an instrument of land-use control. See 3 Anderson, American Law of Zoning, § 17.15, p. 307. If there is a conflict between a comprehensive plan and a zoning ordinance, the zoning ordinance contains

the controlling provisions when questions of a citizen's property rights are at issue. George Calantoni & Sons, Inc. v. Board of Supervisors, 6 Pa. C. 521, 297 A. 2d 164. See, also, Cochran v. Planning Board of Summit, 87 N. J. Super. 526, 210 A. 2d 99.

So far as the zoning regulation or ordinance of Cass County is concerned, the record shows the plaintiffs' land was zoned, "A" rural and public use district. A publicly owned and operated property is a permitted use in such a district. On two occasions the county board advised the airport authority that the use of the land for the purposes of an airport would not conflict with the zoning regulations. A certificate of occupancy was issued to the airport authority on October 2, 1973. The record establishes the construction of the airport on the plaintiffs' property violated no zoning regulation.

The third category relates to the right or power of the city to condemn the plaintiff's land for airport purposes. The plaintiffs contend an excess of land was condemned and the condemnation was not for a public use. The plaintiffs base this contention upon the minimum land requirements for utility airports established by the Federal Aviation Administration and the fact that approximately 150 acres of the property condemned has been leased for agricultural purposes.

The defendants' evidence established that the area condemned was necessary for the present and future development of the airport. The main runway will be lengthened, a cross-wind runway will be constructed, and additional structures will be added as necessary.

An airport authority has broad powers to include all facilities necessary or convenient in constructing an airport project. § 3-504, R. R. S. 1943. There was no evidence of fraud or bad faith in the determination of the amount of land necessary for the project.

The agricultural lease of the property which is not otherwise required for use at this time is authorized by statute. § 3-504, R. R. S. 1943. See Bowley v. City of

Omaha, 181 Neb. 515, 149 N. W. 2d 417. The lease is subject to reduction in acreage as needed and serves the purpose of maintenance and erosion control as well as providing revenue to the authority.

An additional ground presented in the District Court has been waived upon this appeal. The plaintiffs contended there had been no good faith negotiation by the city prior to the filing of proceedings in eminent domain. Although this issue should have been raised in the condemnation case, it has been litigated and determined adversely to the plaintiffs and can not be relitigated in the condemnation case.

Some mention should be made of the other similar actions which were commenced by the plaintiffs but then dismissed prior to trial. In view of the conclusion which we have reached in this case it is unnecessary to discuss the other proceedings other than to note that it appears there may have been an abuse of the judicial process in one or more of those actions. The plaintiffs were entitled to an adjudication of their rights, but a proliferation of actions in which the same issues are raised is not a proper method of procedure and will not be tolerated.

The judgment of the District Court is affirmed.

AFFIRMED.

NEWSON CONSTRUCTION COMPANY, A CORPORATION, APPELLANT, V. CALVARY ASSEMBLY OF GOD CHURCH, A CORPORATION, APPELLEE, MATTHEWS CO., INC., DOING BUSINESS AS MATTHEWS SCAFFOLD & EQUIPMENT CO., ET AL., INTERVENERS-APPELLEES.

227 N. W. 2d 886

Filed April 17, 1975. No. 39742.

1. **Contracts: Words and Phrases** Construction "in a good and workmanlike manner" is determined according to good usage

and accepted practice by a competent workman in the community.

2. **Contracts.** Where a contract is plain and unambiguous, it will be enforced according to its terms.
3. **Equity: Evidence.** In an appeal in an equity case, proper consideration will be given to the fact that the trial court inspected the premises and that its examination constituted evidence; the findings therefrom will be affirmed if supported by competent evidence in the record.

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

Ledwith & Shokes, for appellant.

Joseph C. Byrne, for appellee.

Heard before WHITE, C. J., MCCOWN, and NEWTON, JJ., COLWELL, District Judge, and KUNS, Retired District Judge.

KUNS, Retired District Judge.

This is an action for the foreclosure of two mechanics' liens claimed in connection with the construction of a church building by the plaintiff for the defendant. The trial court found for the defendant as to the first lien, for the plaintiff as to the second, and for the defendant upon a cross-petition awarding damages against the plaintiff for unskillful performance. The plaintiff appealed. We affirm the decree of the trial court.

The record shows that the appellee, desiring to have a church building constructed, entered into a written contract with the appellant for that purpose. The appellee presented a printed form of construction contract, which provided, inter alia, that the contract should be performed "according to the plans and specifications and in a good and workmanlike manner." The appellant commenced construction and received partial payments as the work progressed. When the structure was partly finished, a severe windstorm caused two walls to collapse and damaged three others. The loss being covered

by insurance, appellee entered into a second contract with the appellant for the necessary rebuilding and reconstruction using a printed form like the first one. The insurance carrier, after the ascertainment of the amount of loss, issued its check payable jointly to the parties; this check was endorsed by the appellee to the appellant, but payment thereon was stopped by the maker for reasons of its own. Disagreements then arose between the parties concerning the sufficiency of performance of both contracts by the appellant. During the trial, the parties presented a large amount of testimony, both oral and photographic, about the work done by the appellant. In view of the fact that the trial court made an extensive examination of the building, it is unnecessary to state such testimony or the conflicts therein at length. It should be noted that none of the witnesses testified there was any misunderstanding of the meaning of the performance requirements or that the parties had adopted conflicting interpretations of the contracts.

The trial court found from the weight of the testimony and its own inspection of the building that the work by the appellant was not performed in a good and workmanlike manner under either contract, but that the appellee had accepted performance of the second contract by the endorsement of the loss check. The appellee was awarded a part but not all the damages claimed in its cross-petition.

Only the assignment of error relating to the construction of the clause requiring performance "in a good and workmanlike manner," requires discussion. The appellant argues that this clause is ambiguous and that under the circumstances of this case should be construed only to require performance in accordance with the appellant's skill.

This clause provides almost exactly the same obligation as to workmanship which this court has held to be implied in construction contracts generally, in the ab-

sence of express statements to the contrary. In Henggeler v. Jindra, 191 Neb. 317, 214 N. W. 2d 925, it was held that the implied duty rests upon a builder to erect a building in a reasonably good and workmanlike manner, and in accordance with good usage and accepted practice in the community. The standard by which performance will be judged is the usage and practice in the community and not merely of an individual contractor. The appellant cannot create an ambiguity merely by claiming that one exists. 17A C. J. S., Contracts, § 294(2), p. 36. Where a contract is plain and unambiguous, it will be enforced according to its terms. Watkins Products, Inc. v. Busch, 184 Neb. 359, 167 N. W. 2d 574.

As previously mentioned, the trial court inspected the building and the physical matters involved between sessions of the trial and before the cause was argued. In the appeal of an equity case, we may and should give proper consideration to the fact that the trial court did make such an inspection and that its examination constituted evidence bearing upon the weight to be given to the testimony of the various witnesses in arriving at the findings and the decree thereon. Wemmer v. Young, 167 Neb. 495, 93 N. W. 2d 837; Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602. The record furnishes ample competent evidence to support the findings and the judgment is affirmed.

AFFIRMED.

KEVIN KUBE, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, MARIE KUBE, APPELLANT, V. KENNETH KUBE, APPELLEE.

227 N. W. 2d 860

Filed April 17, 1975. No. 39780.

Employer and Employee: Infants. There is no private cause of action implied for violation of the Fair Labor Standards Act

and Regulations by employment of a child under 16 years of age to operate a farm tractor of over 20 PTO horsepower.

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

Burbridge & Burbridge and Deutch & Hagen, for appellant.

Jewell, Otte, Gatz & Collins, for appellee.

Heard before WHITE, C. J., BOSLAUGH, and MCCOWN, JJ., and LYNCH and BURKE, District Judges.

BOSLAUGH, J.

This is an action by the mother and next friend of Kevin Kube to recover damages for injuries he sustained in an accident on July 16, 1971. At the time of the accident Kevin was 14 years of age and employed as a farm laborer by his uncle, the defendant. The accident occurred while Kevin was operating a farm tractor of over 20 PTO horsepower on a highway while on his way to a field. The tractor overturned causing severe injuries to Kevin.

The action was brought under the Federal Fair Labor Standards Act as amended and, more particularly, the provisions of the act prohibiting employment of persons under the age of 16 in occupations that have been found and declared to be particularly hazardous for such persons. See 29 U. S. C., c. 8; 29 C. F. R., § 570.71. The petition alleged that the employment of the plaintiff by the defendant was unlawful and in violation of the federal act and regulations, and that the violation of the law was the proximate cause of the accident and the injuries to Kevin. There was no allegation of negligence.

The trial court sustained a general demurrer to the petition and dismissed the action. The plaintiff has appealed.

The federal act provides no civil remedy for this violation of the act but prescribes criminal penalties. The

issue on appeal is whether a civil remedy may be implied.

So far as we have been able to determine there has been only one case that has considered the precise question involved in this case.

In Breitwieser v. KMS Industries, Inc., 467 F. 2d 1391, the United States Court of Appeals, Fifth Circuit, held the Fair Labor Standards Act did not create a private cause of action for the death of a 16-year-old boy who was operating a forklift truck in violation of the provisions of the act and the regulations. There was a dissent in that case, but the petitions for a rehearing and a rehearing en banc were overruled. Certiorari was denied by the United States Supreme Court in 1973, 410 U. S. 969, 93 S. Ct. 1445, 35 L. Ed. 2d 705.

The Breitwieser case was decided upon the theory that the Fair Labor Standards Act contains a comprehensive enforcement scheme including substantial criminal penalties for violations of child labor law. The District Court had based its decision on the ground that Congress did not intend that private damage suits should be an available remedy under the child labor section because civil remedies were provided for certain violations of the act but only criminal sanctions were provided under the child labor section. See, also, Martinez v. Behring's Bearings Service, Inc., 501 F. 2d 104.

This appears to be an area in which the decisions are not uniform. In cases involving other statutes it has been held that a civil remedy may be implied.

Some note should be made of the fact that the law does not prohibit the operation of farm tractors of over 20 PTO horsepower by persons under the age of 16 in all situations. The provisions of the act do not apply to a child employed by his parent or a person standing in the place of his parent on a farm owned or operated by such parent or person. 29 U. S. C., § 213. In other words, Congress has not determined that the operation of a farm tractor of over 20 PTO horsepower by a child 14 years of age is so inherently dangerous as to be pro-

hibited as a matter of public policy in all cases. See Benner v. Evans Laundry Co., 117 Neb. 701, 222 N. W. 630.

We recently noted that exchange of work arrangements are common in this state. Meyer v. State Farm Mut. Auto. Ins. Co., 192 Neb. 831, 224 N. W. 2d 770. We hesitate to adopt a rule that would create a cause of action because Kevin's uncle was the employer where there would be none if Kevin had been injured while employed by his father on his father's farm.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SAMUEL DENNIS CORDELL, APPELLANT.
228 N. W. 2d 273

Filed April 24, 1975. No. 39561.

Trial: Appeal and Error: New Trial. In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon.

Appeal from the District Court for Dodge County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Padley & Dudden, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

NEWTON, J.

Defendant was charged with rape, assault with intent to rape, and kidnapping. Pursuant to a plea bargain he plead guilty to the assault charge. Thereafter, at de-

fendant's request, he was examined for the purpose of ascertaining if he was a sexual sociopath. He was found to be a sexual sociopath and committed for an indefinite period. Later he was found to be no longer a sexual sociopath and received a sentence of 5 to 8 years on the original charge with credit given for the time of incarceration including that as a sexual sociopath.

Defendant assigns as error proceedings connected with his commitment as a sexual sociopath, alleged defects in his arraignment, and excessiveness of the sentence. We affirm the judgment of the District Court.

Examination of the record reveals that defendant's complaints in regard to his arraignment and commitment as a sexual sociopath are groundless and frivolous. Furthermore, no appeal was taken from the sexual sociopath proceeding and defendant has failed to file a motion for new trial. "In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon." State v. Ryan, 188 Neb. 381, 196 N. W. 2d 919.

The sentence is well within that provided by statute and is not excessive.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALONZO ATWATER, APPELLANT.
228 N. W. 2d 274

Filed April 24, 1975. No. 39615.

1. **Criminal Law: Trial: Prosecuting Attorneys.** The conviction herein is reversed for the failure of the trial court to grant a mistrial for the inexcusable conduct of the prosecution in presenting before the jury possible inferences of previous crimes on the part of the defendant.
2. ———: ———: ———. **Defendants must be given fair trials,**

and it is the responsibility of the prosecution to see that each defendant receives one.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded.

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

Paul L. Douglas, Attorney General, and Chauncey C. Sheldon, for appellee.

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

SPENCER, J.

Defendant prosecutes this appeal from a robbery conviction on which he was sentenced to a term of 8 to 25 years in the Nebraska Penal and Correctional Complex. He premises his appeal on two allegations: (1) The trial court committed reversible error in failing to grant a mistrial; and (2) the sentence was excessive. We reverse the conviction herein for the failure of the trial court to grant a mistrial for the inexcusable conduct of the prosecution in presenting before the jury possible inferences of previous crimes on the part of the defendant.

Defendant was charged with participating in an after-closing-hour robbery of a restaurant in Omaha, Nebraska, during which the defendant and his accomplice, armed with a pistol and a box cutter, threatened three employees of the restaurant. One of the employees was beaten and his throat was cut with the box cutter. During the course of the robbery, money was taken from the employees and they were locked in a deep freeze used for storing food and meat. Defendant was placed at the scene by his license number and a description of his vehicle which had been observed parked at the back of the restaurant shortly prior to the robbery.

During the direct examination of officer Alexander relative to photographs, including that of the defendant, shown to witnesses during a photographic lineup, the following testimony was adduced: "BY MR. RYBERG: * * * Q. Did you then obtain some photographs? A. Yes, I did. *I obtained some mug shots.* Q. Okay. Where—well, I'll show you—* * * Q. I'll show you what's been marked Exhibits 1 through 8. Are these the photos which you obtained *from the files*? A. Yes, sir. Q. All right. And I ask you how you happened to select those eight. A. *The photos were selected from the Robbery Detail Office. They have files and books concerning parties that are possible suspects in that type of crime or parties they have known to have committed that type of crime before. They were selected from that location.*" (Italics supplied.)

It is evident that the description of the photos as "mug shots," and that they concerned parties "known to have committed that type of crime before," was sufficient to convey the impression to the jury that the defendant was a known criminal who had previously been arrested for a crime exactly like the one on trial. The officer had testified on two previous occasions in this same case, out of the presence of the jury, about these photographs. In neither of the previous instances did the officer refer to them as "mug shots," although in answer to the question, "Where did you obtain these photographs?" he did say, "They're from the files kept at Central Station. They were located in the Robbery Detail Office."

The prosecution knew that the commission of other crimes by the defendant was irrelevant, improper, and inadmissible in its case. While the evidence of defendant's guilt herein is conclusive, this is a transgression which cannot be condoned. The evidence against the defendant was more than adequate. Possibly in the past we have been too lenient in excusing these transgressions under the guise of harmless error, and the prose-

cution has concluded that anything goes. Defendants must be given fair trials, and it is the responsibility of the prosecution to see that each defendant receives one. Harmless error is intended to cover those inadvertent slips, which occasionally creep into a hotly contested trial, which do not severely prejudice the rights of the defendant. Harmless error should never be applied in those instances where the prosecution deliberately, or because of very careless procedures, injects prejudicial error into the proceedings.

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

REVERSED AND REMANDED.

WHITE, C. J., NEWTON, and BRODKEY, JJ., concur in the result.

STATE OF NEBRASKA, APPELLEE, V. RICKY D. CUNNINGHAM, APPELLANT.
228 N. W. 2d 275

Filed April 24, 1975. No. 39698.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of grand larceny upon a plea of guilty and sentenced to imprisonment for 1 year. He has appealed and contends the sentence was excessive. A presentence report did not accompany the rec-

ord. However, the defendant's brief contains a statement of facts accepted by the State.

The theft occurred on January 10, 1974. The defendant was employed by the Nebraska Furniture Mart and participated in the larceny of a color television set from his employer. The television set was placed in the defendant's car and it appears that he intended to keep the set.

The defendant was 20 years of age, married, and the father of two children at the time of sentencing. He had been released on bond during the pendency of the case and had found other employment.

Although the record does not show a previous conviction for felony, the defendant was placed on probation for burglary in California when he was 13 years of age and his record includes a number of arrests. The sentence imposed was the minimum provided by law. § 28-506, R. R. S. 1943.

We find nothing in the record that required the trial court to grant probation in this case. There was no abuse of discretion. The judgment is affirmed.

AFFIRMED.

NEAL C. WILLMS, APPELLEE, V. NEBRASKA CITY AIRPORT AUTHORITY, APPELLANT.
228 N. W. 2d 276

Filed April 24, 1975. No. 39719.

1. **Airports: Administrative Law: Budgets.** Full compliance with the requirements of the Nebraska Budget Act, sections 23-921 to 23-933, R. R. S. 1943, is mandatory and jurisdictional, and a budget of an airport authority adopted without full compliance with those requirements is void, and may be set aside in an action brought under section 23-930, R. R. S. 1943.
2. **Political Subdivisions: Administrative Law: Budgets: Attorneys at Law: Fees.** Where an action is brought pursuant to section 23-930, R. R. S. 1943, the trial court is without authority to

award the plaintiff an attorney's fee or to charge an award of attorney's fees as costs against the defendant.

Appeal from the District Court for Otoe County: WILLIAM F. COLWELL, Judge. Affirmed as modified.

Richard R. Hoch of Hoch & Steinheider, for appellant.

Daniel J. Duffy of Cassem, Tierney, Adams & Henatsch, for appellee.

Heard before SPENCER, BOSLAUGH, and BRODKEY, JJ., and HASTINGS and CLARK, District Judges.

BRODKEY, J.

This case involves an interpretation of the Nebraska Budget Act, being sections 23-921 to 23-933, R. R. S. 1943. The plaintiff, Neal C. Willms, filed this action against the defendant, Nebraska City Airport Authority, under the provisions of section 23-930, R. R. S. 1943, praying that the fiscal 1973 budget of the defendant be set aside as having been adopted in violation of the Nebraska Budget Act. The case was tried to the court, which on May 20, 1974, entered judgment in favor of the plaintiff. The court declared the defendant's budget to be "void and without effect"; declared the levy made under the budget to be "void"; and ordered "all monies now received, or that may hereafter be received by either the City Treasurer of Nebraska City, Nebraska, or the County Treasurer of Otoe County, Nebraska, by reason of this levy made on behalf of the Defendant shall be by them distributed as provided by law and the order of this court * * *." The costs of the action were taxed to the defendant. At a subsequent hearing, the court awarded the plaintiff an attorney's fee for his attorney in the sum of $800, "the same to be charged as costs in this action to be paid by defendant." The defendant thereafter perfected its appeal to this court. As its principal assignments of error in this appeal, defendant alleges that the trial court erred in determining that

the defendant was subject to the provisions of the Nebraska Budget Act, and in determining that strict compliance by the defendant with the provisions of that act was required in view of the fact that a public hearing had been held by the Nebraska City council on its budget which included defendant's budget as provided by law. It also claims the court erred in awarding an attorney's fee for plaintiff's attorney and in taxing that award as costs to the defendant.

Before discussing the facts of the case, it will be helpful to note some of the pertinent provisions of applicable statutes. We first note the purpose of the Legislature in enacting the Nebraska Budget Act in 1969. This is clearly set out in section 23-921, R. S. Supp., 1972, as follows: "The purpose of this act is to *require governing bodies* of this state to which this act applies to *follow prescribed budget practices and procedures* and *make available* to the public *pertinent information* pertaining to the financial requirements and expectations of such governing bodies *so that intelligent* and informed *support, opposition, criticism, suggestions, or observations* can *be made by those affected*; * * *." (Emphasis supplied.) Section 23-922, R. S. Supp., 1972, provides: "As used in this act, unless the context otherwise requires: (1) Governing body shall mean, in the case of a city, the council; * * *; in the case of an airport authority, the airport authority board; * * *." Section 23-923, R. S. Supp., 1972, provides: "Each governing body shall prepare in writing and file with its secretary or clerk, in the year of its organization and each year thereafter, not later than the first day of August of each year on forms prescribed and furnished by the auditor following consultation with representatives of such governing bodies or as otherwise authorized by state law, a proposed budget statement containing the following information, except as provided by state law: * * *." The provisions for a hearing on the proposed budget, and the specific procedures to be followed, are set out in section

23-925, R. S. Supp., 1973, as follows: "Each governing body, after the filing of the proposed budget statement with its secretary or clerk, shall each year conduct a public hearing on such proposed budget statement. *Notice of place and time of such hearing, together with a summary of proposed budget statement, shall be published at least five days prior to the date set for hearing, in a newspaper of general circulation within the governing body's jurisdiction* or by direct mailing of the notice to each resident within the community; Provided, that when the total operating budget, not including reserves, does not exceed ten thousand dollars per year, the proposed budget summary may be posted at the governing body's principal headquarters. After such hearing, the proposed budget statement shall be adopted, or amended and adopted as amended, and a written record shall be kept of such hearing. The amount to be received from taxation shall be certified to the levying board after the proposed budget statement is adopted, or is amended and adopted as amended, and if the levying board shall represent more than one county, a member or representative of the governing board shall appear and present its budget at the hearing of each county in which is located a major area of the county affected by its budget. If the adopted budget statement reflects a change from that shown in the published proposed budget statement, a summary of such changes shall be published within twenty days after its adoption in the manner provided in this section, but without provision for hearing, setting forth the items changed and the reasons for such changes." (Emphasis supplied.) The procedures to be followed after the hearing on the budget are detailed in section 23-927, R. S. Supp., 1972, which reads as follows: "After publication and hearing thereon and within the time prescribed by law, each governing body, except as provided in section 79-2210, shall file with and certify to the levying board on or before August 15 and file with the auditor, a copy

of the adopted budget statement, together with the amount of the tax to be levied. Proof of publication shall be attached thereto. The governing body shall certify an amount of tax to be levied by the levying board, which levy shall not exceed the maximum levy prescribed by state law; Provided, the governing body, in certifying the amount to be so levied, may make allowance for delinquent taxes not exceeding five per cent of the amount to be levied, plus the actual percentage of delinquent taxes for the preceding tax year. Except for such allowance, a governing body shall not certify, nor a levying board levy, an amount of tax greater than the amount determined under section 23-924."

The statutory provisions authorizing a taxpayer to contest the validity of the budget statement adopted by the governing body are contained in section 23-930, R. R. S. 1943: "A taxpayer upon whom a tax will be imposed as a result of the action of a governing body in adopting a budget statement, as herein required, may contest the validity of the budget statement so adopted by the governing body by filing an action in the district court of the county in which the governing body is situated. Such action shall be based either upon a violation of or a failure to comply with the provisions and requirements of this act by the governing body. In response to such action the governing body shall be required to show cause why the budget statement should not be ordered set aside, modified or changed. The action herein authorized shall be tried to the court without a jury and the same shall be given priority by the district court over other pending civil litigation, and by the Supreme Court on appeal, to the extent possible and feasible to expedite a decision therein. Such action shall be filed within thirty days after the adopted budget statement is required to be filed by the governing body with the levying board. If the court finds that the governing body has violated or failed to comply with

the requirements of this act, the court shall, in whole or in part, set aside, modify, or change the adopted budget statement, tax levy, or mill rate, as the justice of the case may require.

"The remedy provided hereby shall not be exclusive but shall be in addition to any other remedy provided by law."

Two other statutes, not part of the Nebraska Budget Act, but contained in the City Airport Authorities Act, should be noted. Section 3-503(3), R. S. Supp., 1973, provides, among other things: "All obligations of such city for the payment of money to an authority incurred in carrying out the provisions of this act shall be included in and provided for by each annual budget of such city thereafter until fully discharged." Also, section 3-504, R. S. Supp., 1973, which sets out the powers of an airport authority, provides: "Any authority established under the provisions of this act shall have power: * * * (12) To certify annually to the governing body of the city the amount of tax to be levied for airport purposes, which the authority requires under its adopted budget statement to be received from taxation, *not to exceed one mill* on the dollar upon the assessed valuation of all the taxable property in such city, except intangible property, and the governing body shall levy and collect the taxes so certified at the same time and in the same manner as other city taxes are levied and collected, and the proceeds of such taxes when due and as collected shall be set aside and deposited in the special account or accounts in which other revenue of the authority is deposited; Provided, that an authority in a city of the first or second class shall have power *to certify annually* to the governing body of such a city *an additional amount* of tax to be levied for airport purposes, *not to exceed one mill,* to be levied, collected, set aside, and deposited, as above specified, and if negotiable bonds of the authority are thereafter issued, this power shall continue until such bonds are paid in full.

When such additional amount of tax is first certified, the governing body may then require but not thereafter, approval of the same by a majority vote of the governing body, or by a majority vote of the electors voting on the same at a general or special election. The provisions of this subdivision shall not apply to cities of the metropolitan class; * * *." (Emphasis supplied.) We also note the provisions of section 77-1736.04, R. S. Supp., 1973, providing for automatic refunds by a county of taxes which a court has adjudged and determined are illegal.

With the above statutes as a background, we now examine what transpired in this case. In the course of preparing the fiscal 1973-1974 budget for Nebraska City, the clerk-treasurer of that city, on May 23, 1973, notified the Nebraska City airport authority by letter that the council would appreciate receiving the budget requests of the authority as soon as possible so that they might be included in the general all-purpose levy of the city. Under the Nebraska statutes, above-quoted, the airport authority has the power to levy a one-mill tax on the property within Nebraska City without the vote of the people or the city council but the actual levy is made by the city council after receipt of the certification of the budget from the authority. Following receipt of the letter from the city clerk, the airport authority, on June 5, 1973, posted a notice in three public places that a meeting of the Nebraska City airport authority would be held at 9 p.m., Thursday, June 7, at the fire & rescue building, which meeting would be open to the public. At no time prior to that meeting, held on June 7, 1973, did the authority publish notice in a newspaper of general circulation that there would be a budget hearing held on that date, or showing the amounts of the proposed budget, as required by law. The Nebraska City airport authority adopted its proposed budget on that date, and thereafter certified its budget requirements to the city. That budget did not

include requests for planning funds, but the city clerk added a request for such funds to the budget after oral consultation with the secretary of the airport authority. The city clerk then consolidated the budget submitted by the authority with the budgets from other city boards into the general city budget; and on July 16, 1973, a public budget hearing was held on the consolidated budget, including the requests of the airport authority, before the Nebraska City council, after due publication of notice of such hearing. No members of the airport authority attended that hearing, although two citizens did appear to speak in opposition to the airport authority's request. The Nebraska City council then adopted its budget, which included the exact amounts requested by the airport authority. Following the public hearing, the city clerk-treasurer notified the airport authority that its budget had been adopted by the council at its July 16, 1973, budget meeting. The city's levy included .9 mills on behalf of the airport authority which according to computations would produce tax revenue totalling $13,520. It is to be noted that in making such levy on behalf of the airport authority, the city acted ministerially, as by statute the authority had the power to levy a one-mill tax without the vote of the people or the city council although the city council would have had to give its approval to levy an additional one-mill tax for airport authority purposes.

On September 14, 1973, the plaintiff filed his petition under section 23-930, R. R. S. 1943, of the Nebraska Budget Act, to set aside the airport authority's budget. It should be noted in passing that under that section the burden of proof is placed upon the governing body to show cause why the budget statement should not be ordered set aside, modified, or changed. Upon trial, as previously stated, the trial judge sustained plaintiff's contentions and set aside the budget statement. Defendant has appealed from that judgment.

The record in this case clearly shows that the airport

authority failed to comply with the clear and specific requirements of the Nebraska Budget Act in many respects. In fact, the secretary of the airport authority testified he had never examined the Nebraska Budget Act, nor any law in connection with the certification or budget procedures for an airport authority. The Nebraska Budget Act requires, among other things, that the authority prepare and file with its secretary a proposed budget statement detailing the estimated receipts and expenditures for the ensuing fiscal year. It did not do so. The statute also requires that the airport authority hold a public meeting, where the budget in question exceeds $10,000, at least 5 days after the publication of the details of such proposed budget in a newspaper of general circulation. The airport authority at one of its regular meetings, held on June 7, 1973, considered its budget requirements, made up a proposed budget which it adopted, and certified the budget at the same meeting. The notice of that meeting was posted, not published, 2 days before the meeting, and the notice made no mention of the purpose of the meeting or the details of the proposed budget statement. The proposed budget statement was prepared, adopted, and certified to the city without notice to the public or a public hearing, notwithstanding the Nebraska Budget Act specifically defines the airport authority board as being a "governing body" in the case of an airport. Defendant, however, argues that it "substantially complied" with the requirements of the Nebraska Budget Act, and that the Nebraska law does not require an airport authority to hold a separate public hearing when the city holds the required hearing on its budget and includes the airport authority budget as part of the city's consolidated budget.

The question, therefore, is whether the requirements and procedures contained in the Nebraska Budget Act are mandatory and jurisdictional, or whether substantial compliance will suffice. The trial court held those re-

quirements were jurisdictional. We agree. We are supported in our conclusion by the clear language of section 23-921, R. S. Supp., 1972, of the Nebraska Budget Act, previously referred to, which sets out the purpose of the act: "The purpose of this act is to *require* governing bodies of this state to which this act applies to follow *prescribed* budget practices and procedures and make available to the public pertinent information pertaining to the financial requirements and expectations of such governing bodies so that intelligent and informed support, opposition, criticism, suggestions, or observations can be made by those affected; * * *." (Emphasis supplied.) The act specifically requires "governing bodies," in this case the airport authority board, to hold such a public hearing after legal notice in the manner provided and after notice of the details of the proposed budget has been given, so that intelligent and informed discussion of the budget by those affected can be made. This was not done. The fact that the public was permitted to attend the meeting of the city council at which its budget was adopted would not, in our opinion, satisfy this requirement. It is to be noted that the Nebraska City council had no discretion whatsoever with respect to the airport authority's budget submitted to it in this case. This is made clear in Obitz v. Airport Authority of the City of Red Cloud, 181 Neb. 410, 149 N. W. 2d 105 (1967), where in discussing the statutory status of an airport authority, the court emphasized that city's ministerial duties with respect to the collection of any tax of one mill or less certified to it by an airport authority, and stated as follows: "The Airport Authority is a public corporation and an agency of the city. Its creation is for a public purpose. * * * The authority uses its income from rentals, charges, and sales to maintain and operate its airport. In addition thereto, it is authorized to certify to the city an amount not exceeding one mill on the dollar of the assessed valuation of the property in the city, except intangible property, to aid in the cost of

operating the airport. The city makes the levy, collects the tax, and pays it to the authority as part of its ministerial duties required by law. * * * The amount to be certified to the city to be levied on the tangible property of the city is for the purpose of carrying on the airport facility. * * * It is a part of the funds of the authority and not at any time funds of the city although the city performs the ministerial duty of levying, collecting, and paying the tax to the authority. * * * The tax is in effect that of the authority, a separate entity, a public corporation, and an agency of the city. It is in no sense of the term a city tax, and when the city performs its ministerial functions with reference to its levy, collection, and payment over, the city's responsibility ceases and no obligation remains. * * * The tax for all practical purposes was made by the authority upon the tangible property of the city. The city has no interest in the tax other than to perform its ministerial duties with reference thereto."

The main purpose of the Nebraska Budget Act in requiring a public budget hearing is to guarantee the right to attempt to persuade a taxing body not to levy a tax for an unwanted project. The appearance of citizens before a meeting of the Nebraska City council would not accomplish that purpose, and the airport authority board should not have bypassed the clear requirements of the statute in that regard. The spirit and purpose of the Nebraska Budget Act was not carried out.

The District Court awarded plaintiff the sum of $800 as a fee for his attorney, and in its judgment entry taxed the amount of such award as costs against the defendant. Defendant objects to the award, claiming that there is no statutory authority or uniform practice for such allowance. Strawn v. County of Sarpy, 156 Neb. 797, 58 N. W. 2d 168 (1953); Warren v. Warren, 181 Neb. 436, 149 N. W. 2d 44 (1967). This is undoubtedly true. However, plaintiff seeks to justify the award of attorney's fees on the theory that the services of his attorney

resulted in rescuing or preserving a fund not only for plaintiff's benefit, but also for the benefit of all others in the same class. See, Summerville v. North Platte Valley Weather Control Dist., 171 Neb. 695, 107 N. W. 2d 425 (1961); Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489 (1954). There is evidence that the fund in this case consists of taxes collected by the county treasurer and apparently is still in his hands. Had this action been brought by a taxpayer or taxpayers as a class action for and on behalf of the members of the class to recover a refund of taxes levied without authority of law, as was done in Gamboni v. County of Otoe, *supra,* and if the county been made a party defendant to this action, as was true in the Gamboni and Summerville cases, there is little question but that an award of attorney's fees would have been proper. However, even in that event, the attorney's fees could not have been charged as costs in the action, but would have to be a charge on the fund so created. Allen v. City of Omaha, 136 Neb. 620, 286 N. W. 916 (1939); Summerville v. North Platte Valley Weather Control Dist., *supra.* In this case, however, plaintiff did not bring the action as a class action, but as an individual under section 23-930, R. R. S. 1943, of the Nebraska Budget Act. That statute has no provisions for the payment of attorney's fees to a successful taxpayer. We also point out that in 1972, Gamboni was disapproved insofar as it had approved a class action for a refund of taxes. See Hansen v. County of Lincoln, 188 Neb. 798, 197 N. W. 2d 651 (1972). Subsequent to Gamboni, it was held in State ex rel. Sampson v. Kenny, 185 Neb. 230, 175 N. W. 2d 5 (1970), that a suit cannot be maintained by one taxpayer on behalf of himself and others similarily situated to recover back taxes alleged to have been illegally assessed, but each taxpayer must bring action on his own behalf. We also note that section 77-1736.04, R. S. Supp., 1973, effective September 2, 1973, now provides for an

automatic refund to a taxpayer of taxes which by judgment or final order of any court of competent jurisdiction have been adjudged or determined to be illegal. It is not even necessary that the taxpayer file a claim therefore.

However, even if this were a class action which resulted in the creation of a fund for the benefit of a class of persons, under the facts of this particular case it would not be legally possible to award plaintiff an attorney's fee. The fund out of which the award of attorney's fees would have to be paid is in the hands of the county treasurer of Otoe County, Nebraska, who was not made a party to this action. Nor has the fund itself, consisting of taxes collected under the levy in question, ever been within the jurisdiction of the court. Obviously, therefore, the court would have no jurisdiction to charge that fund with the payment of attorney's fees, or to order the county treasurer of Otoe County to do so. This distinguishes the case from Summerville and Gamboni, even if otherwise applicable, where each county treasurer himself was a party defendant in the respective lawsuits. For all these reasons, we conclude that the District Court was without authority to award plaintiff an attorney's fee in this case, or to charge an award of attorney's fees as costs against the defendant. Furthermore, even if an award of attorney's fees were permitted because of the creation of a fund, in this case the court would be without jurisdiction to make such award a charge against the fund of collected taxes in the hands of the county treasurer who was not a party to the action.

We modify the judgment of the District Court and deny the award of attorney's fees to plaintiff. Our decision on this issue is not to be construed as in any manner abrogating or affecting any private contract, arrangement, or understanding between the plaintiff and his attorney with regard to the payment of attorney's fees.

In all other respects, the judgment of the District Court is affirmed.

AFFIRMED AS MODIFIED.

MARY KAY RIEDERER, APPELLANT, V. JEROME SICIUNAS, APPELLEE.
228 N. W. 2d 283

Filed April 24, 1975. No. 39734.

1. **Paternity: Parent and Child: Infants.** Section 13-102, R. R. S. 1943, when construed together with section 42-364, R. R. S. 1943, gives statutory authority for the court to modify the amount of child support in a paternity action decree because of a change in circumstances of the parties or in the best interests of the children.
2. **Judgments.** A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition.

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

Jerrold L. Strasheim of Venteicher & Strasheim, for appellant.

Robert P. Miller, for appellee.

Heard before SPENCER, BOSLAUGH, CLINTON, and BRODKEY, JJ., and RONIN, District Judge.

RONIN, District Judge.

This is an application brought by the plaintiff, Mary Kay Riederer, on June 29, 1973, for an increase in an amount of child support payments from the defendant, Jerome Siciunas, due to a change of circumstances. Plaintiff had previously in this case filed a paternity action against the defendant in the District Court for Douglas County, Nebraska. The defendant was adjudged therein to be the father of the plaintiff's minor child born out of wedlock, and on March 29, 1963, a judgment and decree was entered ordering the defendant to pay

the sum of $40 per month for the support of said child together with certain birth-connected expenses. The record discloses that the defendant has paid all sums then due under the provisions of the decree.

After a hearing on said application, the trial court denied plaintiff's application for increase in the amount of child support for her said child. Plaintiff's motion for a new trial was overruled and plaintiff appeals from that order.

The trial court in its judgment order gave its reason for dismissal of the application as follows: "Section 42-312 relating to Divorce or Annulment specifically provides for revising or altering the Decree if the circumstances of the parties change or the best interests of the children demand. This is a special statutory proceeding. No such provision is found in Chapter 13 and, accordingly, the Court finds that the Application should be and is denied."

The primary issue herein is whether the court has the authority to modify the amount of child support in a paternity action decree because of a change of circumstances.

We are in agreement with the contention of the defendant that Chapter 13, R. R. S. 1943, which generally provides for "Children Born Out of Wedlock," conflicts with the common law rule and must be strictly construed. Timmerman v. Timmerman, 163 Neb. 704, 81 N. W. 2d 135 (1957).

The plaintiff relies on section 13-102, R. R. S. 1943, as expressly providing statutory authority for the granting of her application. This section provides in part as follows: "The father of a child whose paternity is established either by judicial proceedings or by acknowledgment as hereinafter provided shall be liable for its support *to the same extent and in the same manner* as the father of a child born in lawful wedlock is liable for its support." (Emphasis supplied.)

The trial court in its order made reference to section

42-312, R. R. S. 1943, which authorized the modification of decrees in divorce or annulment actions if the circumstances change or the best interests of the children demand such change. It is to be noted that the above section cited by the trial court was repealed prior to the filing of plaintiff's application herein by Laws 1972, L. B. 820, § 35. However, this section was replaced by similar provisions enacted in section 42-364, R. R. S. 1943, and this discrepancy would make no difference in the reason given by the trial court for its ruling.

Plaintiff also relies on two cases of this jurisdiction to support her contention. In Brown v. Echtenkamp, 130 Neb. 297, 264 N. W. 757 (1936), the trial court modified its original support decree to reduce the amount of the payments. This court approved of this procedure. The court's syllabus states: "It would be proper in any case in which the trial court was clearly convinced of the utter inability of the defendant to furnish a bond, or to meet the payments fixed, to grant a defendant some modification of the terms thereof." The defendant points out that this case was brought under the previous statute which was different than section 13-102, R. R. S. 1943, the one involved in this action. See § 9-106, Comp. St. 1929. There are differences in these statutes but there is one pertinent similarity. Neither statute specifically allows for a subsequent modification of a support decree in a paternity action, which procedure was affirmed in Brown v. Echtenkamp, *supra*.

Plaintiff also cites Taylor v. Stull, 86 Neb. 573, 125 N. W. 1105 (1910), in support of her contention that the court has the authority to modify the payments of a support decree in a paternity action. In the Taylor case the trial court modified its original judgment order in a paternity action by prescribing a different rate and time of payment of child support. The judgment of the trial court was affirmed but is in reality dicta on this legal proposition as this was not an issue in the case. One of the main issues was whether an execution could

be issued on the judgment, as the only express statutory remedies to enforce the paternity judgment were by imprisonment or by bringing suit on the defendant's bond. In affirming the action of the trial court, which had issued a writ of execution to enforce the judgment, this court said: "If anything had occurred which should excuse defendant from making further payments, as required by the judgment, his release could only be obtained by a further order of the court. That the court has power, upon a proper showing, to make such an order cannot be doubted." Our court then upheld the execution process on the paternity judgment notwithstanding the fact that there was no provision for it in the (bastardy) act.

This court holds that the general powers given the court in section 13-102, R. R. S. 1943, are broad and inclusive, and when correlated with section 42-364, R. R. S. 1943, are sufficient for it to be authorized to modify the amount of child support in a paternity action if there has been a change of circumstances. To hold otherwise the court would be prevented from treating the liability for a child born out of wedlock in the same manner and extent as the liability for support by the father of a child born in wedlock.

The defendant asserts the defense of res judicata and states in his brief that there is no Nebraska authority on this question. The authorities cited by the defendant are to the effect that a final adjudication in a paternity proceeding against a man being charged with being a father of an illegitimate child is a bar to a subsequent prosecution on the same charge. See Annotation, 37 A. L. R. 2d 836. The cases cited therein generally refer to situations where the defendant is found to be not the father of the illegitimate child after trial, and then is subjected to a different civil action by a guardian ad litem of the child, or the child's mother. Other actions involve a compromise settlement in which the defendant expressly denies being the father of a child but agrees

to make certain specified payments in a judgment order expressly approved by a court. It is generally held in those cases that such judgments are a bar to a subsequent paternity action involving the same issues. This is not the situation in the case before us. The defendant herein was found to be the father of the illegitimate child after trial. There was no compromise settlement or release of any kind given by plaintiff. This court holds that the defense of res judicata is not valid under the facts of this case.

Plaintiff further contends that if section 13-102, R. R. S. 1943, is interpreted in such a manner that subsequent modification of a child support decree is not allowed in this action when warranted by changed circumstances, then such statutory provisions are an unconstitutional denial of the equal protection of the laws secured to all persons under the Fourteenth Amendment to the United States Constitution. By reason of our interpretation of the foregoing statute it is not necessary to consider the constitutional question raised by plaintiff.

The trial court granted the parties a full hearing on plaintiff's application which included the issue on whether any change in circumstances warranted an increase in the amount of the child support. This issue is properly before the court even though the trial court did not rule on it.

The essential facts in the record in this case on this issue are these: At the time of the hearing on plaintiff's application, the defendant had been employed as a dock supervisor for a trucking company for a period of approximately 5 months with a gross income of $1,000 a month, with a take-home pay of approximately $770 each month. His income for the year 1973 amounted to $8,030.69. The defendant purchased an equity in two rental properties one of which he had attempted to sell and on which he took a small loss. The other property is a duplex which he has recently purchased. The de-

fendant testified he had not owned the duplex property long enough to know how he was going to come out on his investment in which he had an equity of about $1,500. This court is also of the opinion and finds that the defendant should not be charged with any income from either of his two rental properties at this time in determining the amount of child support herein, although this may later be an income factor after he has rented the duplex for a longer period of time.

The defendant was 36 years of age at the time of the hearing on January 3, 1974. He married his present wife prior to the original trial of this action on February 4, 1963. The defendant's wife is employed as a part-time bookkeeper and contributes to the household expenses. The defendant has two children by this marriage, a son born in 1963 and a daughter born in 1965, and his marriage has the appearance of being a stable one.

The defendant and his wife are joint owners of their home and automobile both of which are mortgaged. The value of the home was fixed between $20,000 and $22,000 and the mortgage is $12,000. Various expenses of the defendant were placed in the record and it was his testimony that he had approximately $22.46 each month left out of his earnings to buy groceries. The support order of $40 per month for the subject child of this action has been regularly paid.

The plaintiff was earning about $30 a week at the time of the original trial and lived with her parents. She later attended college and secured her Master's Degree. Her present employment is as a social worker for the Nebraska Psychiatric Institute with a yearly salary of $12,200 and a take-home pay of $274.15 every other week. Plaintiff has never married and the subject child resides with her. Plaintiff purchased her home in 1972 for $20,000 which is subject to two mortgages totaling around $14,500. Her only other income is the $40 per month support from the defendant. Her ex-

penses incurred directly for her child are substantially in excess of the amount paid by the defendant.

However, it is still incumbent upon the plaintiff to prove by a preponderance of the evidence that the defendant has the present financial ability to pay more child support by reason of the change in circumstances of both parties. The question at this time is a close one. We hold that this burden of the plaintiff has not been met, and that her application to increase the amount of child support should be dismissed on the merits and not for the reason given by the trial judge.

A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. Elander v. Kellogg Grain Co., 174 Neb. 782, 119 N. W. 2d 522. We affirm the judgment of the trial court.

AFFIRMED.

KENNETH M. DONAHOO ET AL., APPELLANTS, V. HOME OF THE GOOD SHEPHERD OF OMAHA, INC., A CORPORATION, APPELLEE.

228 N. W. 2d 287

Filed April 24, 1975. No. 39762.

1. **Contracts: Evidence.** Where a contract, after preliminary negotiations and oral conversations, is reduced to writing that is clear and unambiguous, there is a conclusive presumption that the parties have reduced their entire engagement to writing, and that any parol agreement is merged in the written contract, and that testimony of prior or contemporaneous conversations to alter, contradict, or explain such writing is incompetent to vary the terms of the written instrument.
2. **Contracts: Deeds: Vendor and Purchaser.** In determining whether a sale is by the acre or in gross, the intention of the parties is controlling, as in other contracts, and must be given effect.
3. **Contracts: Deeds: Evidence: Vendor and Purchaser.** If there is ambiguity in the contract as to whether a sale is strictly in gross or one by the acre, extrinsic evidence, such as the

circumstances which surround the parties, and their situations, may be admissible as an aid in interpreting the contract to ascertain the intention of the parties.

4. **Contracts.** The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of their contract, and should be given great if not controlling influence, and the courts should ordinarily enforce such construction.
5. **Contracts: Vendor and Purchaser.** A contract of sale by the tract or in gross is one wherein boundaries are specified but quantity is not specified or, if specified, the existence of exact quantities specified is not material; each party takes the risk of the actual quantity varying to some extent from what he expected it to be.
6. ———: ———. A contract may be originally one by the acre and subsequently so modified as to be turned into a sale in gross.
7. **Principal and Agent: Fees.** The payment of fees alone is not enough to create an agency relationship.
8. **Principal and Agent.** An agency relationship exists only when there has been a manifestation of consent that one person shall act on behalf of another and is subject to that person's control.
9. **Brokers: Property: Contracts: Vendor and Purchaser.** Section 36-107, R. R. S. 1943, requires that a sale of real estate made through a broker be in writing between the broker and the landowner.
10. **Trial: Appeal and Error.** This court will consider the fact that the trial court saw and heard the witnesses, and observed their demeanor, and will give great weight to the trial court's judgment as to credibility.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Michael McCormack and Michael J. Mooney of McCormack, Cooney & Mooney, for appellants.

Charles R. H. Kluver and John H. Kellogg, Jr., of Hotz, Hotz & Kellogg, for appellee.

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

WHITE, C. J.

This is an action by the plaintiffs and appellants, Kenneth M. and Nelsie R. Donahoo, in which they seek an abatement of the purchase price of real estate purchased from the defendant, Home of the Good Shepherd of Omaha, Inc. (hereinafter referred to as the "Home"), on the theory that there was a shortage of acres in an alleged contract calling for the delivery of approximately 215 acres of land. The defendant cross-petitioned for the balance due on the purchase price of $376,250. The District Court resolved all the issues presented in favor of the defendant Home, dismissed the plaintiffs' petition, and entered judgment in favor of the defendant Home for the balance of the purchase price due under the contract of sale. We affirm the judgment of the District Court.

The first and fundamental question presented is whether the contract entered into was a sale by the acre, or a purchase in gross. The land involved is known as the "Shepherd Hills" owned by the defendant and originally purchased by it to build a home for girls. The Home changed its plans and abandoned the project, and was interested in selling this large tract of land, a portion of which borders on the Elkhorn River. Donahoo, the plaintiff purchaser, had been raised in the vicinity of the Shepherd Hills and had lived on the adjoining property for the first 16 years of his life. Donahoo had maintained a continuing interest in the Shepherd Hills vicinity and had recently purchased from his mother a tract of land adjoining Shepherd Hills.

The Home had acquired the property in 1965 for the sum of $160,000. The purchase agreement the Home had entered into in 1965 and the deed to it made no reference to acreage or the number of acres. The descriptions used in the purchase agreement and deed when the Home acquired the property are *identical* to the legal description in the purchase agreement, land contract, and deed from the Home to Donahoo.

A Mr. Mel Strong, "on his own," and without a listing contract or agency agreement with the Home, learned of the Home's plans to sell the property, contacted the plaintiff Donahoo, and secured from him an offer to purchase the property. It is undisputed that there was no listing agreement between the Home and Strong, or the Harney Realty Company of which he was sole proprietor, and that Strong had merely gone out and located Donahoo as a prospective purchaser since he knew that Donahoo owned the adjoining property and had expressed an interest in the Shepherd Hills area. This initial offer procured by Strong, dated April 26, 1972, stated that the purchaser recognizes that he is paying for 215 acres and that the purchase price would be $322,500. This offer was presented to the Home and was turned down. On November 11, 1972, the Home entered into an *exclusive* listing agreement with the N. P. Dodge Company to sell the property. The listing agreement stated that the property was listed at $2,150 per acre and that there were approximately 216 acres. It appears that the reason the listing agreement recited these figures was that the tax records of the County of Douglas, Nebraska, showed 215.16 acres and the Home itself, having purchased the property in gross, had no independent knowledge of the exact amount of acreage. The N. P. Dodge Company, acting through Jerry Hassett and Wallace Wiig, their agents, contacted Donahoo about purchasing the property and Wiig took out a proposed purchase agreement to Donahoo for signature on November 28, 1972. However, Donahoo informed Wiig on November 29, 1972, that *he was going to submit an offer through Mr. Strong of the Harney Realty Company.* Prior to this time Strong had attempted to get a listing on the property from the Home but had been informed by it that the N. P. Dodge Company had an exclusive listing. Strong, on behalf of Donahoo, contacted Hassett of N. P. Dodge and submitted a purchase agreement dated November 29, 1972. It is true that this

Strong agreement initially stated that the land contained approximately 215 acres. Hassett of N. P. Dodge, in reviewing the terms and conditions of this offer, and knowing how the property was conveyed previously, made an effort to locate a survey. He was unable to find one and after discussion with counsel, it was decided that the Home should not make any representation as to acreage. Hassett called Strong and advised him that the reference to acreage must be stricken and requested that an addendum be forwarded showing that the purchase was for the property legally described, without reference to acreage. After receiving an addendum still referring to an acreage Hassett again called Strong rejecting any reference to specific acreage. Strong did not answer.

In the meantime, and before the acceptance of this offer of November 29, 1972, it became necessary to extend the acceptance date of the offer, since the Home had to discuss with and secure the approval of its Provincial Council.

The Council approved the sale for $376,250 and delegated the details to one Sister Gabriel. After discussing the purchase agreement with Hassett of N. P. Dodge, the reference to acreage in the purchase agreement and the addendum were crossed out and initialed by Sister Gabriel. In addition, a statement was added to the acceptance clause of the purchase agreement stating that: "We accept the offer of $376,250 *for the property legally described herein.*" (Emphasis supplied.) This statement was initialed by Donahoo. Hassett told Strong that the Home would not be pinned down to representing the number of acres. In any event, Strong took the purchase agreement to Donahoo and Donahoo initialed the above-described changes in the purchase agreement and the statement addendum. This purchase agreement of November 29, 1972, as changed, was executed by both parties. Donahoo then decided that he wanted to purchase the property on land contract in-

stead of a cash sale, and so a new purchase agreement, dated January 26, 1973, was drawn up by Strong to effectuate Donahoo's wishes, and was delivered to Hassett of N. P. Dodge. *This new and last purchase agreement* noted the new mode for the payment of the land, and it made no reference to the acreage in the property. The subsequent land contract executed pursuant to the new purchase agreement also made no reference to the acreage in the property and referred to the sale of "property legally described herein."

After the second purchase agreement, changing the financial terms of the sale, but before the signing of the final land contract incorporating the terms of the second purchase agreement, Donahoo delivered the abstract of the property to his attorney and received an opinion from the attorney stating that: "*The original Government parcels appear to be fractional and because of the fact that the land adjoins a river, the acreages cannot be accurately ascertained from the abstract. If the acreage is material, it should be determined by a recent survey.*" (Emphasis supplied.) Again, Donahoo relying on Strong asked him to see if there was a recent survey. Strong investigated and replied that there was none. Donahoo did nothing further in regard to a survey.

The sale was closed with counsel of both parties present. A deed, executed pursuant to the purchase agreement and the land contract, was exhibited at the closing, and it made no reference to acreage in the property. The deed, exhibit 48, was held in escrow by the attorney for the Home pending Donahoo's completion of payments. After the closing of the sale and the placing of the deed in escrow, Donahoo in subsequent dealings with the property, had a survey made, and discovered the acreage shortage.

In addition to the above basic facts, the trial court, sitting in equity, liberally permitted a large volume of testimony touching upon oral conversations, understand-

ings, and opinions during the long period of negotiations, initialing, changing, and the final consummation of the written contract. Much of this conflicting testimony concerns the status of Strong with relation to the Home and Donahoo. In our decision, we are forced, in the interest of brevity to refrain from a detailed recital of the point-counterpoint-and conflicting testimony in these areas. As we shall see, much of it was perhaps inadmissible and irrelevant to the issues involved in this case because of the basic rule that where a contract, after preliminary negotiations and oral conversations, is reduced to writing that is clear and unambiguous, there is a conclusive presumption that the parties have reduced their entire engagement to writing, and that any parol agreement is merged in the written contract, and that testimony of prior or contemporaneous conversations to alter, contradict, or explain such writing is incompetent to vary the terms of the written instrument. Transportation Equipment Rentals, Inc. v. Mauk, 184 Neb. 309, 167 N. W. 2d 183; Ford v. Luria Steel & Trading Corp., 192 F. 2d 880; Parsons Constr. Co. v. Metropolitan Utilities Dist., 170 Neb. 709, 104 N. W. 2d 272.

The plaintiffs' contentions are overlapping. Nevertheless, they will be considered separately. The plaintiffs first contend, in substance, that the contract for sale was a sale by acre and not one in gross for the reasons that the tract was listed and negotiated by the acre; that it was represented to the plaintiffs by Mel Strong to contain 215 acres more or less an acre or two; that it was represented by the defendant's attorney to contain 215 acres; that the purchase price in the land contract is an exact multiple of $1,750 per acre times 215 acres; and that the minutes of the meetings of the Provincial Council of the Home show a decision to accept an offer of $1,750 per acre.

On this crucial issue, the parties cite many different authorities, and applicable principles of law, but their

attempt to colormatch cases on the facts is unrewarding, and the principles of law cited, while accurate, depend upon a basic decision as to the significance of the underlying facts. A basic rule is that in determining whether a sale is by the acre or in gross, the intention of the parties is controlling, as in other contracts, and must be given effect. 55 Am. Jur., Vendor and Purchaser, § 130, p. 605; Hart v. Harding, 106 Neb. 428, 184 N. W. 46. Of course, where there is ambiguity in the contract as to whether a sale is strictly in gross or one by the acre, extrinsic evidence, such as the circumstances which surround the parties, and their situations, may be admissible as an aid in interpreting the contract to ascertain the intention of the parties. See 55 Am. Jur., Vendor and Purchaser, § 130, p. 605.

The thrust of plaintiffs' argument is to put emphasis and controlling weight upon the formulation of the original purchase agreement by N. P. Dodge and the representations and "understandings" of Strong. They argue that at that point all the parties considered the contract by the acre, and that the contract was drawn accordingly. However that may be, it is incontestable that the specific acreage provision in the offer was stricken out and initialed by Sister Gabriel and Donahoo. This understanding in the contract, in clear and precise terms, states that the sale was of the plot of ground for "property legally described herein." This description contained no reference to acreage. The evidence shows that the Home insisted that the acreage provision be struck because the Home itself was uncertain of the acreage and had received the property as "legally described" and without reference to acreage. The evidence further shows an insistence that the purchaser, Donahoo, be advised of this change or representation, and that he be required to assent thereto by initialing the change himself, which he did. We feel that no clearer intention could be mutually intended by the parties that the sale was in gross. But the reaffirmation

of the assent to this condition appears even stronger when we consider that the Home was willing to enter into a new purchase agreement changing the financial arrangements. This was accomplished according to Donahoo's wishes and again the new purchase agreement contained no reference to acreage and affirmatively described it as being sold as "legally described herein." This written purchase agreement referred to provided that the offer was based upon the personal inspection and investigation of the premises and not upon any representation by the seller or the seller's agent. It also appears, as is common with the sale of riverfront and rolling hill property, that the acreage was difficult to ascertain and in this particular situation appears still uncertain because one survey was to the high bank of the Elkhorn River rather than to the thread of the stream. In any event, Donahoo after the new purchase agreement, received the abstract of title and had it examined by his own lawyer. His own lawyer reported that the original government parcels "appear to be fractional" and stated "because of the fact that the land adjoins a river, *the acreages cannot be accurately ascertained from the abstract.* If the *acreage is material,* it should be determined by a recent survey." (Emphasis supplied.) Much emphasis is placed upon the tax record acreage. The unreliability of precise acreage records with respect to accretion land and survey therein is well-known in the real estate profession. However that may be, Donahoo was specifically warned of the danger of such an acreage record, and told to find out, if interested, what the exact acreage was. He failed to do so and proceeded to sign the land contract. Under these circumstances there is an entire lack of proof that there was any ambiguity or failure of the parties to have a meeting of the minds as to the exact nature of the sale.

Any fraud or ambiguity in the preliminary negotiations and bargaining representations was specifically

and categorically eliminated by affirmative action of the parties. Here the interpretation of the contract is clear from the conduct of the parties and the actions they actually took during the process of its formulation. The intent to sell in gross is further reaffirmed by the Home in its conduct while subsequently acting upon the original purchase agreement that had the acreage provision deleted from it. Donahoo relied upon the changed terms in the new purchase agreement and failed to secure a survey after being advised to secure one, prior to his signing the final land contract. Closely parallel here is the fundamental rule that the interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of their contract, and should be given great if not controlling influence, and the courts should ordinarily enforce such construction. Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448; McLeod v. Crawford, 176 Neb. 513, 126 N. W. 2d 663. A contract of sale by the tract or in gross is one wherein boundaries are specified (as here) but quantity is not specified or, if specified, the existence of exact quantities specified is not material; each party takes the risk of the actual quantity varying to some extent from what he expects it to be. 55 Am. Jur., Vendor and Purchaser, § 127, p. 601. A contract may be originally one by the acre and subsequently so modified as to be turned into a sale in gross. See Annotation, 1 A. L. R. 2d, § 6, p. 18. See, also, O'Shea v. Hampton, 127 Neb. 60, 254 N. W. 670; Sibley v. Hayes, 96 Tex. 78, 70 S. W. 538; Annotation, 1 A. L. R. 2d, p. 18 (footnote 13). We come to the conclusion that there was no ambiguity in the land contract signed and executed by the parties, and that it provided for a sale in gross. There is no merit to the plaintiffs' contention.

In an overlapping argument, the plaintiffs next assert, in effect, that the Home's actions and representations constituted fraud in the inducement of the con-

tract. Again, the thrust of this argument is an emphasis upon the testimony of Strong, concerning his representations to Donahoo and his conversations and the opinions in connection with the negotiations with N. P. Dodge, who did represent the Home under a listing contract. Again, we point out, as we have previously herein decided, assuming that N. P. Dodge or the Home in the negotiations made statements as to acreage to Donahoo, or his agent, that they were effectively corrected and agreed to by Donahoo and could not have been relied upon by him in signing the final land contract. We have already explored the significance of the assertion that Donahoo relied upon the acreage statements in the tax records. Here applicable is what this court said in In re Estate of Robinson, 105 Neb. 1, 178 N. W. 840: "'* * * * Each tract is definitely limited, and any surveyor could easily ascertain its contents; and the plaintiff might have known (ascertained) the quantity of land contained within the limits described, before he concluded his purchase, by taking proper measures. If, to avoid any trouble, he chose to rely on the estimation of the defendant, he should have taken care that an express convenant was introduced into the deed.'" The deed was exhibited at the closing conference, with counsel present, and Donahoo, through his counsel, at that time could have insisted that a warranting covenant as to acreage be placed therein.

Despite the almost conclusive negative evidence, plaintiffs continue to assert that Strong was an agent of N. P. Dodge and that he misrepresented the acreage in order to secure the deal. They assert strongly that the payment of a commission by N. P. Dodge to Strong, of itself, is enough to create an agency relationship. We disagree. We have said before that the payment of fees is not enough to create an agency relationship. Anderson v. Valley Feed Yards, Inc., 175 Neb. 719, 123 N. W. 2d 839. An agency relationship exists only when there has been a manifestation of consent that one person

shall act on behalf of another and is subject to that person's control. Restatement, Agency 2d, § 1. The distinguishing features of an agency relationship are consent and control. It is conclusively clear that the Home never gave its consent for Strong to sell the property. Whatever the exact nature of his relationship with Donahoo is, it is a fact that the Home refused Strong's request to be its broker when Strong first approached the Home concerning its proposed sale. There is no evidence that the Home had any control over what Strong said. There was no written agreement or oral agreement between the Home and Strong. Section 36-107, R. R. S. 1943, requires that a sale of real estate made through a broker be in writing between the broker and the landowner. Plaintiffs nevertheless argue that Strong was a subagent of N. P. Dodge. Again, the evidence shows that N. P. Dodge had no control of any nature over Strong and the evidence is clear and undisputed that it was Donahoo who insisted that Strong carry out the dealings *for him*. Strong submitted Donahoo's offer to N. P. Dodge. As we have set out before, N. P. Dodge first attempted to solicit an offer from Donahoo but Donahoo advised that he would use Strong in conducting any negotiations and rejected N. P. Dodge's direct solicitations. We reach this conclusion de novo on a cold record. We point out, however, that the oral testimony in this area of Strong's representations is subject to the rule, particularly applicable here, that this court will consider the fact that the trial court saw and heard the witnesses, and observed their demeanor, and will give great weight to the trial court's judgment as to credibility. There is no merit to the contention that there was fraud in the inducement of the contract for the sale of the property in gross.

It becomes unnecessary for us to consider the other contentions of the plaintiffs with relation to the admissibility of evidence.

The judgment of the District Court in denying abate-

ment, and granting judgment on the cross-petition for the balance of the purchase price is correct and is affirmed.

AFFIRMED.

LARRY J. MACIEJEWSKI, APPELLANT, V. JOHN L. SULLIVAN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.
228 N. W. 2d 294

Filed April 24, 1975. No. 39766.

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

Duane L. Nelson, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

BRODKEY, J.

This is an appeal from an order and judgment of the District Court for Lancaster County affirming an order of the Director of Motor Vehicles revoking the driver's license of appellant for the reason that he had accumulated 12 points against his driver's license within a 2-year period. On January 27, 1974, appellant was given a traffic ticket in Lincoln, Nebraska, for not having a driver's license in his possession. At the time he had a valid Nebraska license. Subsequent thereto, a complaint was filed against him in the Lincoln municipal court, alleging a violation of section 10.52.040 of the Lincoln municipal code, which made it an offense for any person to operate a motor vehicle upon any street or highway within the city without having on his person and in full force and effect an operator's license or

learner's permit to operate it as provided by the laws of the State of Nebraska. Appellant was under the impression that he had forwarded the defect ticket he received to the police department with his driver's license, as required, but the court had no record of this having been done. He entered a guilty plea by waiver and was, on March 11, 1974, fined $2 and costs. An abstract of the conviction was forwarded to the Director of Motor Vehicles and two points were assessed against the driving record of appellant. Those points brought appellant's total accumulation to 12 points within a 2-year period, and on April 29, 1974, the Director of Motor Vehicles, acting ministerially pursuant to statute, issued an order revoking his operator's license and operating privileges for a period of 1 year. Appellant appealed to the District Court for Lancaster County, arguing that since he was charged and convicted under the aforementioned ordinance of the City of Lincoln rather than under section 60-413, R. R. S. 1943, the Director was in error in assessing two points for the latter conviction. The District Court affirmed the order of the Director of Motor Vehicles.

The issue presented in this case was considered and decided in Coffey v. Sullivan, 191 Neb. 781, 217 N. W. 2d 918 (1974), and that case is dispositive of the present case. Further, the record reveals that appellant did not raise the issue of the unconstitutionality of the Lincoln ordinance involved in this case or of sections 39-669.22 and 39-669.26, R. R. S. 1943, in his motion for a new trial in the District Court, and those issues are therefore not involved in this appeal. See, also, State v. Lessert, 188 Neb. 243, 196 N. W. 2d 166 (1972).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL D. SHATTO, APPELLANT.
228 N. W. 2d 295

Filed April 24, 1975. No. 39781.

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

E. Dean Hascall, for appellant.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

CLINTON, J.

Defendant pled guilty to a charge of assault with intent to rob. He was sentenced to a term of 2 to 4 years in the Nebraska Penal and Correctional Complex with credit being given for time spent in the county jail while awaiting trial. He appeals, assigns as error that the sentence was excessive, and asks that this court reduce the sentence to one of probation. We affirm the judgment of the trial court.

The defendant and two others were apprehended in the act of attempting to rob a supermarket. The defendant was charged in two counts. The second count, alleging the use of a firearm in the commission of a felony, was dismissed when defendant pled guilty to count I. The arraignment was detailed and meticulous and the plea was clearly voluntary.

The defendant is 35 years of age. His history of serious criminal activity is of recent origin, dating from November 1, 1971. On that day he received a sentence of probation in Kansas on two charges of theft and unlawful use of a credit card. On December 1, 1972, he was sentenced in Douglas County to 10 to 15 years after having been found guilty by a jury of three counts of robbery. He had served 10 months of that term when

his conviction was set aside by this court upon a confession of error by the State.

A presentence investigation was made which included a lengthy written presentation by the defendant in the form of a letter to the trial judge in which the defendant argued his case for probation. All this the trial court carefully considered, as has this court. The trial judge determined that imposition of some sentence was necessary if the defendant's claimed desire to rehabilitate himself was to have any prospect of bearing fruit. We concur.

AFFIRMED.

ALYCE V. CUMMING, APPELLANT AND CROSS-APPELLEE, V. JAMES H. CUMMING, APPELLEE AND CROSS-APPELLANT.
228 N. W. 2d 296

Filed April 24, 1975. No. 39788.

1. **Divorce: Alimony.** 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.
2. **Judgments: Interest.** The provisions of section 45-103, R. R. S. 1943, as to interest on decrees and judgments for the payment of money refer to judgments or decrees for money which is immediately due and collectible where its nonpayment is a breach of duty on the part of the judgment debtor.
3. **Equity: Judgments: Interest.** A court of equity has a reasonable discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right.
4. **Divorce: Alimony: Parent and Child.** 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.

Appeal from the District Court for Platte County: JAMES A. BUCKLEY, Judge. Affirmed as modified.

Walker, Luckey, Whitehead & Sipple, Robert Lloyd Jeffrey, and Michael F. Lee, for appellant.

Sidner, Svoboda, Schilke & Wiseman, for appellee.

Heard before SPENCER, NEWTON, and MCCOWN, JJ., HAMILTON, District Judge, and KUNS, Retired District Judge.

MCCOWN, J.

This is an action for dissolution of a marriage. The District Court dissolved the marriage, made a property division, and provided for custody and child support. The petitioner wife has appealed and the respondent husband has cross-appealed.

The parties were married on April 17, 1949. Four children were born to the marriage: Cheri Lee, born June 15, 1952; Mary Kathryn, born March 7, 1954; Jamie Van, born February 11, 1957; and Lisa Viola, born January 1, 1960. The two older children were emancipated and living in California at time of trial. The daughter, Jamie, was living with her father and the daughter, Lisa, was living with her mother. At the time of trial the petitioner was 46 years old and the respondent was 44. Neither of them had serious health problems, although petitioner had high blood pressure and was overweight; and respondent had some hernia problems, and had a partially crippled hand.

At the time of the marriage the petitioner had no assets. The respondent owned an automobile and a half interest in a drive-in restaurant in Columbus valued at $4,000 to $5,000. For a time after the marriage the petitioner worked as a bookkeeper. Since 1952, the petitioner has worked at respondent's restaurant only irregularly, although she kept the books for the respondent's business until about 1960. The respondent's restaurant business prospered and expanded and at the time of trial the respondent was engaged in the real estate business, the insurance business, the restaurant business, and operated a farm. For 5 or 6 years prior to trial his taxable income varied from $21,000 to $38,000 per year and averaged approximately $26,000.

The parties had accumulated substantial property during the marriage. Appraisals ranged from approximately $428,000 to $458,000, over $300,000 of which was real estate. Total liabilities were approximately $83,000.

The District Court dissolved the marriage, awarded custody of Jamie to respondent and the custody of Lisa to the petitioner, and directed respondent to pay $250 per month child support for the daughter. The court made a property division between the parties and awarded the petitioner items of real estate which included a 10-acre tract upon which the residence of the parties was located and in which petitioner was living; a rental home and farm buildings; and adjacent farm land, all of which totaled approximately 80 acres. The petitioner was awarded all personal property in the residence, the irrigation equipment located on the farm land assigned to her, and two automobiles. The value of this property was approximately $170,000, slightly less than one-half of the $350,000 net value of all the property of the parties. The court awarded to the respondent the remaining personal property and real estate, which included the restaurant property and a residence property, and directed respondent to pay all the liabilities of approximately $83,000.

The court then directed that petitioner "pay to the Respondent the sum of $37,000.00; that this sum may be paid in whole or in part at any time, provided that the entire sum be paid not later than such time as Petitioner receives $60,000.00 or more in whole or partial distribution of her share of the estate of Marian Van Berg, deceased. Interest shall accrue on the unpaid balance at the rate of eight percent (8%) per annum from the date of the Decree." The respondent was directed to pay specified attorney's fees and costs.

The petitioner contends that the property division is inequitable and insufficient and that the $37,000 payment by petitioner to respondent improperly takes into

account the inheritance which petitioner was to receive from her father's estate.

The record establishes the District Court determined that respondent's long hard work and frugal habits had been the principal factor in the accumulation of the property of the parties, and that petitioner's contribution to the acquisition and enhancement of those properties was relatively small by comparison. The court also determined that a proper division of property would be approximately 63 percent to the respondent and 37 percent to the petitioner. The total value of the property for purposes of such division as determined by the court was approximately $350,000. The court attempted to assign income-producing real estate to the petitioner aside from her residence, but such property was not appropriate for fractional division. The court also determined that sale of some of such property might not be necessary in view of petitioner's inheritance from her father's estate. The estimated amount of her share of the estate was between $75,000 and $96,000, expected to be distributed in January of 1975. The court therefore provided that the $37,000 payment, which was the amount necessary to bring the property division to the proper level already determined by the court, was to be payable not later than such time as petitioner received $60,000 or more from her father's estate. The evidence establishes that the court did not include petitioner's inheritance from her father in determining an appropriate division of the marital property.

The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case and the courts will consider all pertinent facts in reaching an award that is just and equitable. 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. Schwaninger v. Schwaninger, 192 Neb. 681, 223 N. W. 2d 829.

The court properly considered all the circumstances of the parties and made an appropriate and equitable division of the property. However, the court provided that interest should accrue on the $37,000 to be paid by the petitioner to the respondent, and that the interest would accrue "from the date of the Decree." There is some uncertainty as to whether the word "decree" may have referred to the decree of distribution in the estate of petitioner's father or to the decree in this proceeding. The court apparently awarded interest on the basis of section 45-103, R. R. S. 1943, which provides: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of eight dollars upon each one hundred dollars annually until the same shall be paid; * * *." The provisions of that section refer to judgments or decrees for money which is immediately due and collectible where its nonpayment is a breach of duty on the part of the judgment debtor. See Patterson v. Spelts Lumber Co., 166 Neb. 692, 90 N. W. 2d 283.

In the decree here, although any part or all of the $37,000 *may* be paid at any time, none of it is required to be paid until the petitioner receives the distribution of her share from her father's estate. A court of equity has a reasonable discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right. See Patterson v. Spelts Lumber Co., *supra*.

We therefore determine that interest on the $37,000 payment, or any unpaid balance thereof, from petitioner to respondent shall accrue from the date of the decree of distribution assigning to petitioner her share of the estate of Marian Van Berg, deceased.

Petitioner also contends that the amount of child support is insufficient and that alimony should be awarded to petitioner. 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. Broadstone v. Broadstone, 190 Neb. 299, 207 N. W. 2d 682. We find no abuse of discretion here.

Supplemental transcripts in connection with respondent's cross-appeal have been stricken by order of this court and there is no issue for consideration on that cross-appeal.

The judgment of the District Court is modified only with respect to the time of accrual of interest on the cash payment from petitioner to respondent. In all other respects the judgment is affirmed. The petitioner's attorney is allowed a fee of $750 for services in this court.

AFFIRMED AS MODIFIED.

DOUGLAS M. DORT, EXECUTOR OF THE ESTATE OF NELLIE M. DOERCK, DECEASED, APPELLANT, V. SWIFT AND COMPANY, A CORPORATION, ET AL., APPELLEES.

DOUGLAS M. DORT, ADMINISTRATOR OF THE ESTATE OF CHARLES LLOYD DORT, DECEASED, APPELLANT, V. SWIFT AND COMPANY, A CORPORATION, ET AL., APPELLEES.

228 N. W. 2d 588

Filed May 1, 1975. Nos. 39601, 39602.

1. **Motor Vehicles: Negligence.** The existence or presence of elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of motor vehicles the duty to exercise a degree of care commensurate with such surrounding circumstances.
2. **Appeal and Error: Verdicts.** To justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake.

Appeals from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Wagener & Youngs, for appellant.

Cline, Williams, Wright, Johnson & Oldfather and Alan E. Peterson, for appellees Swift & Co. and Brems.

Healey, Healey, Brown, Wieland & Burchard and Douglas L. Kluender, for appellee Hill.

Perry, Perry, Witthoff & Guthery, for appellee M. W. Anderson Constr. Co.

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

MCCOWN, J.

These actions are for damages for the deaths of two guest passengers in an automobile accident at an intersection. Plaintiff is the personal representative of the two decedents. The defendants were the host driver; the driver of the other vehicle and his employer; and a construction company which was engaged in construction work on private property located near the intersection. The plaintiff's causes of action against the host driver and the construction company were dismissed. The jury returned its verdict in favor of the defendant, Edward B. Brems and his employer, Swift and Company, and plaintiff has appealed.

The accident here occurred about 6 p.m., on January 10, 1973, at the intersection of 27th Street and Old Cheney Road in Lincoln, Lancaster County, Nebraska. It was dark and headlights were lighted on both cars. The weather was clear and cold. Both 27th Street and Old Cheney Road were blacktop two-lane roads and they were icy. The speed limit on 27th Street was 50 miles per hour and the speed limit on Old Cheney Road was 55 miles per hour. The roads on which the automobiles were traveling were substantially level or had only slight grades in the area near the in-

tersection. Old Cheney Road was protected by stop signs on 27th Street to the north and south of the intersection. The stop sign for southbound traffic on 27th Street was located at the northwest corner of the intersection 24 feet north of the north edge of Old Cheney Road and 14 feet west of the west edge of 27th Street. There was a pile of dirt on private property northwest of the intersection which partially obstructed the view in that area. The defendant, Leonard W. Hill, was the driver of an automobile in which the two decedents were riding as guest passengers. The Hill automobile was traveling south on 27th Street. The defendant Edward B. Brems, driving an automobile owned by his employer, Swift and Company, was proceeding east on Old Cheney Road.

When Mr. Hill reached a point on 27th Street approximately 100 yards north of the intersection, he commenced to slow for the stop sign. He testified that he stopped at the stop sign with the front end of his automobile about even with the stop sign. He looked east and west along Old Cheney Road but saw no traffic approaching. He started forward and proceeded into the intersection with the intention of making a right-hand turn onto Old Cheney Road. At this point, however, he observed car lights approaching from the west, and in an effort to avoid a collision, he drove straight forward to the south.

The defendant Brems meanwhile was driving east on Old Cheney Road at a speed of between 35 and 40 miles per hour. At a point some 200 or 300 yards west of the intersection he observed an automobile cross the intersection, and dimmed his lights and slowed down 3 or 4 miles per hour. When he neared the intersection, he saw the headlights of the Hill car which was entering the intersection from the north. He hit his brakes but struck the Hill car just behind the front door on the right side. The collision occurred in the southwest quadrant of the intersection. The Hill car continued on

south and came to rest on its side in the ditch along the east side of 27th Street 93 feet south of the point of impact. The Brems car left skid marks of 47 feet prior to impact, spun around, and came to rest in the south ditch of Old Cheney Road some 52 feet from the point of impact. Brems was not hurt but the plaintiff's decedents were both killed in the accident.

Plaintiff's causes of action against the host driver Hill and against M. W. Anderson Construction Company were dismissed by the court, and only the causes of action against the defendant Brems and his employer, Swift and Company, were submitted to the jury. The jury returned a verdict in favor of the defendants and the plaintiff has appealed.

Plaintiff first contends that the Nebraska guest statute is unconstitutional, and that the host driver, Leonard W. Hill, although not grossly negligent, was improperly dismissed. That issue was recently decided by this court adversely to plaintiff's contention, and requires no further discussion here. See Botsch v. Reisdorff, *ante* p. 165, 226 N. W. 2d 121.

Plaintiff also contends that the trial court erred in dismissing plaintiff's causes of action against M. W. Anderson Construction Company. That defendant had left a pile of dirt on private property to the northwest of the intersection which was a partial obstruction to the view in that area. No warning signs were placed at or near the pile of dirt. Failure to warn is the sole act of negligence charged against the defendant Anderson. The dirt was not located on the highway right-of-way but was entirely on private property.

The pile of dirt here was clearly observable and, at most, constituted simply a condition which should have been evident to both drivers. The existence or presence of elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of motor vehicles the duty to exercise a degree of care

commensurate with such surrounding circumstances. See, Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333; Snipes v. Smith, 191 Neb. 4, 213 N. W. 2d 456.

Plaintiff cites no case which supports his contention nor do we find any. The plaintiff wholly failed to establish that the defendant, M. W. Anderson Construction Company, had any duty to warn the driver of an automobile on the highway of the existence of a condition on private property which was open and observable. Neither is there any evidence that failure to warn could have constituted a proximate cause of the accident. Plaintiff's contention is without merit.

Finally, the plaintiff asserts that the jury verdict for the defendants was contrary to the evidence and the instructions. No objection has been made to any instruction, nor did the plaintiff move for a directed verdict against the defendants, and plaintiff is therefore relegated to the contention that the evidence establishes negligence on the part of the defendants as a matter of law, or at least that the jury verdict was clearly wrong. The evidence destroys the contention. Except for the icy condition of the streets, the defendants might themselves have been entitled to a directed verdict. See Steinberg v. Pape, 181 Neb. 806, 150 N. W. 2d 912.

To justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake. Merritt v. Reed, 186 Neb. 561, 185 N. W. 2d 261. That is not this case. A verdict based on conflicting evidence will not be disturbed on appeal unless it is clearly wrong. Haney v. L. R. Foy Constr. Co., Inc., 186 Neb. 528, 184 N. W. 2d 628.

The judgment of the District Court was correct in all respects and is affirmed.

AFFIRMED.

JOHN PREISENDORF, JR., ET AL., APPELLEES, V. HAROLD K. JENKINS, APPELLANT.
228 N. W. 2d 591

Filed May 1, 1975. No. 39683.

1. **Brokers: Contracts.** When an owner lists his property with a business broker for sale, it is generally understood that the broker's duties are merely to find a purchaser.
2. ———: ———. A listing by the owner does not constitute an offer to any third party, but is merely an employment contract between owner and broker.
3. **Specific Performance: Contracts.** Before there can be specific performance of an oral contract, the contract itself must be proved.

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

Kelly & Kelly, for appellant.

Luebs, Tracy, Dowding, Beltzer & Leininger, for appellees.

Heard before SPENCER, BOSLAUGH, and BRODKEY, JJ., and HASTINGS and CLARK, District Judges.

CLARK, District Judge.

This is an action for specific performance of an alleged contract to sell a bar and restaurant business located in Grand Island, Nebraska. The District Court found that plaintiffs were entitled to specific performance of the contract but that the defendant had divested himself of the property, and therefore specific performance was impossible. The court further found that in lieu of specific performance plaintiffs were entitled to monetary damages in the amount of $8,000 and entered judgment accordingly. Defendant has appealed.

On August 12, 1972, defendant entered into a "Business Listing Contract" with one Bill Moore, a Grand Island realtor and business broker. By the terms of this listing agreement Moore was given the sole and exclusive right to sell the business known as "The Library Lounge."

This agreement listed the asking price for the business as $31,500 on cash terms and specified Moore's commission to be whatever amount in excess of $31,500 a buyer would agree to pay. The agreement was executed by defendant as "Owner."

Moore approached plaintiffs regarding possible purchase of "The Library," and on August 21, 1972, plaintiffs executed a purchase agreement for the business and gave to Moore a check for $3,500 as earnest money. The purchase agreement of August 21, 1972, varied the terms of payment from those set out in the listing agreement and provided that it was subject to written approval and acceptance by defendant on or before August 28, 1972.

When this purchase agreement was tendered to defendant by Moore, defendant rejected it and told Moore that there was an apparent misunderstanding in that he, the defendant, was not the sole owner of "The Library." It then developed that defendant was actually the owner of two-thirds of the stock in the S-J corporation, which corporation owned "The Library." The other one-third of S-J corporation stock was owned by one Larry Stromer, who actually operated "The Library." Defendant also stated he felt a moral obligation to give Stromer first chance to buy "The Library."

Moore advised plaintiffs of defendant's rejection of the purchase agreement. On August 24, 1972, plaintiff executed a second purchase agreement which met the terms set out in the listing agreement with Moore and listed the purchase price as $35,500. This second purchase agreement provided that it was subject to the written approval and acceptance by defendant on or before August 28, 1972.

Moore tendered the second purchase agreement to defendant and was informed that he, the defendant, still felt the same way about giving Stromer first chance to buy. Defendant did not approve or accept the agreement.

Subsequently, within several days after August 24, 1972, two meetings were held between plaintiffs, defendant, and Moore. At these meetings, although the testimony is in some conflict, defendant apparently informed plaintiffs that he felt a moral obligation to let Stromer buy him out if Stromer could raise the money. Further conversation resulted in an agreement by the plaintiffs and defendant to allow Stromer 60 days in which to raise the money. Plaintiffs had the impression that if Stromer didn't raise the money, defendant would sell to them. Moore made the notation on the second purchase agreement "Refused 25th."

Defendant also advised plaintiffs that he was not in fact the owner of "The Library" but only the majority stockholder in the S-J corporation.

On October 16, 1972, counsel for plaintiffs advised Moore by letter that plaintiffs believed defendant had contracted to sell "The Library" and they intended to consummate the transaction on October 25, 1972. On November 6, 1972, plaintiffs' counsel wrote defendant that plaintiffs intended to buy the "Library Lounge" from defendant for the price of $35,500.

On December 11, 1972, defendant sold all his stock in the S-J corporation to Larry Stromer for $35,000.

On January 22, 1973, plaintiffs commenced this action.

Defendant's assignments of error may be summarized as follows: (1) Error in finding plaintiffs were entitled to specific performance; (2) error in awarding monetary damages in lieu of specific performance; and (3) excessiveness of damages allowed.

This being an action in equity, it is tried de novo in this court.

We first consider whether a valid contract was entered into between the parties. Upon consideration of the record, we conclude there was not. Before there can be specific performance of an oral contract, the contract itself must be proved. Griggs v. Oak, 164 Neb. 296, 82 N. W. 2d 410.

The listing agreement with Moore was nothing more than a broker's contract giving Moore the exclusive right to procure a purchaser for the property. It did not constitute an offer to the plaintiffs. ". . . the words 'for sale,' 'to sell,' and the like, in a broker's contract of employment, amount to nothing more than an employment to find a purchaser and to present him to the owner or to conduct negotiations with him and does not of itself give the broker any authority to make a binding contract of sale on behalf of the owner." 12 C. J. S. Brokers, § 20, p. 63. See, also, Gould v. Rockwell, 105 Neb. 724, 181 N. W. 655; Kobza v. Spath, 166 Neb. 623, 90 N. W. 2d 246.

Both of plaintiffs' purchase agreements required written acceptance by defendant on or before August 28, 1972. They were not an acceptance of any offer by defendant, but were offers by plaintiffs. They were never signed by defendant and obviously were rejected by him. In subsequent conversations with plaintiffs, the defendant merely indicated that he felt a moral obligation to give Stromer first chance to buy. The parties then agreed to wait 60 days to see if Stromer could raise the money. This was not sufficient to constitute an acceptance of plaintiffs' offer, and therefore there was never a valid acceptance.

Further, it is obvious there was never a meeting of the minds between the parties. Plaintiffs' offer was for purchase of the "Library Lounge" in its entirety, and their demand for performance was also in that tenor. In reality, defendant owned only two-thirds of the stock of the corporation which owned the business, and he so informed the plaintiffs.

Having so ruled, we find it unnecessary to consider defendant's other assignments of error.

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

REVERSED AND DISMISSED.

DEAN EDWARD WHEELER, APPELLEE, V. MARILYN WHEELER, APPELLANT.
228 N. W. 2d 594

Filed May 1, 1975. No. 39716.

1. **Divorce: Alimony: Parent and Child.** Ordinarily the fixing of child support and alimony rests in the sound discretion of the court, and in the absence of abuse of discretion, will not be disturbed on appeal.
2. **Divorce: Alimony.** The earning capacity of the husband is an element to be considered in the allowance of alimony.
3. ———: ———. The provision for reasonable security for payment of alimony provided for in section 42-365, R. R. S. 1943, should not be invoked in the original decree except when compelling circumstances require it.

Appeal from the District Court for Johnson County: WILLIAM F. COLWELL, Judge. Affirmed as modified.

Griffiths & Gildersleeve, for appellant.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee.

Heard before SPENCER, CLINTON, and BRODKEY, JJ., and FLORY and WHITE, District Judges.

FLORY, District Judge.

The parties were married in 1960 when the petitioner, Dean Wheeler, was a freshman in the Kansas State University School of Veterinary Medicine. He was graduated in 1964. During this period of time respondent worked and contributed substantially to their living expenses while caring for their two children born in 1961 and 1963. After Dr. Wheeler's graduation they moved to Hebron, Nebraska, where he practiced for 1 year. In 1965 they moved to Tecumseh, Nebraska, where he practiced to the present time and continues to do so. Until 1969 he conducted his practice from his home with the respondent's assistance in taking care of the books, answering the phone, mixing medicines, and otherwise assisting him in his practice. In 1969 he formed a partner-

ship with another veterinarian in a new clinic building owned by the parties.

Dr. Wheeler left the family in October 1973, and filed this action for dissolution of the marriage. At the time of the trial in June 1974, both were 38 years old and in good health. Dr. Wheeler's share of the partnership income in 1972 was $27,807, in 1973, $28,851.16. He also receives $3,000 annually for the rental of the clinic building.

The decree dissolved the marriage, awarded custody of the children to the respondent, with reasonable visitation to the petitioner, and ordered the petitioner to pay child support in the amount of $125 per child per month and to pay for future medical and dental expenses required by the children.

The two principal items of property, the clinic building of the approximate value of $22,500, subject to an indebtedness of $12,308, was awarded to the petitioner together with his interest in the partnership; and the home, a modest residence on 6.9 acres in the country near Tecumseh of an approximate value of $20,000, subject to indebtedness of $15,432, household goods and personal property, plus $2,000 in cash was awarded to the respondent.

Other miscellaneous personal property was divided between the parties and petitioner was ordered to pay an attorney's fee of $750 for the respondent.

In addition petitioner was ordered to pay respondent as alimony $500 July 1, 1974, $300 a month for the next 6 months, $200 a month for the next 6 months, $175 per month for the next 24 months, and $100 a month for the next 36 months, a total of $11,300. Temporary allowances including cost of appeal, an additional attorney's fee of $300, child support, alimony, and mortgage payments were awarded respondent pending determination of this appeal. The record further shows that respondent is now employed by the State of Nebraska earning $2.566 per hour, expecting to work a 40-hour week,

for an approximate gross annual salary of $5,300, plus possible overtime, with health and life insurance furnished by the State.

Respondent has appealed contending that the property awarded her was inadequate and that the alimony and child support payments are inadequate. We think the division of property was reasonable and practical and it will not be disturbed.

Ordinarily 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, 191 Neb. 361, 215 N. W. 2d 84; Reisig v. Reisig, 191 Neb. 612, 216 N. W. 2d 731.

The earning capacity of the husband is an element to be considered in the allowance of alimony. Sowder v. Sowder, 179 Neb. 29, 136 N. W. 2d 231.

In this case, considering the fact that the respondent contributed substantially to the education of the petitioner and assisted him during the early years of his practice, that he is now entering the period of peak earning potential, and the ages of the children, we believe that the child support should be increased to $150 per month per child and that the alimony awarded to the respondent should be increased to $20,100 by providing that the payments of $200 per month in the schedule of the trial court should continue at that rate for 89 months.

Respondent further contends that the decree should have provided for security for the payment of child support, alimony, and the mortgage payments on the clinic building and to provide for college education for the children.

With this we do not agree.

It is true that section 42-365, R. R. S. 1943, provides that reasonable security for payment of alimony may be required by the court; however, in our opinion such remedy should be invoked in the original decree only when compelling circumstances require it. Before the

present divorce law was enacted, section 42-323, R. R. S. 1943, of the prior divorce law, provided that the court could order sufficient security for the payment of alimony or child support and upon the neglect or refusal to give such security the court could appoint a receiver to take charge of his property. See Ford v. Ford, 101 Neb. 648, 164 N. W. 577, where this court said: "The order requiring security to be given and the one appointing a receiver are both somewhat extraordinary and drastic remedies. . . . The order requiring security should be made only as it appears to the court that such an order is necessary to make sure the payment of the alimony decreed. If such an order is made and not complied with, then the court, in appointing a receiver, should put into the hands of the receiver only so much of the husband's property as appears necessary to be held to make sure the payments due and to become due." See, also, Griess v. Griess, 161 Neb. 1, 71 N. W. 2d 513, where it was only after contempt proceedings were necessary that this court required the defendant to provide security for payment of child support.

Respondent seeks more security for herself and the children than the ordinary family has. Section 42-364, R. R. S. 1943, pertaining to child support, provides for subsequent changes when required after notice and hearing; and section 42-365, R. R. S. 1943, pertaining to alimony, provides for modification or revocation for good cause shown when alimony is allowed in the original decree.

Except for the modification as to child support and alimony, the decree of the District Court is affirmed. Respondent is awarded additional attorney's fees in this court in the amount of $600.

AFFIRMED AS MODIFIED.

MARK STARLIN, APPELLEE, V. BURLINGTON NORTHERN, INC., A DELAWARE CORPORATION, APPELLANT.
228 N. W. 2d 597

Filed May 1, 1975. No. 39729.

1. **Trial: Verdicts: Evidence.** A motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. ———: ———: ———. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.
3. **Motor Vehicles: Negligence: Railroads.** If the operator of a motor vehicle is familiar with a railroad crossing and the surroundings, it is his duty to look and listen at a time and place where looking and listening will be effective even though vision of the tracks is restricted, a failure to do so is less than the exercise of due or ordinary care and no recovery can be had for damages resulting from collision with a train.
4. ———: ———: ———. It is the duty of the driver of the automobile to have his car under such control that, when it comes to a place where it is possible to see and to hear an approaching train, he can stop to avoid a collision.
5. **Proximate Cause.** The proximate cause of an injury is that cause which, in natural and continuous sequence, unaccompanied by any efficient, intervening cause, produces the injury, and without which the result would not have occurred.
6. **Proximate Cause: Trial: Verdicts.** Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded with directions to dismiss.

Knudsen, Berkheimer, Endacott & Beam, for appellant.

Bauer, Galter & Geier, for appellee.

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

KELLY, District Judge.

This is an action at law to recover damages for personal injury suffered by the plaintiff while a passenger in an automobile involved in a collision between it and a train, owned by defendant and operated by its engineer. Upon trial to a jury, the plaintiff was awarded judgment. Defendant's motion for a new trial was overruled and it appealed to this court. There are numerous assignments of error, but since our decision must be that the trial court erred in overruling defendant's motion to dismiss or direct a verdict at the conclusion of plaintiff's evidence, or at the conclusion of all the evidence, it will not be necessary to discuss the other assignments.

Plaintiff's amended petition alleged substantially that the collision and damages proximately resulted from the negligence of defendant because: (1) The engineer failed to keep a proper lookout; (2) the engineer failed to yield the right-of-way to the automobile occupied by the plaintiff; (3) the engineer failed to keep defendant's switch engine under reasonable control; (4) the defendant did not equip its engine with adequate or proper lighting; and (5) the defendant did not provide adequate or proper lighting at said intersection.

The decision depends upon the evidence adduced in plaintiff's behalf and rules of law applicable thereto in arriving at the conclusion hereinafter set forth. We are mindful of the well-established rule that a motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant 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 evi-

dence. Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175. However, we must also bear in mind that where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. Whitthauer v. Paxton-Mitchell Co., 146 Neb. 436, 19 N. W. 2d 865.

The evidence adduced on plaintiff's behalf reveals that the plaintiff was a passenger in a Volkswagen automobile, owned and operated by one Jay Madsen. The plaintiff occupied the passenger's side of the front seat of the automobile. A second passenger, John Robinson, was on the passenger's side of the rear seat. On December 5, 1971, at approximately 10 o'clock p.m., the automobile was proceeding in a northerly course on Cotner Boulevard in the City of Lincoln. Cotner Boulevard is the city route for U. S. Highway No. 6. As the automobile came to a point where the Burlington Northern tracks intersect at approximately 73rd Street, the automobile came into contact with a switch engine owned by defendant, pulling some 12 hopper cars, some of which were loaded and some of which were empty. The left front of the said switch engine came into contact with the right front of the automobile at approximately the center of the intersection. The injuries received by the plaintiff as a result of the accident were numerous and extensive.

Plaintiff's driver has no recollection of the accident itself, and can only recall certain events which substantially preceded the accident. The plaintiff testified that he did not see or hear the locomotive until immediately prior to the accident at which time he made an exclamation "Oh, My God!". The passenger, John Robinson, likewise testified that he neither saw the approaching engine nor heard any warning until he heard the plaintiff's exclamation. Testimony of the four members of the train's crew and an independent witness

stated that the bell on the train was ringing continously; that the engineer gave the standard signal on the train's whistle prior to the crossing; and that, after the standard signal was given, the engineer sounded the whistle of the train several more times prior to impact. One of the defendant's employees, Millard H. Hughes, testified that he was a member of the crew at the time of the accident. This witness further testified that he was acting as a flag man for the defendant, and immediately prior to the accident was standing approximately 7 feet from the east curb of Cotner Boulevard into the street. The witness further testified that he saw the approaching automobile coming toward the crossing from the south. He further testified that he attempted to signal the automobile of the approaching train with an electric lantern which he had in his possession. He further testified that when he saw a crash was imminent, he ran to the east and was approximately 50 feet from the crossing when the accident occurred.

The speed of the automobile immediately prior to the accident was somewhere between 30 and 55 miles per hour; the speed of the train was somewhere between 5 and 10 miles per hour. No witness saw the driver of plaintiff's automobile make any attempt to avoid the collision by either braking his vehicle or altering the course of travel. The testimony further indicated that when the engineer saw the approaching automobile and realized a collision was likely, he applied the emergency air brakes on the train.

The traveling public was warned of the railroad crossing by a standard reflective railroad crossing sign, installed by the Department of Roads, located approximately 273 feet to the south of the point where the accident occurred. At the crossing, itself, was a standard railroad cross-buck sign. The driver of plaintiff's vehicle, as well as both passengers, were very familiar with the crossing. On the night of the accident there had been some previous moisture and the pavement was

wet, however, no moisture was falling at the time of the accident. The switch engine was equipped with a headlight which was stationary, and illuminated the path ahead of the engine. The particular crossing in question was not protected by either a flashing red signal or crossarms.

The law in Nebraska is well settled that if the operator of a motor vehicle is familiar with a railroad crossing and the surroundings, it is his duty to look and listen at a time and place where looking and listening will be effective even though vision of the tracks is restricted, a failure to do so is less than the exercise of due or ordinary care and no recovery can be had for damages resulting from collision with a passing train. It is the duty of the driver of the automobile to have his car under such control that, when it comes to a place where it is possible to see and to hear an approaching train, he can stop and avoid a collision. Loudy v. Union P. R.R. Co., 146 Neb. 676, 21 N. W. 2d 431; Kennedy v. Chicago, R. I. & P. R.R. Co., 156 Neb. 345, 56 N. W. 2d 446.

The proximate cause of an injury is that cause which, in natural and continuous sequence, unaccompanied by any efficient, intervening cause, and without which the result would not have occurred. Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury. Ecker v. Union P. R.R. Co., 164 Neb. 744, 83 N. W. 2d 551.

In reviewing this case the court can come to but one conclusion, that the defendant was not negligent or that its negligence was not the proximate cause of the injury to the plaintiff. On the contrary, the sole proximate cause of the injury suffered by the plaintiff was the negligence of the driver of the automobile. The trial court should have entered judgment and directed a verdict in favor of the defendant at the close of all the

evidence for the reason that reasonable minds could draw but one conclusion.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

SCHOOL DISTRICT OF GERING, IN THE COUNTY OF SCOTTS BLUFF, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. DONALD C. STANNARD ET AL., APPELLEES, CHARLES A. GEIL, INTERVENER-APPELLANT.

228 N. W. 2d 600

Filed May 1, 1975. No. 39733.

1. **Schools and School Districts: Taxation.** School tax money received by one school district from lands apparently, but not legally, within its exterior boundaries, levied and collected for its uses and purposes, cannot be recovered by the school district within whose territory the lands actually lie, where no levy was made or taxes collected on said lands by such district for its uses and purposes; each district obtained exactly the amount of money for which its budget called and neither district obtained or had the use of money intended for the other district.
2. **Schools and School Districts: Public Officers and Employees: Appeal and Error.** An order of a county superintendent changing school district boundaries under the provisions of section 79-402, R. R. S. 1943, may be collaterally attacked if the superintendent is without jurisdiction to act.
3. **Schools and School Districts: Pleadings.** In determining the validity of an instrument filed for the purpose of complying with statutory procedures required in a proceeding to change school district boundaries, the substance and not the form of the instrument controls.
4. **Schools and School Districts: Constitutional Law.** The Legislature has the plenary power to fix school district boundaries by direct legislative action which, if otherwise valid, is unaffected by constitutional guaranties of procedural due process. Where, however, the Legislature has authorized school district boundary changes by private persons acting within

guidelines and procedures established by the Legislature, procedural due process is required.

5. **Schools and School Districts: Public Officers and Employees: Constitutional Law: Limitations of Actions: Time.** Legal school voters of school districts involved in district boundary changes under section 79-402, R. R. S. 1943, are entitled to judicial review of the action of the county superintendent ordering such changes, including, when appropriate, the right of collateral attack; and such rights may not be barred by a statute of limitations enacted subsequent to the commencement of suit to challenge or review the same.
6. **Schools and School Districts: Parties.** Legal school voters of school districts have the right to intervene in any pending proceeding in the District Court brought by one of the districts involved and challenging district boundary changes ordered under section 79-402, R. R. S. 1943.

Appeal from the District Court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Wright & Simmons, for appellant and intervener-appellant.

Robert O. Hippe, W. H. Kirwin, and G. Randolph Reed, for appellees Stannard et al.

Van Steenberg, Brower, Chaloupka & Mullin, for appellee School Dist. No. 8.

Heard before WHITE, C. J., BOSLAUGH, NEWTON, CLINTON, and BRODKEY, JJ., RIST, District Judge, and KUNS, Retired District Judge.

RIST, District Judge.

This is an action brought by the School District of Gering against certain county officers, the committee for the reorganization of school districts and School District No. 8, all of Scotts Bluff County, Nebraska. Plaintiff's amended petition sets forth two causes of action. The first is for an accounting of school taxes levied and collected on a certain tract of real estate alleged to have been assessed in School District No. 8,

and seeks the payment thereof to plaintiff district. The second is for a declaratory judgment determining the transfer of said tract from plaintiff district to School District No. 8 to be void. One Charles A. Geil, claiming to be a legal voter and taxpayer of plaintiff district, moved to intervene in said action seeking the same relief as plaintiff. The District Court denied intervener's motion to intervene and sustained demurrers to plaintiff's amended petition and dismissed said petition. Plaintiff and intervener have perfected appeal to this court.

The causes of actions of plaintiff and intervener are pleaded in identical terms, the following allegations of which are deemed material, as set forth in the petition and the exhibits attached thereto: Plaintiff district was and is an accredited Class III school district and defendant School District No. 8 was and is a nonaccredited Class I school district. On May 22, 1967, the City of Gering (located within the boundaries of plaintiff district) was the owner of a certain tract of real estate, hereinafter referred to as the tract, and sought to have said tract detached from plaintiff district and transferred to and made a part of School District No. 8. By a duly adopted resolution, the board of education of plaintiff district approved such transfer and resolved that a petition signed by plaintiff district be presented to the county superintendent of Scotts Bluff County petitioning for the same. No petition as such was so filed but a certified copy of the resolution was. Petitions signed by legal school voters of School District No. 8 were also filed with said county superintendent petitioning for such transfer of property. Appropriate lists of legal school voters were also filed. The proposed transfer of said tract to School District No. 8 was submitted for consideration to both the county and state committees for school district reorganization; public hearing was held with respect thereto; and the petition and resolution then filed with the county super-

intendent, who, on July 31, 1967, after hearing thereon, determined the petition and resolution legally sufficient and ordered the requested change in school district boundaries effective that date. The treasurer, assessor, and clerk of Scotts Bluff County thereafter acted in accordance with the order of the county superintendent and taxes were levied and collected against said tract for School District No. 8. The petition contains other allegations which are not deemed material unless subsequently noted herein.

On December 28, 1973, at the apparent request of intervener Geil, plaintiff commenced this action.

We consider first the action of the trial court sustaining demurrers to plaintiff's amended petition and dismissing the same, which demurrers allege that said petition does not set forth facts sufficient to constitute a cause of action; that the action is barred by the statute of limitations as set forth in section 79-1108, R. R. S. 1943, as amended by Laws 1974, L.B. 592; and that plaintiff's action is an impermissible, collateral attack on the action of the county superintendent.

We follow the rule that an appeal from a judgment of dismissal after a general demurrer to a petition has been sustained presents for decision the sufficiency of the facts well pleaded by the petition to state a cause of action. Buford v. Dahlke, 158 Neb. 39, 62 N. W. 2d 252.

With respect to plaintiff's first cause of action seeking an accounting of tax money collected on the tract and for payment thereof to plaintiff district, the trial court correctly sustained the demurrers. There are no allegations in the amended petition of any levy on the tract involved for plaintiff district or of taxes so collected thereon which plaintiff district has not received. Neither are there any allegations that School District No. 8 received or had the use of money levied and intended for plaintiff district. Factual allegations of this nature would be necessary to state a cause of action for an accounting and payment of funds.

The rule set forth in the case of School Dist. No. 8 v. School Dist. No. 15, 183 Neb. 797, 164 N. W. 2d 438, is applicable: "The authorities sustain the rule that money received by one school district from lands apparently, but not legally, within its exterior boundaries, levied and collected for its uses and purposes and devoted to its uses and purposes, cannot be recovered by a district within whose territory the lands actually lie, where no levy had been made or taxes collected for its uses and purposes, and where both districts involved obtained exactly the amount of money for which their budget called, and neither district obtained or had the use of money intended for the other."

With respect to plaintiff's second cause of action seeking a declaratory judgment that the transfer of the tract from plaintiff district to School District No. 8 is void, several issues must be considered.

The proceedings in 1967 which purported to transfer the tract to School District No. 8 were those provided for in section 79-402, R. R. S. 1943. This statute provides for the filing of petitions, by at least a stated percentage of legal voters of the districts involved, requesting such transfers. Where the change affects a Class III district, the board of education of such district may so petition. After review and recommendation by the county and state school reorganization committees, whose recommendations are advisory only, Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N. W. 2d 599, and public hearing on such recommendations, the petitions are filed with the county superintendent of schools who, after notice, holds a hearing to determine the sufficiency of the petitions. If the petitions are legally sufficient, the statute provides that: "the county superintendent shall proceed to effect the changes in district boundary lines as set forth in the petitions."

This court has considered such proceedings on many occasions. It has held that the hearing by the county superintendent to determine the sufficiency of the pe-

titions is judicial in nature, Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692; that if the petitions are legally sufficient, the county superintendent has the jurisdiction and the mandatory duty to order the requested change in boundaries, Cacek v. Munson, *supra*; that judicial review of the county superintendent's action is by petition in error and that such proceedings may be attacked collaterally when such proceedings are void and the county superintendent lacks jurisdiction, State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626; and that evidence involving other matters relating to convenience, travel, and propriety and expediency is irrelevant and immaterial in such proceedings as such matters are for the decision of the petitioners involved and not for the county superintendent to pass upon, School Dist. No. 49 v. Kreidler, 165 Neb. 761, 87 N. W. 2d 429.

It is clear that plaintiff's second cause of action constitutes a collateral attack on the action of the county superintendent and the question is whether this cause of action alleges facts which, if true, show the action of the county superintendent to be void and that he was without jurisdiction to act. This involves a consideration of whether there was an effective petition from plaintiff district, and of section 79-1108, R. R. S. 1943, and the effect, if any, of the amendment thereof by L.B. 592.

Plaintiff contends there was no petition from the board of education filed with the county superintendent and that the resolution is insufficient for this purpose. We disagree. The resolution clearly approves and requests the transfer of the land and it was filed. We follow our holding in Schroeder v. Oeltjen, 184 Neb. 8, 165 N. W. 2d 81, that: "In determining the sufficiency of the proceedings had under the statute, the substance and not the form of the instrument controls." The filing of the resolution was sufficient.

At the time of the superintendent's action in 1967, section 79-1108, R. R. S. 1943, provided as follows: "No

transfer of property from an accredited school district to a nonaccredited school district of any class shall be permitted." This statute clearly and unequivocally prohibited the transfer of land from an accredited to a nonaccredited school district. Plaintiff's amended petition alleges this is what occurred; the exhibits attached thereto show this situation was called to the attention of the county superintendent and it is a matter in which the superintendent had no discretion or authority to act as the requested change in school boundaries clearly contravened this section. The limitations set forth in this statute are of general application to proceedings for the transfer of lands between school districts, Pribil v. French, 179 Neb. 602, 139 N. W. 2d 356, and would apply to proceedings under section 79-402, R. R. S. 1943. We conclude therefore that the action of the county superintendent was void and therefore subject to collateral attack unless the amendment of section 79-1108, R. R. S. 1943, by L.B. 592 bars plaintiff's action.

L.B. 592, enacted with the emergency clause and effective February 20, 1974, creates a 4-year statute of limitations on actions to set aside transfers made in violation of section 79-1108, R. S. Supp., 1974, and concludes with the following sentence: "This provision shall apply to all transfers made prior as well as subsequent to the effective date of this act." It became effective if at all, after plaintiff commenced this action and while such action was pending in the District Court.

Defendants, citing De Jonge v. School Dist. of Bloomington, 179 Neb. 539, 139 N. W. 2d 296, contend that the state is supreme in the creation and control of school districts, may do what it believes appropriate with regard to them without the consent of the residents thereof or even over their protest, and that the legislative function in the transfer of school lands is unaffected by constitutional guaranties of procedural due process. Hall v. Simpson, 184 Neb. 762, 171 N. W. 2d 805. They conclude that the state may therefore enact a statute ter-

minating a pending legal action challenging a change in district boundaries.

There is no question that the Legislature has the plenary power described by defendants and had the Legislature fixed district boundaries by direct legislative action otherwise valid, defendants' conclusions would doubtless prevail. But this is not what happened. The procedures under section 79-402, R. R. S. 1943, were not repealed and still exist. The right of limited collateral attack still exists. The amendment contained in L.B. 592 of section 79-1108, R. R. S. 1943, sought only to place a time limitation on legal action challenging boundary changes, which amounts to legislative recognition that such actions are accepted and proper procedures. L.B. 592 did not fix or establish any school district boundaries.

This court has held that the Legislature may authorize the organization of school districts and boundary changes thereof by private individuals acting within prescribed guidelines and procedures established by the Legislature. When this course of action is permitted, however, the Legislature must accept the requirement of procedural due process. In Lindgren v. School Dist. of Bridgeport, *supra,* this court held: "The fixing of boundaries of school districts is a legislative function. The Legislature may, in the exercise of its control over school district boundaries, provide a method for changing such boundaries, and the method provided may properly authorize such change to be initiated by petition * * *. Such a method must, however, provide a means for determining whether the proposed change in boundaries is for a public purpose, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined." The judicial determination of rights includes the right of appellate review including the right of appeal to the court of last resort. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566. See, also, Hall v. Simpson, *supra.*

This court has also had occasion to determine when rights accrue in school district boundary proceedings. In Clark v. Sweet, 187 Neb. 232, 188 N. W. 2d 889, which involved a boundary change by petition under section 79-403, R. R. S. 1943, it was held that: "Such rights as are granted by the statutes can be terminated by the Legislature up until the time the board had acted and the boundary changes had been actually accomplished." The same rule would be applicable to proceedings under section 79-402, R. R. S. 1943. In the instant case, not only had the county superintendent acted in a quasi-judicial capacity to fix boundaries, but this action was pending at the time L.B. 592 became effective. We conclude that plaintiff's rights had accrued prior to the amendment contained in L.B. 592 and the Legislature was without authority to terminate the same during the pendency of legal action with respect to those rights, where the Legislature was not fixing district boundaries by direct legislative action otherwise valid.

It is appropriate to note that L.B. 592 was passed with the emergency clause, and provided for no period after passage within which accrued rights might be asserted. This court in Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc., 192 Neb. 431, 222 N. W. 2d 125, held that "* * * no limitation shall be made to take effect on existing claims without allowing a reasonable time for parties to bring action before these claims are absolutely barred by a new enactment."

Defendants assert that plaintiff is estopped from attacking the action of the county superintendent and argue in their brief that this rests upon plaintiff's acquiescence of the change in boundaries for something over 6 years. We find and determine that the time involved between the superintendent's action and the institution of these proceedings is insufficient to invoke any such doctrine. Nor are we directed to any allegations in the amended petition that would give rise to the imposition of estoppel on other grounds.

Defendants assert that L.B. 592 is a curative act and as such may have immediate application, including application to pending litigation. The parties agree that the distinction between a curative act and a statute of limitations is that the former is enacted to cure past irregularities which are not jurisdictional and the latter to bar any right, however high its source. Since we have decided that the defect alleged in plaintiff's amended petition was jurisdictional, and not just an irregularity, whatever curative aspect may be included in L.B. 592 would not apply in this case.

We turn now to intervener who was denied leave to file his petition in the trial court. Defendants contend that intervener has no standing in this action as plaintiff district is prosecuting the same in good faith and, in such circumstances, a taxpayer may not intervene. Intervener alleges he is a legal voter and taxpayer of plaintiff district and seeks to intervene on behalf of himself and others similarly situated, and adopts, by reference, all plaintiff's amended petition as his own.

While the authority of plaintiff district to maintain this action is not before us and therefore not a proper matter for consideration, this court has repeatedly held that legal school voters of school districts involved in district boundary proceedings have the right to maintain legal action with respect thereto in their own names. We do not find any requirement that they first seek the institution of such action by the school district. This is particularly true of proceedings under section 79-402, R. R. S. 1943. See, Cacek v. Munson, *supra*; State ex rel. Larson v. Morrison, *supra*. We hold in these circumstances that the intervener should have been permitted to intervene and the trial court erred in denying his motion.

In view of our holdings herein we do not find it necessary to decide other questions raised in the briefs filed in this cause.

We therefore affirm the dismissal of plaintiff's first

cause of action, reverse the dismissal of plaintiff's second cause of action, and reverse the denial of intervener's motion to intervene. This cause is remanded for further proceedings in accordance with this opinion.

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

STATE EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLANT, V. AMERICAN COMMUNITY STORES CORPORATION, A CORPORATION, APPELLEE.
228 N. W. 2d 299

Filed May 1, 1975. No. 39747.

Banks and Banking: Savings and Loan Associations. Where a federal savings and loan association installs a computer terminal in a retail store as authorized by the Federal Home Loan Bank Board for the purpose of facilitating the electronic transfer of funds between the association and its depositors, the owner or operator of the store, by manning the computer terminal and assisting in such electronic transfer of funds under the facts here, is not engaging in either a banking or savings and loan business.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellant.

Delehant, Croker & Huck, for appellee.

Thomas C. Brickle and Richard W. Peterson, for amicus curiae.

Heard before McCOWN, and NEWTON, JJ., COLWELL and CLARK, District Judges, and KUNS, Retired District Judge.

McCOWN, J.

This is a quo warranto action brought by the State of

Nebraska through its Attorney General against American Community Stores Corporation. The action seeks forfeiture of the corporate charter, rights, and privileges of the respondent on the ground that the respondent had engaged in the banking or savings and loan business without authorization, in violation of the laws of the state. The District Court for Lancaster County found that the respondent was not engaged in the banking or savings and loan business and dismissed the information. The State has appealed.

The respondent, American Community Stores Corporation, is a Texas corporation licensed to do business in Nebraska. It operates 35 supermarket stores in the state under the name of "Hinky Dinky." The annual food sales volume is in excess of $100 million. To increase food sales, respondent has traditionally offered incidental services to its customers, including the cashing of checks, selling of stamps, selling of money orders, free use of telephones, and the availability of postal boxes.

First Federal Savings and Loan Association of Lincoln is a federally chartered savings and loan association subject to the jurisdiction of the Federal Home Loan Bank Board. On January 9, 1974, the Federal Home Loan Bank Board authorized First Federal to install computer terminals in two of the Hinky Dinky stores in Lincoln. On January 14, 1974, the computer terminals owned by First Federal were installed in the two stores. First Federal paid no consideration to respondent, nor does respondent pay First Federal any fees or compensation. Neither is any charge made to the customer for the service, which is called TMS (transmatic money service). The Federal Home Loan Bank Board refers to the system as a "place-of-business funds transfer system."

The TMS service is a means by which a TMS depositor of First Federal of Lincoln can communicate with First Federal in order to make deposits and withdrawals by

means of a computer terminal installed at a location such as one of the respondent's stores. A customer in the Hinky Dinky store cannot open a First Federal account, nor deposit or withdraw from a passbook or certificate account with First Federal, nor make a loan payment. The computer terminal itself is about the size of an adding machine and is connected by a regular telephone to the computer at the home office of First Federal in Lincoln. The terminal is located at the courtesy counter in respondent's store. The respondent maintains an interest-bearing transmatic savings account with First Federal, initially $25,000, which is replenished from time to time as needed. Each depositor of First Federal who uses the system must have a transmatic savings account at First Federal and both the store and the customer have a transmatic card which must be used with each transaction. Transactions are handled exclusively by respondent's employees.

If a customer wishes to deposit in his or her First Federal account, the customer goes to the courtesy counter of the store and obtains a transaction slip from a store employee. When that slip is filled out, the respondent's employee then places the two electronically embossed and coded TMS cards in the terminal. One card identifies the store and the other identifies the customer. The customer also has to furnish certain personal confidential numbers, which are not contained on the card, for the purpose of verifying that the person using the card is authorized to use it. The store employee then uses the telephone on the terminal to activate the on-line computer, which is located at the main office of First Federal. The computer then verifies the account and the information. Once verification has been made, the transaction proceeds instantaneously. The computer debits the store's account at First Federal in the amount of the customer's deposit; credits the customer's account at First Federal in the same amount; and notifies the terminal operator that the transaction has been com-

pleted. The store then accepts from the customer the money or check representing the deposit and the money is placed in the cash register with other money of the store.

In the case of a withdrawal the procedure is essentially the same except that in this case the computer debits the customer's First Federal account and credits the store's First Federal account, and the store then pays the amount of the withdrawal in cash to the customer from the store's cash drawer.

The TMS operation at respondent's two stores in Lincoln began experimentally on January 14, 1974, and continued until March 1, 1974. It was then temporarily suspended and later begun again. During the experimental period from January 14 to March 1, 1974, 3,169 individual transactions were initiated from the two stores, involving a total deposit volume of $333,085.80, and a total withdrawal volume of $40,605.70, an average of $117.92 per transaction.

The evidence also establishes that state chartered savings and loan associations maintain agents in cities or areas where they have no home office or branch. These agents accept deposits and transmit them to the home office and make on-the-spot withdrawals or transmit withdrawal requests to the home office. They also solicit business and handle other activities for the home office. The Assistant Director of Banking of the State of Nebraska, who is the supervisor of state chartered savings and loan associations for the department, testified that there is nothing in the statutes to cover this activity by agents of savings and loan associations, and that so far as he knows, there is nothing that would prohibit anyone from acting as agent for a savings and loan association in such transactions. He conceded that the respondent could act as an agent for a state chartered savings and loan association in Nebraska under current state statutes.

The State contends that performance of the activities

above described by the respondent through the means of a computer terminal located in its store constitutes engaging in a banking or savings and loan business. The evidence, however, is conclusive that the operations challenged here have been specifically authorized by the Federal Home Loan Bank Board, which has jurisdiction over the operations of First Federal Savings and Loan Association; and also that the actions of respondent were not in violation of any statute of this state governing the carrying on of a savings and loan business. The State's position therefore rests on the assertion that the actions of the respondent here constitute engaging in a banking business.

The State contends that respondent's actions violate section 8-114, R. R. S. 1943, and, in particular, the language of that section which provides: "It shall be unlawful for any corporation to receive money upon deposit or conduct a bank under the laws of this state, until such corporation shall have complied with all the provisions and requirements of sections 8-101 to 8-1,122." The State argues that the respondent is itself receiving deposits and paying withdrawals, and that this amounts to carrying on the business of banking as well as being in violation of statutory provisions limiting branch banking.

This court has continuously held that the relationship of banker and depositor can only be created by contract, express or implied. In City of Lincoln v. First Nat. Bank, 146 Neb. 221, 19 N. W. 2d 156, this court said: " 'The term "deposit," when used in connection with a banking transaction, denotes a contractual relationship ensuing from the delivery, by one known as the "depositor," of moneys, funds, or things into the possession of the bank, which receives the same upon the agreement to pay, repay, or return, upon the order or demand of the depositor, the moneys, funds, or equivalent amount, or things received; * * *.' "

The general rule is that a bank which receives a gen-

eral deposit of money becomes the debtor of the depositor. Glass v. Nebraska State Bank, 175 Neb. 673, 122 N. W. 2d 882. The undisputed evidence here establishes that the element of a debtor and creditor relationship essential to any bank deposit or withdrawal of funds never exists between the store and the customer. The customer is transacting business with First Federal through the use of a computer terminal in the store, and the actions of the store facilitate that transaction. The State wishes to disregard not only the facts of electronic technology but the undisputed evidence in this case. The computer terminal is analogous to communication equipment of other kinds in that it simply transmits information to the central computer of First Federal. The deposit and withdrawal transactions are electronically effected and perfected by the computer on the records and premises of First Federal. At no time does First Federal have possession or ownership of any cash or funds physically transferred on the store premises between the store and the customer. It seems clear to us that under the operations outlined here, the First Federal depositor is giving funds to or receiving funds from the respondent's store, and the store is simply a financial as well as an operational intermediary between the depositor and First Federal.

We are advised that this case is one of first impression in the courts. Various federal agencies having jurisdiction over financial institutions have determined that computer terminals located in stores or other places of business, and manned by an employee of the store, may be established under specified conditions by a financial institution under their jurisdiction. Such operations do not constitute an illegal banking or savings and loan operation by the store, nor the carrying on of business at an unauthorized branch by the financial institution involved. See, Federal Home Loan Bank Board Document 74-573, 39 Fed. Reg. 23991, and Resolution 74-575, June 26, 1974; Comptroller of the Currency, Department

of the Treasury, 39 Fed. Reg. 44416, December 24, 1974; National Credit Union Administration, 39 Fed. Reg. 30107, August 21, 1974. See, also, Opinion No. 74-196 Attorney General of Kansas, June 12, 1974. We have found no ruling by any regulatory agency to the contrary.

The State has the burden of proving that the actions of the respondent constitute the carrying on of a banking or savings and loan business. The evidence is uncontradicted, however, that the respondent does not accept or retain deposits, nor promise to repay them or return them to anyone. The respondent's activities are restricted to acting as an intermediary and assisting in the transfer of funds between First Federal and First Federal's depositors. The State has failed to cite authority in direct support of its legal position, and has failed to sustain the burden of proof on the facts.

Where a federal savings and loan association installs a computer terminal in a retail store as authorized by the Federal Home Loan Bank Board for the purpose of facilitating the electronic transfer of funds between the association and its depositors, the owner or operator of the store, by manning the computer terminal and assisting in such electronic transfer of funds under the facts here, is not engaging in either a banking or savings and loan business.

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

AFFIRMED.

GRETCHEN SWANSON FAMILY FOUNDATION, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES, V. CECIL A. JOHNSON, ET AL., APPELLEES, SWANCO TRUST COMPANY, A CORPORATION, INTERVENER-APPELLEE, COUNTY OF DOUGLAS, NEBRASKA, INTERVENER-APPELLANT.
228 N. W. 2d 608

Filed May 1, 1975. No. 39757.

1. **Wills.** A patent ambiguity in a will must be removed by interpretation according to legal principles and the intention of the testator must be found within the will; that intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention.
2. ———. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
3. ———. It is competent for a testator to specify what property or class of property shall assume the burden of taxes on the transfer or the right of succession of his estate, as, for example, providing that such taxes shall be paid out of the residuary estate.
4. ———. Where a possible construction of the words in a will leads to a highly improbable result, the court will lean toward a construction that will carry out the natural intention of the testator.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Donald L. Knowles and Henry L. Wendt, for intervener-appellant.

Alfred G. Ellick of Ellick & Spire, for appellees Gretchen Swanson Family Foundation, Inc., et al.

Joseph A. Troia and John Ilich, for appellees Johnson et al.

August Ross, for intervener-appellee.

Heard before WHITE, C. J., MCCOWN, and NEWTON,

JJ., COLWELL, District Judge, and KUNS, Retired District Judge.

COLWELL, District Judge.

This is an action for the construction of the last will and testament of Gilbert C. Swanson, deceased, who died testate March 8, 1968, a resident of Douglas County, Nebraska. Intervener County of Douglas, Nebraska, appeals from the judgment of the District Court finding for the plaintiffs that the word "charges" in the second line of Paragraph SECOND of the will includes only funeral expenses and just debts of the decedent and does not include death taxes. We affirm.

By stipulation of the parties the bill of exceptions was settled by the trial judge; we consider it pursuant to Rules 7 d 2 and 7 i, Revised Rules of the Supreme Court, 1974.

The pertinent parts of the will are:

"FIRST: I direct that all of my funeral expenses and just debts, except debts secured in whole or in part by mortgages on real estate, be paid as soon after my death as practicable. I direct that all estate, inheritance, transfer, succession, legacy, or other death taxes which may become payable upon or with respect to any property included as a part of my gross taxable estate shall be paid out of the corpus of my residuary estate.

"SECOND: After making full provision for the payment of charges as stated in the FIRST part of my Will above, my Executors shall allocate two-thirds (2/3) of my Estate for charitable uses which are contemplated by the Gilbert C. Swanson Foundation, Inc., a tax exempt status corporation founded by me to promote charitable, religious, educational and research objectives."

Plaintiff, Gretchen Swanson Family Foundation, Inc., is a nonprofit charitable corporation established in 1950, having an Internal Revenue Service tax exempt status.

Plaintiff, Gilbert C. Swanson Foundation, Inc., was formed to promote charitable purposes. Its tax exempt

status had not been established with the Internal Revenue Service at the time of the death of its founder, Gilbert C. Swanson.

Intervener-appellant Douglas County, Nebraska, claims that the Nebraska state estate tax, under sections 77-2101 to 77-2112, R. R. S. 1943, due in this estate is included as a charge upon the estate of decedent included in the word "charges" in the second line of Paragraph SECOND of the will and, as such, it was to be paid out of the estate assets the same as debts and funeral expenses, and not out of the residuary estate.

The plaintiffs and all the other parties, except intervener Douglas County, Nebraska, contend it was the intent of the testator that all death taxes were to be paid out of the residuary estate as specifically directed in Paragraph FIRST, and that the claim of intervener Douglas County is (1) contrary to the specific language of the will; and (2) contrary to what any rational person would want to intend.

"The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in the will. * * * In construing a will the court should give effect to the true intention of the testator as shown by the will itself in the light of the attendant circumstances under which it was made, if that intention is consistent with the applicable rules of law. * * * No particular words or conventional forms of expression are necessary to enable one to make an effective testamentary disposition of his property. * * * The intention of the testator is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will." First Nat. Bank & Trust Co. v. Oeltjen, 175 Neb. 345, 121 N. W. 2d 816. See, also, Wall v. Wall, 157 Neb. 360, 59 N. W. 2d 398.

There is a patent ambiguity appearing on the face of the instrument. "A patent ambiguity must be removed by interpretation according to legal principles and the intention of the testator must be found in the will. In

searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. * * * The intention within the ambit of this rule is the one the testator expressed by the language of the will and not an entertained but unexpressed intention." Dunlap v. Lynn, 166 Neb. 342, 89 N. W. 2d 58.

Gilbert C. Swanson executed his will on January 5, 1968. There was evidence of attendant circumstances that it was part of the testator's estate and tax plan which he was considering with the assistance of his attorney, Cecil A. Johnson, a family counselor for more than 20 years. On December 1, 1967, Johnson prepared a two-page, single-spaced memorandum for Swanson's consideration, recommending a change in his testamentary disposition, including present gifts to Swanson's children, and his possible tax liability as related to death taxes, gift taxes, and gifts made in contemplation of death. On January 3, 1968, Johnson prepared another memorandum for Swanson's consideration, being one page, single-spaced, with five pages of supporting accounting data, including a calculation showing possible death taxes resulting from the suggested disposition with the consideration that the death taxes would be paid out of Swanson's residuary estate. On January 5, 1968, Johnson prepared another three-page, single-spaced memorandum for Swanson recommending the transfer of $2,500,000 to an irrevocable trust; Johnson again discussed the possible liability of gift taxes, estate taxes, gifts made in contemplation of death, and, particularly, suggested that the proposed will of Gilbert C. Swanson should provide for all the death taxes being paid out of the residuary estate. The record shows that these memorandums were delivered to Gilbert C. Swanson and Johnson discussed them with him.

On January 2, 1968, as a part of his estate plan Swan-

son created the irrevocable Gilbert C. Swanson Family Sprinkle Trust. The sum of $2,600,000 was transferred by the settlor to the trustees of that trust.

The concern of the testator to minimize his death tax liability is found in Paragraph SECOND of his will. "The Gilbert C. Swanson Foundation, Inc. is currently under a cloud pertaining to its tax exempt status under the Internal Revenue Code. * * * until the issue is resolved at the national level of the Internal Revenue Service and the Gilbert C. Swanson Foundation, Inc. is cleared of this cloud, I am handicapped in using this Foundation for the purposes of planning the disposition of my Estate on my death and the care of it after my death."

At the time testator executed his will, he was informed of the difference in the amount of death taxes dependent upon which bequest was designated to bear that tax burden; and he was aware of the resultant impact upon the beneficiary, Gretchen Swanson Family Foundation, Inc. In round numbers it is revealing to compare. The probate estate was about $11,250,000; if the position of the plaintiffs is correct, the Gretchen Swanson Family Foundation, Inc., would receive about $7,500,000, death taxes would be $2,564,000, and the residuary estate would be $1,186,000. If the position of intervener Douglas County is correct, the foundation would receive $4,139,000, death taxes would be $5,043,000, and the residuary estate would be $2,068,000.

"It is competent for a testator to specify what property or class of property shall assume the burden of taxes on the transfer or the right of succession of his estate, as, for example, by providing that such taxes shall be paid out of the general or residuary estate, or out of a particular fund, or designated portions of his estate." 42 Am. Jur. 2d, Inheritance, Etc., Taxes, § 347, p. 559. See, also, Stuckey v. Rosenberg, 169 Neb. 557, 100 N. W. 2d 526.

A the time of the execution of the will testator was

well informed as to the intended beneficiaries, the consequences of the various alternatives in distribution, and he had particular knowledge and understanding of the impact that the payment of death taxes would have upon all beneficial interests. It is clear that the testator intended to minimize the tax liability of his estate.

The intent of the testator is very apparent when the specific provisions of the will itself are considered. The first sentence in Paragraph FIRST directs the early payment of funeral expenses and debts. In the second sentence of Paragraph FIRST the testator specifically directs the payment of taxes out of his residuary estate by saying: "I direct that all estate, inheritance, transfer, succession, legacy, or other death taxes which may become payable upon or with respect to any property included as a part of my gross taxable estate shall be paid out of the corpus of my residuary estate." This is a brief, concise, understandable direction to the executrix of the estate that all death taxes were to be paid out of the residue of the estate.

"Where a possible construction of the words used in a will leads to a highly improbable result, the court will lean toward a construction that will carry out the natural intention of the testator." 57 Am. Jur., Wills, § 1127, p. 721.

The reference to "payment of charges" as contained in the first sentence of Paragraph SECOND if considered separate and apart is inconsistent, since it does refer to Paragraph FIRST; however, to suggest that taxes were intended to be included as a part of the "charges" would completely disregard the specific provision in the second sentence of Paragraph FIRST and, in addition, when the whole will is considered with the circumstances surrounding its execution, the intervener's suggested improbable result approaches absurdity.

The judgment of the District Court is affirmed.

AFFIRMED.

MARGUERITE DONNER, APPELLANT, V. DONALD PLYMATE, APPELLEE.

228 N. W. 2d 612

Filed May 1, 1975. No. 39769.

1. **Animals.** The Legislature, by enacting section 54-601, R. R. S. 1943, removed the common law restriction of proving scienter or knowledge of the dangerous propensities of dogs, but only as it applied to the actions of dogs specified in the statute.
2. ———. Obviously the Legislature was fully aware of the need for protection from the intentional, deliberate, and purposeful acts of dogs and as a result restricted section 54-601, R. R. S. 1943, to those acts manifesting such qualities.
3. ———. When the words killing, wounding, worrying, or chasing as used in section 54-601, R. R. S. 1943, are read together, they exclude playful and mischievous acts of dogs.

Appeal from the District Court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Yost, Schafersman, Yost & Lamme, for appellant.

Ray C. Simmons, for appellee.

Heard before SPENCER, MCCOWN, and NEWTON, JJ., and HAMILTON and BLUE, District Judges.

HAMILTON, District Judge.

This is an action brought by Marguerite Donner to recover damages under section 54-601, R. R. S. 1943, for personal injuries sustained in a fall that she alleges was caused by a dog owned by Donald Plymate.

In her petition appellant alleges that "plaintiff, while at the residence of the defendant in North Bend, Nebraska, was worried and chased by the defendant's large German Shepherd dog, which wounded her by knocking her down."

The appellee filed an amended answer alleging that appellant assumed the risk, was guilty of contributory negligence, and that the sole proximate cause of the injury was appellant's actions.

Appellee moved for a summary judgment stating that the pleadings and depositions show there is no genuine

issue as to a material fact and that appellee was entitled to judgment as a matter of law. The trial court sustained the motion for summary judgment without stating any reasons, but on appeal both parties treat the basis for the trial court's action as a finding that section 54-601, R. R. S. 1943, was applicable to the factual situation.

There were no witnesses to the incident. Appellee took the deposition of appellant and offered it in evidence to support the motion for summary judgment.

The appellant is a sister-in-law of appellee, and was employed by him to do painting and redecorating at his home. Over a period of several weeks she had been so employed and a pattern developed where she would, after eating lunch, take her dog and the appellee's dog outside to allow the dogs to run and exercise for 15 to 20 minutes each day.

The incident in question occurred when appellee's dog, while exercising, struck the appellant's knee while she was stepping back, causing her to fall and sustain injury. She acknowledged that the dog was in a playful mood, and when asked to describe what the dog was doing when the injury happened, she answered: "Chasing at me and I stepped back, took one step and he hit my right knee."

Appellant described the dog's activities as just chasing at her without being intentionally mean; that it did not growl at her and seemed playful; that the dog would run in circles during the exercise periods and would run at her on occasions, estimated at more than a dozen times; that this was done by the dog in an effort to get exercise and be playful; and that the dog never acted mean on these occasions.

Our present section 54-601, R. R. S. 1943, was originally enacted imposing liability for dog owners for damages by reason of such dog or dogs killing, wounding, worrying, or chasing any sheep or other domestic animals.

In 1947 the statute was amended to include liability

for damages to persons having been bitten by dogs. In 1961 the statute reached its present form so as to include not only damages to persons bitten by dogs, but also includes any and all damages "to *any person,* firm or corporation by reason of such dog or dogs killing, *wounding, worrying, or chasing any person* or persons or any sheep or other domestic animals * * *." (Emphasis added.)

In Pettigrew v. Home Ins. Co., 191 Neb. 312, 214 N. W. 2d 920, this court said: "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." In Johnson v. School Dist. of Wakefield, 181 Neb. 372, 148 N. W. 2d 592, the court stated: "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 purposes rather than one which will defeat it." See, also, Rebman v. School Dist. No. 1, 178 Neb. 313, 133 N. W. 2d 384.

The purpose of the original statute was to protect domestic animals, which are ordinary prey of dogs. Brown v. Graham, 80 Neb. 281, 114 N. W. 153. This protection was extended to persons in 1961 by L. B. 205, the history of which indicates a legislative concern for children and adults being attacked by dogs in the Douglas County area.

The Legislature, by enacting section 54-601, R. R. S. 1943, removed the common law restriction of proving scienter or knowledge of the dangerous propensities of dogs, but only as it applied to the actions of dogs specified in the statute.

Obviously the Legislature was fully aware of the need for protection from the intentional, deliberate, and pur-

poseful acts of dogs and as a result restricted section 54-601, R. R. S. 1943, to those acts manifesting such qualities.

Dog owners are statutorily liable for any and all damage without proof of scienter or knowledge of dangerous propensities of their dog for biting and by reason of such dog or dogs killing, wounding, worrying, or chasing domestic animals and persons.

The appellant sought relief under the allegation that she was worried and chased by the dog, which wounded her. She has detached and separated the statutory wording of wounding, worrying, and chasing. The words must be read together, the meaning of each is dependent on the other in the context that the Legislature chose to place them. The meaning of each is determined by the accompanying words.

The word "wound" is defined: "An injury of a person or animal in which the skin or other membrane is broken, as by violence or surgery." Webster's Collegiate Dictionary (5th Ed., 1948). The word "chase" is defined variously as "to follow quickly or persistently in order to catch or harm" and "to make run away; drive" or "to go in pursuit." The word "worry" means "to treat roughly as with continual biting" or "to bite or tear with the teeth." Webster's New World Dictionary (1971 Ed.).

When the words killing, wounding, worrying, or chasing as used in section 54-601, R. R. S. 1943, are read together they exclude playful and mischievous acts of dogs.

The factual situation as shown by the deposition of appellant clearly shows that her injury was caused by the playful and mischievous act of appellee's dog and not within the scope of protection afforded by section 54-601, R. R. S. 1943.

The motion for summary judgment was properly sustained. The action of the trial court was correct and its judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRED GALLEGOS, APPELLANT.
228 N. W. 2d 615

Filed May 1, 1975. No. 39782.

1. Statutes. Where the language of a statute is plain and unambiguous, no interpretation is needed and the court is without authority to change the language.
2. Criminal Law. In Nebraska there are no common law crimes and we only resort to common law definitions where general terms are used to designate crimes.
3. Criminal Law: Burglary. It is not the law of Nebraska that failure to consummate the crime of burglary is an essential element of attempted burglary.
4. Criminal Law: Statutes. Where the statutory definition of the crime is the attempt to do a certain act or acts, it is immaterial whether or not the objective of the attempt is successful, and the actual commission of a crime represents the execution of an attempt to commit it.

Appeal from the District Court for Dawes County: ROBERT R. MORAN, Judge. Affirmed.

Raymond & Olsen and John K. Sorensen, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

Heard before SPENCER, MCCOWN, and NEWTON, JJ., HAMILTON, District Judge, and KUNS, Retired District Judge.

HAMILTON, District Judge.

Defendant appeals his conviction of attempted burglary. Defendant alleges four assignments of error, all of which are based upon the defendant's contention that failure to consummate the substantive offense of burglary is an essential element of the offense of attempted burglary.

At the trial the evidence disclosed that law enforcement personnel in Chadron, Nebraska, enlisted the help of motel operators in an attempt to catch a burglar. The operator of the Westerner Motel in Chadron set up

a room so that it appeared someone was in bed, put a wallet and keys on the nightstand, and left the door closed but unlocked.

During the night a police intern conducted a surveillance from a parking area with the use of binoculars. At approximately 1:25 a.m., the defendant drove into the parking lot and was observed testing door knobs until he tested and entered the room in question.

When the defendant entered the motel room, the intern used a walkie-talkie radio to call police who were cruising in the area. They arrived just as the defendant emerged from the motel room and after a block and a half chase the defendant was apprehended with a billfold, which had been planted in the motel room by the manager, in his pocket.

Defendant contends that the evidence presented by the State clearly proves that a burglary was committed. That since a failure to consummate the substantive charge of burglary is an essential element of attempted burglary, the court should have directed a verdict for defendant, or the jury should have been instructed of the essential element and the failure to so instruct requires a reversal of defendant's conviction.

The attempted burglary statute provides in part: "Whoever attempts any act prohibited by section 28-532, shall be guilty of attempted burglary * * *. For the purpose of this section any act done with specific intent to commit the offense defined by section 28-532, amounting to more than mere preparation, intending, *even though failing,* to effect its commission is attempted burglary." (Emphasis added.)

In Nebraska there is no general attempt statute and in this state all crimes are statutory; no act is criminal unless the Legislature has in express terms declared it to be so. State v. Hauck, 190 Neb. 534, 209 N. W. 2d 580.

Obviously the Legislature found it desirable and necessary to punish persons who attempted criminal acts as well as those who completed criminal acts. The mere

fact that a criminal was apprehended before completion or prevented from completing the criminal act intended does not make the person any less culpable in the eyes of the law.

The attempted burglary statute, section 28-532.01, R. R. S. 1943, sets out in express terms the crime charged: "Whoever attempts any act prohibited by section 28-532, shall be guilty of attempted burglary * * *." The Legislature by way of clarification provided: "For the purpose of this section any act done with specific intent to commit the offense defined by section 28-532, amounting to more than mere preparation, intending, even though failing, to effect its commission is attempted burglary."

The words "even though failing" are words of inclusion, not exclusion, and reflect a clear legislative intent not to exclude successful burglaries, but to include unsuccessful burglaries. If the Legislature had intended to require a failure to consummate the substantive crime of burglary as an element of the crime, it could have easily substituted the word "but" for the words "even though."

Where the language of a statute is plain and unambiguous, no interpretation is needed and the court is without authority to change the language. Rudder v. American Standard Ins. Co. of Wisconsin, 187 Neb. 778, 194 N. W. 2d 175.

The defendant's contention that failure to consummate the substantive crime is an essential element of attempted burglary evolved from the common law doctrine of merger, where the attempt was merged into the completed crime. In Nebraska there are no common law crimes and we only resort to common law definitions where general terms are used to designate crimes. State v. Hauck, *supra*; State v. Coomes, 170 Neb. 298, 102 N. W. 2d 454.

The trial court, in its burden of proof instruction and in defining attempt, instructed the jury in the language of the statute which is all that is required in a criminal

action. State v. Sukovaty, 178 Neb. 779, 135 N. W. 2d 467; 42 C. J. S., Indictments and Informations, § 150, p. 1079.

It was not error to refuse defendant's requested instruction on the elements of the crime since the instruction included a proposition of law that did not conform to the statute. It is not the law of Nebraska that failure to consummate the crime of burglary is an essential element of attempted burglary. The court properly refused to so instruct in its burden of proof instruction.

Where the statutory definition of the crime is the attempt to do a certain act or acts, it is immaterial whether or not the objective of the attempt is successful and the actual commission of a crime represents the execution of an attempt to commit it. People v. Jelke, 1 N. Y. 2d 321, 152 N. Y. S. 2d 479, 135 N. E. 2d 213; People v. Horn, 25 Cal. App. 583, 144 P. 641; People v. Baxter, 245 Mich. 229, 222 N. W. 149; 22 C. J. S., Criminal Law, § 75, p. 228.

The defendant cannot complain that the proof was greater than necessary to prove the essential elements of the crime charged. In every case where an attempt is charged, proof of the actual commission of the offense establishes the attempt.

The judgment of conviction is affirmed.

AFFIRMED.

MARJORIE MARLOW, APPELLANT, V. MAPLE MANOR APARTMENTS, A PARTNERSHIP, APPELLEE.
228 N. W. 2d 303

Filed May 1, 1975. No. 39787.

1. **Workmen's Compensation: Judgments.** When a judge of the Workmen's Compensation Court enters a judgment which he is authorized by law to make, such judgment is conclusive on all parties at interest.

2. **Workmen's Compensation.** In construing the Workmen's Compensation Act, it has long been the policy of this court to give a liberal construction to it so that its beneficent purposes may not be thwarted by technical refinements of interpretation.
3. **Workmen's Compensation: Words and Phrases.** We construe the words in section 48-148, R. R. S. 1943, "subject to the provisions of sections 48-109 to 48-147 files any claim" as intended to cover only claims arising out of and in the course of the employment.
4. **Workmen's Compensation.** The operative fact is one of coverage, not of election to file a claim for compensation.
5. ———. If coverage exists, even though for some reason compensation may not be payable, the Workmen's Compensation Act is exclusive.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded.

James M. Fitzgerald of Matthews, Kelly, Cannon & Carpenter, for appellant.

Pilcher, Howard & Dustin, for appellee.

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

SPENCER, J.

Plaintiff appeals from the sustaining of a motion for summary judgment dismissing her personal injury action. The trial court held plaintiff's action was barred by section 48-148, R. R. S. 1943, because the plaintiff had previously filed a claim against defendant in the Workmen's Compensation Court. We reverse.

Section 48-148, R. R. S. 1943, provides as follows: "If any employee, or his dependents in case of death, of any employer *subject to the provisions of sections 48-109 to 48-147 files any claim with*, or accepts any payment from such employer, or from any insurance company carrying such risk, on account of personal injury, or makes any agreement, or submits any question to the court under said sections, such action shall constitute a

release to such employer of all claims or demands at law, if any, arising from such injury." (Italics supplied.)

The plaintiff was employed by defendant as custodian for defendant's apartment complex. While returning from a private errand she slipped and fell on ice in front of the premises of the defendant. She thereafter filed a claim with the Workmen's Compensation Court. After hearing, that court found the accident and injury which plaintiff sustained did not result from a risk reasonably incident to her employment. Since the accident and injury did not arise out of and in the course of her employment, her petition was dismissed. Plaintiff then filed the present action.

No appeal was taken from the determination by the Workmen's Compensation Court. When a judge of the compensation court enters a judgment which he is authorized by law to make, such judgment is conclusive on all parties at interest. Gilmore v. State (1945), 146 Neb. 647, 20 N. W. 2d 918. For the purposes of this appeal, therefore, the accident and injury did not arise out of or in the course of plaintiff's employment.

Defendant argues that both the employer and the employee were subject to the provisions of the act, and that plaintiff, by filing a claim with the Workmen's Compensation Court, brought herself within the provisions of section 48-148, R. R. S. 1943. It is conceded that plaintiff at all times was an employee of the defendant and that she did file a claim for compensation. The sole question presented by this appeal is whether "subject to the provisions of sections 48-109 to 48-147," R. R. S. 1943, covers an employee who sustains an accident and injury which does not arise out of and in the course of the employment?

In construing the Workmen's Compensation Act, it has long been the policy of this court to give a liberal construction to it so that its beneficent purposes may not be thwarted by technical refinements of interpreta-

tion. Wilson v. Brown-McDonald Co. (1938), 134 Neb. 211, 278 N. W. 254.

Section 48-101, R. R. S. 1943, provides: "When personal injury is caused to an employee by accident or occupational disease, *arising out of and in the course of his or her employment,* such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury." (Italics supplied.)

Section 48-109, R. R. S. 1943, is as follows: "If both employer and employee *become subject to sections 48-109 to 48-147,* both shall be bound by the schedule of compensation provided in this act, which compensation shall be paid in every case of injury or death caused by accident or occupational disease *arising out of and in the course of employment,* except accidents caused by, or resulting in any degree from the employee's willful negligence as defined in section 48-151." (Italics supplied.)

Michigan, prior to December 31, 1969, had a statutory provision similar to section 48-148, R. R. S. 1943. Defendant takes comfort from the fact that Michigan in several instances similar to the instant one held its statute to be exclusive where a compensation claim was filed, even though the compensation court held plaintiff had not sustained an accident arising out of and in the course of his employment. The words "subject to the provisions of sections 48-109 to 48-147 files any claim," must be interpreted together. It does not say any employee who files a claim, but any employee "subject to." The reasoning of the Michigan court is not persuasive herein.

The Workmen's Compensation Act provides the exclusive remedy by the employee against the employer for any injury arising out of and in the course of the employment. This is the basis on which the rights of employers and employees are put in balance. The employer, by having liability imposed on him without fault, receives in return relief from tort actions. Logically,

therefore, where the employer is negligent he should not be relieved of liability where compensation coverage is not provided to the employee.

In De Porte v. State Furniture Co. (1935), 129 Neb. 282, 261 N. W. 419, we had a slip and fall case analogous to the instant one. De Porte filed a tort action and the defendant contended her remedy, if any, was under the Workmen's Compensation Act. There we said: "The plaintiff here, when injured, was not actually engaged in any duty of her employment nor upon the premises where the work of her employer was carried on, unless by construction we can hold that passing over the sidewalk in front of her employer's place of business, on her own time for which she was not paid, at the noon hour to get her lunch and to do a personal errand brings her within the scope of the compensation law." The court held the injury occurred on a public sidewalk where the employee was exposed to no other or different hazard than the public and did not come under the Workmen's Compensation Act. She was permitted to maintain her tort action.

As we understand defendant's argument, it does not contend that the plaintiff could not have maintained a tort action in the first instance. It does contend, however, that the plaintiff, having elected to file a claim for compensation, has brought herself within the provisions of section 48-148, R. R. S. 1943, and is now barred from filing a tort action. We do not construe the act so narrowly. To so construe it would make a mockery of its beneficent purposes. Applying to the construction of the act the intent to carry out its beneficent purposes, we cannot believe the Legislature intended to take away from employees rights of actions which are not within the coverage of the Workmen's Compensation Act.

We realize there may be close questions as to whether an injury arose out of and in the course of the employment. In those situations, because of the time provisions of the compensation act, it may be necessary to file a

claim with the compensation court to determine the question of liability under the act. We construe the words in section 48-148, R. R. S. 1943, "subject to the provisions of sections 48-109 to 48-147 files any claim" as intended to cover only claims arising out of and in the course of the employment. The operative fact is one of coverage, not of election to file a claim for compensation. If coverage exists, even though for some reason compensation may not be payable, the Workmen's Compensation Act is exclusive. If the accident does not arise out of and in the course of the employment, there is no coverage, and the parties then are not subject to the act. An adjudication that an injury does not arise out of or in the course of the employee's employment is a conclusive determination only of the fact that the Workmen's Compensation Court lacks jurisdiction in the matter. This determination does not bar recourse to the tort remedy, if one exists.

The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. FRANK A. MENDENHALL, APPELLANT.
228 N. W. 2d 617

Filed May 1, 1975. No. 39801.

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

T. Clement Gaughan and Robert I. Eberly, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

McCOWN, J.

The defendant pleaded guilty to a reduced charge of first offense uttering a no account check for $67.28. He was sentenced to a term of 45 days in the county jail by the Lancaster County court. The District Court for Lancaster County affirmed on appeal. The only contention by the defendant on this appeal is that the sentence was excessive.

The presentence investigation report indicates an extensive record of convictions for petit larceny, obtaining money under false pretenses, and related offenses.

The appeal is frivolous. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEONARD J. SVITAK, APPELLANT.
228 N. W. 2d 306

Filed May 1, 1975. No. 39824.

1. **Criminal Law: Waiver.** A written waiver of jury trial signed by the defendant is sufficient to constitute a valid waiver of a criminal defendant's right to a jury trial.
2. **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.
3. **Criminal Law: Sentences.** Unless an abuse of discretion appears, a sentence within statutory limits will not be disturbed on appeal.

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

T. Clement Gaughan and Richard L. Goos, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

SPENCER, J.

Defendant prosecutes this appeal from a sentence of life imprisonment for second-degree murder on a plea of guilty. Defendant contends the trial court erred in permitting him to waive his right to a jury trial and later to withdraw his plea of not guilty by reason of insanity and enter a plea of guilty to second-degree murder. Defendant also attacks the severity of his sentence. We affirm.

On March 5, 1974, the defendant was charged with second-degree murder. Defendant admits that he fired three shots from a .22-caliber rifle which caused the death of his ex-wife. The preliminary hearing was held on April 15, 1974, and defendant was bound over to the District Court for trial. His arraignment was continued for several weeks for the purpose of conducting psychiatric, psychological, and neurological examinations. On June 26, 1974, defendant entered a plea of not guilty by reason of insanity. Thereafter defendant filed a motion for waiver of jury trial, which motion was sustained on July 29, 1974. On August 27, 1974, defendant was allowed to withdraw his prior pleas and to enter a plea of guilty to second-degree murder. After an extensive presentence investigation, the trial court sentenced defendant to life imprisonment in the Nebraska Penal and Correctional Complex.

A review of the record convinces us that this appeal is patently frivolous. At all stages of the proceeding defendant was adequately represented by competent private counsel who took extreme pains to explain his rights and to be sure he understood the proceedings. During the course of their preparation for trial defendant was examined by three psychiatrists, a psychologist, and a neurologist, none of whom found him to be insane.

The following is from the report of one of the court-

appointed psychiatrists to the judge, who permitted defendant to withdraw his plea of not guilty by reason of insanity and to enter a guilty plea: "In my examination I addressed myself to the two psychiatric legal questions involved; one, his mental capacity to stand trial and two his mental capacity at the time of the crime.

"Firstly as to his mental capacity to stand trial. The following are some of the considerations I used in making my conclusions. Is the patient free of any serious mental illness? Does he understand he is being charged in the death of his ex-wife? Does he understand the role of the judge, jury, prosecuting attorney and witnesses? Can he relate in a significant way with his own attorney? Does he know he can call witnesses in his behalf; that thru his attorney he can challenge witnesses? Does he understand that if he is found guilty he can be punished? Will his behavior be disturbing to the trial? Can he control his behavior?

"To all the above considerations I would say yes and therefore, in my psychiatric opinion he has the mental capacity to stand trial.

"As to his mental responsibility at the time of the crime, I have used the McNaughton rules since these are the usual legal tests in Nebraska.

"1. Does Mr. Svitak have a mental illness?

"Mr. Svitak has both an alcoholic disorder as well as an inadequate personality.

"2. Does Mr. Svitak know the nature and quality of his act?

"Answer - Yes.

"3. Does Mr. Svitak know right from wrong?

"Answer - Yes.

"It is therefore, my conclusion that Mr. Svitak should be held mentally responsible for his actions."

Defendant is now suggesting that his motion to waive a jury trial and his request to withdraw his plea should not have been granted because of his alleged depression

and state of mind. This complaint is not supported by the record and is totally devoid of merit. Each of the two attorneys representing defendant advised the trial judge that after lengthy discussions with defendant their opinion was the waiver of jury trial would be in the best interest of defendant. The defendant signed the waiver of jury trial in open court and offered it as an exhibit. The trial judge then questioned the defendant at length. From the record it is clear to us the defendant understood what he was doing and knew if the waiver was granted he could not thereafter change his mind. The procedure employed was strictly in accord with section 1.2(b) of the American Bar Association Standards Relating to Trial by Jury.

In State v. Klatt (1974), 192 Neb. 219, 219 N. W. 2d 761, we held: "A written waiver of jury trial signed by defense counsel and acquiesced in by the defendant is sufficient to constitute a valid waiver of a criminal defendant's right to a jury trial." The waiver here was signed in open court by the defendant in the presence of the court and counsel.

On the morning defendant's case was set for hearing, defendant's counsel advised the court and prosecutor that the defendant had decided to withdraw his pleas of not guilty and not guilty by reason of insanity and enter a plea of guilty. They stated they had spent approximately 4 hours with defendant the previous evening explaining what they were attempting to prove by way of defense, with the hope of getting a conviction for manslaughter rather than second-degree murder. After much discussion the defendant stated he wished to plead guilty to second-degree murder rather than attempt to litigate the matter further. Counsel stated the decision to plead guilty was made by defendant with the express understanding that by so doing he would be found guilty of second-degree murder and would lose the opportunity of contending for a lesser-included offense. Counsel testi-

fied they thoroughly explained the penalties involved to defendant.

Before accepting the plea, the judge addressed the defendant personally to be certain defendant was well aware that if the plea of guilty was accepted he knew the rights he was waiving. The judge advised defendant he would waive his right to have the matter tried by the court, his presumption of innocence, the right to be confronted with witnesses against him, the right to present witnesses in his own defense, the right to remain silent, the right to insist the government prove his guilt beyond a reasonable doubt, and the right to challenge or attack confessions or statements he had made to law enforcement officials. In addition, the judge advised the defendant of the maximum and minimum possible penalties that could be imposed.

The trial judge next ascertained the factual basis for the charge. He further ascertained that no threats, force, inducements, or promises had been used on or made to the defendant to get him to plead guilty to the charge against his will. The defendant advised the trial judge that he entered his plea and waived the above-described rights freely, voluntarily, intelligently, and knew what he was doing. He further advised the trial judge that he entered his plea of guilty because he had committed the offense. Defendant's attorneys also advised the trial judge that their client was waiving his rights freely, voluntarily, and intelligently.

It is obvious that defendant became dissatisfied with his counsel after visiting with the inmate legal advisor in the Penal Complex. His dissatisfaction reached the point where he refused to discuss with them the motion for new trial they had filed on his behalf. They attempted to withdraw for that reason but the court reserved ruling on their motion and required them to appear with a representative of the public defender's office who represented defendant in all further proceedings.

The farcical nature of defendant's contention that he did not understand the effect of his guilty plea is apparent when one reads defendant's testimony on his motion for a new trial. He there concedes he understood he was pleading guilty to second-degree murder. He knew his attorneys could not get a plea bargain. He also knew he could be sentenced to life imprisonment under the 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." State v. Clay (1974), 191 Neb. 654, 217 N. W. 2d 94. The record clearly reflects defendant understood the effect of his guilty plea. To permit him now to withdraw the guilty plea on contentions that are patently false and cannot be supported by the record would make a farce of a very adequate proceeding. We commend the trial judge for his painstaking efforts to be certain defendant thoroughly understood the rights he was waiving and the effect of his plea.

Lastly, defendant complains his sentence to life imprisonment in the Nebraska Penal and Correctional Complex is excessive and should be reduced. The record indicates, although defendant denies he knew about it, that the county attorney filed a charge of second rather than first-degree murder at the suggestion of the public defender, with the understanding that a guilty plea would be entered. Defendant thereafter secured private counsel who represented him until the hearing on the motion for new trial. These counsel advised the court they were unable to work out a plea bargain with the county attorney who told them he had made the only concession he was going to make in filing a charge of second-degree murder. The crime involved herein was brutal. Defendant shot his ex-wife with a .22-caliber rifle three times, once in the buttocks area, and subsequently twice in the head. "Unless an abuse of discretion appears, a sentence within statutory limits will

not be disturbed on appeal." State v. Sheets (1974), 191 Neb. 153, 214 N. W. 2d 379. The sentence imposed does not reflect an abuse of discretion and consequently should not be disturbed.

The defendant's assignments of error are devoid of merit, and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL JOHN COLEMAN, ALSO KNOWN AS MIKE BEASLEY, APPELLANT.
228 N. W. 2d 618

Filed May 1, 1975. No. 39834.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Michael John Coleman, pro se.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of unlawful distribution of heroin and sentenced to imprisonment for 5 to 20 years. At the trial Hugh J. McGuire testified as an expert witness for the State. Later it was discovered McGuire had testified falsely concerning his academic qualifications. The defendant then filed a motion for a new trial on the ground of newly discovered evidence.

The motion was consolidated for hearing with a number of similar motions filed in other cases. After an evidentiary hearing the trial court overruled the motion. The defendant has appealed.

The question presented in this case was considered at length in State v. Glouser, *ante* p. 190, 226 N. W. 2d 328.

The motion filed in the Glouser case was heard by the trial court at the same time as the motion filed in this case.

In the Glouser case we held the evidence as to McGuire's background and training was sufficient to qualify him as an expert witness; and the newly discovered evidence concerning McGuire was of an impeaching character and not of such a controlling nature as probably would have changed the result. The decision in the Glouser case is controlling here.

The judgment of the District Court refusing to grant the defendant a new trial is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VASTINE LEON ERVING, ALSO KNOWN AS SAM SAUSAGE, APPELLANT.
228 N. W. 2d 619

Filed May 1, 1975. No. 39837.

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

T. Clement Gaughan and Richard L. Goos, for appellant.

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

BRODKEY, J.

On February 3, 1974, the defendant, who was incarcerated and serving a sentence in the Nebraska Penal and Correctional Complex, pushed corrections officer, Lieutenant William J. Ruhge, who was about to take him to solitary confinement as a result of institutional infractions, and also struck the officer in the eye with

a fingernail clipper while defendant was resisting Lieutenant Ruhge and other officers. He had previously thrown two cups of water on a guard after being refused a cigarette. Defendant was originally charged with the commission of a felony, but the information was later amended to charge defendant with an unlawful assault on William J. Ruhge, which is a misdemeanor. He was later sentenced to 30 days in the county-city jail in Lancaster County, Nebraska, the sentence to be consecutive to any term or terms then being served by the defendant. He has appealed to this court assigning as error the failure of the court to make the sentence run concurrently with the time being served by the defendant, and also alleging that the sentence was excessive. We affirm.

The statutory penalty for the misdemeanor offense of assault is a fine not exceeding $500 or imprisonment in the jail of the county not exceeding 6 months. § 28-411, R. S. Supp., 1974. The sentence imposed was clearly not excessive. However, defendant urges this court to reduce the sentence of the trial court under section 29-2308, R. R. S. 1943, and asserts that it is the duty of the court to do so if warranted by the evidence. The evidence does not so warrant, and we decline to do so. Were we to modify the 30-day sentence and make it run concurrently rather than consecutively with defendant's present sentence, it would be tantamount to defendant receiving no sentence at all. We have repeatedly ruled that we will not disturb a sentence imposed within the limits of the statute unless there appears to be an abuse of discretion. State v. Cano, 191 Neb. 709, 217 N. W. 2d 480 (1974). There was no abuse of discretion in this case. Judgment affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE E. ATWATER, APPELLANT.
228 N. W. 2d 876

Filed May 8, 1975. No. 39616.

1. **Arrest: Probable Cause.** The applicable standard for an arrest without warrant is that there must exist reasonable ground to believe both that a felony has been committed and that the person arrested is guilty of such offense.
2. ———: ———. There is no formula for the determination of reasonableness for an arrest without a warrant. Each case is to be decided on its own facts and circumstances. The ultimate test is whether the action of the officers was reasonable.
3. **Sentences: Criminal Law.** 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.
4. **Guilty Plea: Criminal Law: Records.** A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and Chauncey C. Sheldon, for appellee.

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

SPENCER, J.

Defendant, Lawrence E. Atwater, prosecutes this appeal from two separate robbery convictions. In the first one, he was convicted by a jury after a lengthy trial on two counts. He assigns as error therein the overruling of his motion to suppress evidence, for the reason that his arrest was without probable cause. In the second

case, which involves a different robbery, he changed his plea during the course of the trial and pled guilty. There he assigns as error the insufficiency of the record to establish a waiver of his rights voluntarily, knowingly, and intelligently. We affirm both cases.

In the early morning hours of December 13, 1973, two black men forced their way into Champs Restaurant in Omaha, Nebraska. Three employees were robbed. One of them was beaten and his throat cut with a box knife. Further details of the robbery are immaterial. The only issue presented is whether the warrantless arrest of defendant, Lawrence Atwater, was illegal and without probable cause. If so, then articles found in a search incident to that arrest would be suppressed.

In the investigation of the robbery, the police ascertained that an automobile registered to Alonzo Atwater, a brother of the defendant, was parked in the Champs' parking lot near the time of the robbery. The police began a search for Alonzo, but found he was no longer at the address they had for him. Two officers then proceeded to the home of his mother. In response to a knock, the door was opened by an individual who identified himself as "Mr. Atwater." Shortly thereafter, Mrs. Atwater came to the door. The officers explained the purpose of their presence, and asked if either of the sons were there. They received an answer in the negative. The officers had been permitted to enter the house. While they were talking, they observed Lawrence Atwater come down a flight of stairs and walk into the room. They identified themselves, and he did likewise.

When the officers saw Lawrence, they decided he fit the description given to them of one of the robbery suspects. They then advised Lawrence they would like him to accompany them to the police station for questioning. Lawrence agreed to go, but told them he would have to go upstairs to get dressed. As they proceeded upstairs, Lawrence began arguing about whether he would accompany them to the station. He finally told

them he would not go unless he was under arrest. Lawrence was then advised he was under arrest.

As the officers entered the bedroom with Lawrence, they observed a brown leather jacket lying on the bed, which fit the description of the jacket one of the suspects had been wearing. One of the officers, who went with Lawrence into a clothes closet, saw a box cutting knife, which fit the description of the one involved in the robbery. It was later positively identified by one of the victims as the actual knife used in the robbery.

The question involved herein is the quantum of information necessary before an officer has probable cause to arrest. We said in State v. Russ (1975), *ante* p. 308, 226 N. W. 2d 775: "The applicable standard for an arrest without warrant is that there must exist reasonable ground to believe both that a felony has been committed and that the person arrested is guilty of such offense."

The applicable rule in applying this standard to a particular case is set out in Ker v. California (1963), 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726, wherein the Supreme Court of the United States said: "'* * * there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.'" The ultimate test is whether the action of the officers was reasonable. State v. McElroy (1972), 189 Neb. 376, 202 N. W. 2d 752.

What information was within the knowledge of the officers at the time the arrest was made? A car observed at the scene was registered to Alonzo Atwater. Alonzo was black. Two black men had been involved. Lawrence was Alonzo's brother. When the officers arrived at the mother's home, they were first told that neither Lawrence nor Alonzo was present. They then observed Lawrence, who both officers believed fit the description given by the victims of one of the robbers. They requested that Lawrence accompany them to the police station for questioning. When Lawrence refused

to do so, the officers placed him under arrest. It was immediately thereafter that the incriminating evidence was found in his possession.

There is no question the officers knew the offense had been committed. The only question is, did they have reasonable grounds to detain the defendant? They knew an automobile belonging to defendant's brother had been observed at the scene of the robbery. They knew two black men were involved in the robbery. They believed the defendant fit the physical description of one of the participants given to them by the robbery victims. We believe this sufficient to give the officers reasonable grounds to detain defendant for preliminary questioning. When the defendant refused to accompany the officers, they properly placed him under arrest. There is no merit to defendant's assignment of error.

Defendant's other assignment of error is that the District Court sentence to a term of 10 to 30 years in the Nebraska Penal and Correctional Complex was excessive. The penalty provided for the offense is a term of not less than 3 years and not more than 50 years. § 28-414, R. R. S. 1943. The crime involved was a serious one and particularly agonizing and brutal for the victims. The throat of one of the victims was cut in an effort to force him to divulge the combination of the safe. A gun was placed in the mouth of a female victim, and the hammer was released but caught by the robber before contact was made. Defendant was convicted on two counts of robbery and given concurrent sentences of 10 to 30 years in the Nebraska Penal and Correctional Complex. We have said on many occasions 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. Glouser (1975), *ante* p. 186, 226 N. W. 2d 134. There

was no abuse of discretion herein. Defendant's convictions for the Champs robbery are affirmed.

Defendant's second case involves a prosecution for forcibly and by violence taking from the personal protection of Bruce Kenny personal property of value, the property of the Pizza Hut, with intent to rob and steal. During the course of the trial defendant requested and was allowed to withdraw his plea of not guilty and enter a plea of guilty. Defendant was sentenced to 10 to 30 years in the Nebraska Penal and Correctional Complex, said sentence to be served concurrently with the sentences imposed for the Champs robbery. We affirm.

The only assignment of error is that the court committed reversible error in accepting defendant's plea of guilty without making a constitutionally required inquiry sufficient to show that the defendant pled guilty voluntarily, knowingly, intelligently, and with full knowledge of the rights he was waiving. This assertion is premised upon defendant's contention that the record does not affirmatively show the trial judge informed him of the possible penalties that could be imposed, relying on State v. Lewis (1974), 192 Neb. 518, 222 N. W. 2d 815.

This case may be distinguished from State v. Lewis, *supra*. The plea was taken during the course of the trial, which was aborted by the change of plea. The court carefully explained to the defendant the effect of a change of plea, and refused to accept it until defendant stated he was changing his plea because he had actually committed the robbery as charged in the two counts.

Defendant's attorney stated for the record that he had gone over the matter thoroughly with the defendant and that there was absolutely no chance of his obtaining an acquittal in the case. Defendant's fingerprints had been lifted from the site of the robbery, and both the fingerprint experts for the State and for the defendant agreed that the prints lifted were those of the defend-

ant. There is not the slightest doubt that the record indicates defendant's plea represented a voluntary and intelligent choice among the alternative courses of action open to the defendant, as required by State v. Turner (1971), 186 Neb. 424, 183 N. W. 2d 763. In Turner we said: "A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily."

The only contention of the defendant is that the record does not affirmatively show that the court advised him of the possible penalty. Defendant at that time was awaiting sentence on his conviction on two counts of robbery in the previous case. After the entry of the plea, defendant expressly waived a presentence report in this case because one had been made and was in the possession of the court covering the Champs burglary. Sentencing was set for 2 days later to give the court and defendant's counsel time to read the presentence report.

During the course of the sentencing proceedings, the court said to the defendant: "The Court granted you leave to withdraw your plea of not guilty. And after the Court was fully satisfied that your plea was knowingly, voluntarily, and intelligently made, that you fully understood the significance and importance of your actions and knew the consequences that might inure because of your actions, the Court accepted your plea of guilty to that Count and found you guilty as charged, and a judgment of conviction was entered thereon."

Defendant at all times was represented by able counsel. We find his plea was entered understandingly and knowingly. The proof of his guilt as reflected by the record was overwhelming. Defendant at the time stood convicted of two counts of robbery but had not yet been sentenced thereon. He received 10 to 30 years sentences on each of the previous convictions, both sentences to be concurrent. He was sentenced to 10 to 30 years herein,

and the sentence was made concurrent with the sentences previously imposed. As Chief Judge Gibson observed in Entrekin v. United States (8th Cir., 1974), 508 F. 2d 1328: "It appears to be an exercise in futility and a waste of judicial resources to consider this collateral attack on a concurrent sentence after denying relief on the first sentence." Viewing the totality of the circumstances herein, we distinguish this case from State v. Lewis, 192 Neb. 518, 222 N. W. 2d 815, and affirm the conviction.

For the reasons stated, the convictions of the defendant for the Champs robbery and the conviction for the Pizza Hut robbery are affirmed.

AFFIRMED.

ORLEANS EDUCATION ASSOCIATION, AN UNINCORPORATION ASSOCIATION, APPELLEE, V. THE SCHOOL DISTRICT OF ORLEANS, IN THE COUNTY OF HARLAN, IN THE STATE OF NEBRASKA, ALSO KNOWN AS SCHOOL DISTRICT NO. R-3 OF HARLAN COUNTY, NEBRASKA, ALSO KNOWN AS THE ORLEANS PUBLIC SCHOOLS, A POLITICAL SUBDIVISION, APPELLANT.
229 N. W. 2d 172

Filed May 8, 1975. No. 39658.

1. **Estoppel.** When a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration.
2. **Constitutional Law: Labor and Labor Relations: Legislature.** The power of the Legislature to create a body with appropriate powers to deal with the labor relations of governmental entities and departments does not depend upon the grant of power given by Article XV, section 9, of the Nebraska Constitution, but exists by virtue of the general grant of legislative power under Article III, section 1.
3. **Constitutional Law: Legislature.** The Legislature has plenary legislative authority except as limited by the state and federal Constitutions.
4. **Constitutional Law: Labor and Labor Relations: Administrative**

Law: Statutes. Where the Legislature delegates to an administrative body authority to settle labor relation disputes, the delegation is valid if the statute making the delegation establishes a sufficient basic standard — a definite and certain policy and rule of action for the guidance of the agency created to administer the law. The standards set forth in section 48-818, R. R. S. 1943, meet the above criterium.

5. **Constitutional Law: Court of Industrial Relations: Statutes.** The jurisdiction of the Court of Industrial Relations is limited to what are clearly legislative concerns and the quasi-judicial powers which it exercises are merely incidental thereto. Section 48-818, R. R. S. 1943, does not delegate judicial powers to an administrative body in violation of Article II, section 1, or Article V, section 1, of the Nebraska Constitution.
6. ———: ———: ———. The authority given to the Court of Industrial Relations to establish rates of pay and conditions of employment in accordance with the standards prescribed by section 48-818, R. R. S. 1943, does not constitute the delegation of legislative authority to act in violation of Article III, section 1, or Article VIII, section 6, of the Nebraska Constitution.
7. ———: ———: ———. The act creating the Court of Industrial Relations is not amendatory of section 79-810, R. R. S. 1943, granting budget-making authority to school districts and hence does not violate Article III, section 14, of the Nebraska Constitution.

Appeal from the Court of Industrial Relations. Affirmed.

Person, Dier & Person and Thomas J. Monaghan, for appellant.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

Heard before WHITE, C. J., BOSLAUGH, NEWTON, CLINTON, and BRODKEY, JJ., HASTINGS, District Judge, and KUNS, Retired District Judge.

CLINTON, J.

This is an appeal from an order of the Court of Industrial Relations by which it set the rate of pay and certain other benefits for teachers employed by the de-

fendant, School District of Orleans, and by which it denied other relief prayed for by the plaintiff, Orleans Education Association, on behalf of its members. The school district appeals to this court pursuant to the provisions of section 48-812, R. R. S. 1943, and on appeal makes the following claims: (1) The plaintiff has no standing to sue because it had not, prior to suit, exhausted the remedies available to it under the Nebraska Teachers' Professional Negotiations Act, section 79-1287 et seq., R. R. S. 1943. This contention is founded upon the fact that before negotiation the plaintiff had not complied with the provisions of section 25-314, R. R. S. 1943. (2) The Nebraska Teachers' Professional Negotiations Act and section 48-818, R. R. S. 1943, are unconstitutional because they delegate legislative authority to an administrative agency in violation of Article II, section 1, of the Nebraska Constitution, pertaining to the separation of powers, and delegate the authority to tax to an administrative agency contrary to the requirements of Article VIII, section 1, of the Nebraska Constitution. (3) The Nebraska Teachers' Professional Negotiations Act is unconstitutional because it delegates legislative power to an administrative agency without providing sufficiently definite standards to guide the exercise of that power in violation of Article II, section 1, and Article III, section 1, of the Nebraska Constitution. (4) Section 48-818, R. R. S. 1943, is amendatory of section 79-810, R. R. S. 1943, and since it makes no mention of the amended statute it violates the requirements of Article III, section 14, of the Nebraska Constitution, and is unconstitutional. This contention is founded upon the premise that section 48-818, R. R. S. 1943, which authorizes the Court of Industrial Relations to set pay rates, in effect transfers budget-making authority from the school district, as provided by section 79-810, R. R. S. 1943, to the Court of Industrial Relations. (5) The order prescribing the rate of pay and other benefits is not sustained by the evidence.

The first assignment may be dealt with rather summarily. The defendant argues that since the plaintiff had not complied with section 25-314, R. R. S. 1943, which requires the filing with the Secretary of State of a certificate naming a resident agent before the unincorporated agency is authorized to do business, its attempt to negotiate and the rejection of that attempt by the school district were legally nugatory. Plaintiff did, however, file the certificate before this action was commenced but after the school district had refused to recognize the plaintiff as the negotiating agent for its members. The record establishes that the defendant's refusal to recognize the plaintiff as negotiating agent was not grounded on plaintiff's noncompliance with section 25-314, R. R. S. 1943. The defendant gave two specific reasons for its refusal to recognize the plaintiff. Neither reason was related to plaintiff's compliance with section 25-314, R. R. S. 1943. The reasons were such that it is clear defendant would not have recognized the plaintiff even if it had been in compliance with section 25-314, R. R. S. 1943. The defendant school district cannot be heard to say at this late date that it would have recognized the plaintiff had there been compliance with the statute in question. The record indicates otherwise. When a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration. Boettcher v. Goethe, 165 Neb. 363, 85 N. W. 2d 884. The following principle also seems applicable: A party who has taken a position with regard to procedure, which has been acted or relied upon by his adversary or the court, is estopped from taking an inconsistent position respecting the same matter in the same proceeding to his adversary's prejudice. Lane v. Burt County Rural Public Power Dist., 163 Neb. 1, 77 N. W. 2d 773.

The next three assignments are somewhat interrelated and will be considered together. Does the Ne-

braska Teachers' Professional Negotiations Act and section 48-818, R. R. S. 1943, unconstitutionally delegate legislative power to an administrative body, the Court of Industrial Relations, contrary to Article II, section 1, of the Nebraska Constitution? If it does delegate such power, is the power limited by sufficiently definite legislative guidelines? Do these statutes delegate the power to tax to an administrative body contrary to Article VIII, section 1, of the Nebraska Constitution?

In raising these questions the defendant relies to a considerable degree upon the dissenting opinions in School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N. W. 2d 752, which dissents noted questions not raised by the parties in that case and therefore not directly dealt with in the majority opinion. We must accordingly examine the merits of the issues raised in the dissenting opinions.

Article II, section 1, of the Nebraska Constitution, is as follows: "The powers of the government of this state are divided into three distinct departments, the Legislative, Executive and Judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

Article III, section 1, of the Nebraska Constitution, insofar as it is necessary to quote it, states: ". . . the legislative authority of the state shall be vested in a Legislature consisting of one chamber."

Article VIII, section 1, of the Nebraska Constitution, reads in part as follows: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct."

Under the provisions of our Constitution the Legislature is authorized to delegate taxing power to municipal corporations. Art. VIII, § 6, Nebraska Constitution.

It is necessary to ask ourselves just what authority

the statute in question delegates and whether the above constitutional provisions are violated in some manner not determined either expressly or by necessary implication by our opinion in School Dist. of Seward Education Assn. v. School Dist. of Seward, *supra*. Most of the possible contentions are answered in the majority opinion in School Dist. of Seward Education Assn. v. School Dist. of Seward, *supra*. Only those claims raised by the minority of this court in the dissents and now relied upon by the defendant require consideration. Most of the members of this court who authored or joined in those dissents or indicated that the matters noted there might have merit if properly raised, now, after further consideration, believe otherwise.

The first claim is that Article XV, section 9, of the Nebraska Constitution, does not contemplate or authorize the creation of a body to deal with the labor relations of governmental entities. Judge Newton, in his dissent, pointed out reasons for so believing as did the writer of this opinion in his separate dissent. One may be willing to concede the validity of the contention that the amendment was intended to apply only to the regulation of public utilities. However, this does not answer the question of whether the Legislature otherwise has power to devise methods for dealing with the labor relations of governmental entities and departments. We conclude that the power of the Legislature to create a body with appropriate powers to deal with the labor relations of governmental entities is not, for reasons we develop later, dependent upon the grant of power given by Article XV, section 9, of the Nebraska Constitution. That proposition is implicitly recognized in the majority opinion in the Seward case as well as in the two dissents. The majority opinion, consistently with a well-recognized principle, stated: "The Legislature has plenary power and control over school districts, including provision for the appointment or election of governing bodies thereof. Consequently, it may provide limitations on any author-

ity to be exercised by a school board. If the Legislature has such complete control over public school districts, it follows, by the enactment of L.B. 15, Laws 1969, chapter 407, page 1405, it was exercising that control." The act referred to in that statement is the act by which section 48-810, R. R. S. 1943, was amended to require the exhaustion of the provisions of the Nebraska Teachers' Professional Negotiations Act as a condition precedent to invocation of jurisdiction of the Court of Industrial Relations in cases involving persons and activities subject to the provisions of the Nebraska Teachers' Professional Negotiations Act. In his dissent Judge Newton said: "Public or governmental business has never been a subject of the police power. Such an exercise of power is unnecessary because this type of business is subject to direct legislative control at all times and in all respects without resort to the extraordinary remedy provided by the police power." That dissent then goes on to note that Article XV, section 9, does not authorize the legislation in question. The writer of this opinion in his dissent said: "There would, however, seem to be no question that the Legislature may enact independently of Article XV, section 9, labor legislation applicable to public employees, but in so doing the provisions of Article II on the separation of powers must be observed." The latter statement, implying that the separation of powers provision of the Constitution or Article V, section 1, granting judicial power to the courts was somehow violated, is, I now believe, clearly mistaken.

The Legislature has plenary legislative authority except as limited by the state and federal Constitutions. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N. W. 2d 236. Collective bargaining and the rights and remedies which arise therefrom are wholly the creation of legislative power, state and federal, and are of relatively recent origin. Mabry, Labor Relations and Collective Bargaining, p. 147. This court has stated many times that the method of creation of governmental

subdivisions, the grant of their powers, and the manner of their exercise is almost wholly within the legislative sphere. Dwyer v. Omaha-Douglas Public Building Commission, *supra*. The same is, of course, true of school districts. School Dist. of Seward Education Assn. v. School Dist. of Seward, *supra*. It is clear that the Legislature did not need to look to the authority of Article XV, section 9, of the Nebraska Constitution, when it entrusted to the Court of Industrial Relations authority pertaining to labor relations of governmental services. It has that authority by virtue of Article III, section 1.

The next question to be answered is whether there is any merit to the contention that section 48-818, R. R. S. 1943, is void because it delegates legislative power to an administrative agency without prescribing adequate guidelines governing the exercise of that power. The contention itself contains the assumption that the type of legislative delegation here being considered requires the statutory statement of guidelines to make it valid. The validity of that assumption requires examination. The rule is usually stated in this way: "In the grant of power to an administrative agency to legislate, such power must be limited to the expressed purpose and administered in accordance with standards prescribed in the legislative act." Terry Carpenter, Inc. v. Nebraska Liquor Control Com., 175 Neb. 26, 120 N. W. 2d 374. We have, however, stated it differently. In Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227, we said: "The exercise of a legislatively-delegated authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law with designated limitations and standards, is not an exercise of legislative power. It is administrative in its nature and its use by administrative agencies is usually essential to the complete and wise exercise of the power in the accomplishment of the purpose which the Legislature intended." In both of those cases the power being delegated was rule-making power

having the force of law and for the violation of which penalties could be imposed. It is usually said that matters such as setting compensation of governmental employees and the conditions of their employment is, generally speaking, a legislative power. 67 C. J. S., Officers, § 93(2), p. 336. Setting such compensation is not, however, such a purely legislative power that its valid delegation, in the absence of some specific constitutional requirement, requires the strict standards applicable to the delegation to administrative bodies of the power to make rules and regulations which have the effect of law and for the violation of which penalties are imposed. 16 C. J. S., Constitutional Law, § 138(b), p. 621, see text accompanying note 20. The governing boards of school districts are not legislative bodies, yet we know that historically they have been delegated, without prescription of any standard whatever, the authority to hire administrators and teachers and to fix their salaries. Similar delegations of authority are made by the Legislature to various governmental entities as well as to the other two coordinate branches of government.

The labor relations legislation we are here considering goes further, of course, than the mere setting of salaries of teachers. That act has a much broader public purpose which is set forth in section 48-802, R. R. S. 1943. When the legislative delegation is of this type, it is usually held that the statement of standards is required. 16 C. J. S., Constitutional Law, § 138, notes 99.5, 99.10, 99.15, pp. 629, 630.

Section 48-818, R. R. S. 1943, provides in part as follows: "In making such findings and order or orders, the Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions. In establishing wage rates the court shall take into consideration the overall

compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees." In cases involving the validity of the delegation of power to settle labor relations disputes, it has been held: " 'It is only necessary that the statute establish a sufficient basic standard—a definite and certain policy and rule of action for the guidance of the agency created to administer the law.' " State ex rel. Van Riper v. Traffic Tel. Workers' Federation, 2 N. J. 335, 66 A. 2d 616, 9 A. L. R. 2d 854. See, also Fairview Hospital Assn. v. Public Building Service Union, 241 Minn 523, 64 N. W. 2d 16. In the first-cited case, the New Jersey court held that the statute was unconstitutional because no standards at all were prescribed. However, it pointed to the statutes of a number of other states as containing standards apparently sufficient. One of the statutes referred to was "Nebraska Laws 1947, Bill 537, Chapter 178, § 18." This is section 48-818, R. R. S. 1943. In the second-cited case, the Minnesota court held the statute of that state to be constitutional. The statutory standards prescribed in the Minnesota act were far less precise than those contained in section 48-818, R. R. S. 1943. In Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U. S. 146, 61 S. Ct. 908, 85 L. Ed. 1251, the United States Supreme Court held that section 9(b) of the National Labor Relations Act, which provides that the board "shall decide in each case whether, in order to insure the employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof," supplies adequate standards for administrative action and does not unconstitutionally dele-

gate legislative power. We hold that the standard contained in section 48-818, R. R. S. 1943, is clearly sufficient and the statute is constitutional.

This court pointed out in School Dist. of Seward Education Assn. v. School Dist. of Seward, *supra*, that the act creating the Court of Industrial Relations grants that body a combination of administrative, legislative, and judicial powers. Those granted by section 48-818, R. R. S. 1943, require the receipt of evidence and the determination of facts. Such powers are quasi-judicial. The contention that the statute violates the constitutional prohibition against the delegation of judicial authority to nonjudicial bodies, however, is not well founded because, as we held in School Dist. of Seward Education Assn. v. School Dist. of Seward, *supra*, the Court of Industrial Relations is an administrative body. The function it exercises is a legislative one; its quasi-judicial powers are purely incidental.

The act creating the Court of Industrial Relations creates rights and jurisdiction unknown at common law. Mabry, op. cit. It does not take from any court jurisdiction granted to it by the Constitution, Art. V, § 1, Nebraska Constitution, which, of course, the Legislature could not constitutionally do. State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676. The authority of the Court of Industrial Relations is carefully circumscribed. Its procedures are prescribed by statute. The rules of civil procedure apply. § 48-812, R. R. S. 1943. It follows the rules of evidence applicable in the District Court. § 48-809, R. R. S. 1943. Its jurisdiction is clearly defined and is limited to what are clearly legislative concerns. §§ 48-801(7), 48-810, R. R. S. 1943. The Court of Industrial Relations cannot enforce its own orders. That is left to the District Court and to this court. §§ 48-812, 48-819, R. R. S. 1943. Section 48-818, R. R. S. 1943, does not delegate judicial powers to an administrative body in violation of Article II, section 1, or Article V, section 1, of the Nebraska Constitution.

We now turn to the contention that section 48-818, R. R. S. 1943, delegates to the Court of Industrial Relations the authority to tax. It is patent that the statute does not grant to that court the authority to levy or assess a tax. The defendant's argument is that the order setting salaries and other benefits affect the power of the school district to determine its own budget under section 79-810, R. R. S. 1943, and this is the legal equivalent of taxing authority. It cannot be denied that the orders of the court ultimately have budgetary and tax effects, but is this the equivalent of a delegation of the legislative taxing power? It is patent that if such delegation constitutes the power to tax within the meaning of the Constitution, then there would, as a practical matter, be no way legislation of this type could be effectively implemented for it is obviously impossible for the Legislature to perform this task itself.

The defendant relies primarily upon implications from the opinion of this court in Carlberg v. Metcalfe, 120 Neb. 481, 234 N. W. 87. In that case the Legislature authorized the creation of a municipal university in cities of the metropolitan class when approved by a vote of the people. The act delegated to the governing body of the city the duty to levy the necessary tax. The act gave the board of regents of the municipal university the power to certify to the city council the amount of money necessary to run the university. It was argued in that case that the power granted the regents was an unconstitutional delegation to them of the power to tax. The opinion does not indicate what, if any, control the city council had over the budget, or whether the council could determine the amount of the levy, and hence restrict the budget power of the regents. The court skirted answering the question directly and cited authorities for the proposition that: " 'Of course, if the people of a local district have in any way consented to the delegation . . ., they cannot contest the validity of the delegation of power.' " The defendant argues that the Carl-

berg opinion clearly implied that the power given to the regents to determine the budget was unconstitutional. Even if that is the implication of the holding, it does not apply here.

The defendant cites no cases directly in point. We find several sources which lead us to the conclusion that the defendant's contention is not well taken. In Anderson v. Tiemann, 182 Neb. 393, 155 N. W. 2d 322, it was contended that the authority delegated to the State Board of Equalization and Assessment to set tax rates, and to the Tax Commissioner to adopt rules and regulations was an illegal delegation of the taxing power and legislative authority. In that case we said: "The plaintiffs' contentions with respect to unconstitutional delegation of legislative power extend also to the provisions of L.B. 377 which require the State Board of Equalization and Assessment to set the rate of tax on or before November 15 of each year for the taxable year beginning during the subsequent calendar year. Section 15 of L.B. 377, in at least five subsections, explicitly sets out the computations to be made by the state board, the method and manner in which the computations shall be adjusted and determined, and the specific standards to be used in setting the rate of tax. The discussion as to delegation of legislative authority to the Tax Commissioner and the rules set out above also apply with respect to the delegation of authority to the State Board of Equalization and Assessment. L.B. 377 constitutes a valid and lawful delegation of authority to the State Board of Equalization and Assessment and does not violate the Constitution of Nebraska nor the United States." The rationale relied upon in Anderson v. Tiemann, *supra*, may be stated in the following excerpts from that opinion and they are applicable here: " 'The exercise of a legislatively-delegated authority to make rules to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law with designated limitations is not an exclusive legislative power. It is

administrative in its nature and its use by administrative agencies is usually essential to the complete and wise exercise of the power in the accomplishment of the purpose which the Legislature intended. Consequently, the courts are not inclined to interfere with rules established by legislative direction where they bear a reasonable relation to the subject of the legislation and constitute a reasonable exercise of the powers conferred.' " Citing Board of Regents v. County of Lancaster, 154 Neb. 398, 48 N. W. 2d 221. "Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision."

Many administrative functions affect in greater or lesser degree the budget-making or taxing power but are not held to be invalid delegations. In Wilkinson v. Lord, 85 Neb. 136, 122 N. W. 699, a statute, directing the county superintendent to furnish to the county clerk the data to make a free high school levy when the school refused to do so, was held not to be a violation of Article IX, section 6, of the Nebraska Constitution (the predecessor of Article VIII, section 6). Other examples of valid delegation of authority which affect the taxing power, but not unconstitutionally so, are found elsewhere. See, 16 C. J. S., Constitutional Law, § 138 (16), (17), (20), p. 614 et seq. (determining the amount and validity of claims against the government, issuance of bonds by the administrative authority, and setting salaries of public employees); Sommers v. Patton, 399 Ill. 540, 78 N. E. 2d 313 (statute authorizing trustees of a pension fund to certify to the taxing authority the amounts estimated to be required for the fund to meet its obligations).

The contention that the act establishing the Court of Industrial Relations amends section 79-810, R. R. S. 1943, and hence violates Article III, section 14, of the Nebraska Constitution, is wholly without merit.

The assignment that the findings of the Court of Industrial Relations are not supported by the evidence is

nowhere discussed or argued in the brief. We therefore take no note of it. See Rule 8 a 2(3), Revised Rules of the Supreme Court, 1974.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

NEWTON, J., dissenting.

I find it necessary to disagree with the opinion of Clinton, J. In the case of School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N. W. 2d 752, the question of the constitutionality of the act creating and defining the powers of the Court of Industrial Relations was not raised by the parties and the majority opinion ignored that question. For the first time we are now obliged to meet the constitutional questions.

I will not reiterate my dissent in the Seward case. It will suffice to point out that the Constitutional Convention of 1920 in adopting Article XV, section 9, Constitution of Nebraska, clearly intended to exempt the state and its political subdivisions from the operations of the Court of Industrial Relations. The Constitution is restrictive and whenever a constitutional provision is adopted dealing with legislative powers, it is evidence that it is intended to restrict the broad plenary powers vested in the Legislature. Otherwise it would be meaningless. I agree with Judge Clinton that the Legislature already had the authority to create an industrial commission prior to the adoption of Article XV, § 9. Why then was it adopted? Why was authority over state and political subdivisions deleted? His opinion defeats the clear will of the people of Nebraska.

Constitution must not be given a construction which will defeat obvious will of people. State ex rel. Hennepin County Bar Assn. v. Amdahl, 264 Minn. 350, 119 N. W. 2d 169.

With respect to constitutional interpretation, court should endeavor to place itself in position of framers of

constitution and ascertain what was meant at the time. * * *

Constitutional provision cannot mean one thing at time of its adoption and another thing subsequently when public sentiments have undergone change. Walber v. Wayne Circuit Judge, 2 Mich. App. 145, 138 N. W. 2d 772.

Intent of constitutional convention and people who ratified that which convention framed is primary guideline in construing constitution. White v. Anderson, 155 Colo. 291, 394 P. 2d 333.

"The Constitution should not be construed as to defeat the obvious intent of its framers, if another interpretation may be adopted equally in accordance with the words and sense which will carry out the intent. * * *

"In construing the Constitution, intent must be gathered from both the letter and the spirit of the document, and the polestar is the intention of the makers and adopters." Grantz v. Grauman (Ky. App.), 302 S. W. 2d 364.

A specific constitutional provision must be given effect as against a general clause. Ridgeway v. Catlett, 238 Ark. 323, 379 S. W. 2d 277.

The foregoing sets out a few well-recognized rules of constitutional interpretation and all are applicable to the present situation.

Another well-recognized rule should be considered. "The doctrine is established that legislative authority may be limited by constitutional restrictions which are impliedly imposed. Restrictions in a constitution as to legislation are equally effective whether they arise by implication or are stated in express terms; and such restrictions may be found either in the language employed or in the evident purpose which was in view and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law." 16 Am. Jur. 2d, Constitutional Law, § 230, p. 480.

It is apparent that the delegates to the Constitutional Convention of 1919-1920 intended that the state and its political subdivisions should not fall within the jurisdic-

tion of the Court of Industrial Relations. Under such circumstances there is definitely an implied restriction on the constitutional power of the Legislature to ignore the restriction so effected at the convention. It is true that the Legislature speaks for the people of the State of Nebraska but only within the confines of the state Constitution and in this instance, its power has been restricted at a constitutional convention which was likewise representative of the people of Nebraska and the constitutional provisions then framed were adopted by vote of the people of Nebraska. By what authority does the Legislature ignore such a situation?

This court apparently has undertaken a legislative or constitutional function on policy grounds.

CLINTON, J., respondente.

Judge Newton, in his dissent, accuses this court of undertaking a legislative or constitutional function on policy grounds. This assertion is so serious that it cannot go unanswered. No reason existed for elaborating in the majority opinion the fundamental nature of the power of the Legislature to enact laws beyond the statement of the general principle as set forth in Dwyer v. Omaha-Douglas Public Building Commission, *supra*.

Judge Newton cites and relies upon text authority, 16 Am. Jur. 2d, Constitutional Law, § 230, p. 480, in support of a doctrine of limitation by implication of the authority of the state Legislature to enact laws. An examination of the cases cited in the text footnotes reveals that they do not support the broad brush treatment which Judge Newton would apply and have no application at all to the particular question we are considering. The dissent fails to call attention to a portion of the text statement on which it relies and which omitted portion reads as follows: "Legislative power is deemed curtailed by implied limitations only in cases where it is clear that a construction of the constitutional provisions involved requires such restrictions. Restraints upon legislative powers are not to be lightly inferred.

The implied restriction must be one that is clearly implied." 16 Am. Jur. 2d, Constitutional Law, § 230, p. 481.

The dissent contends that, because the Constitution authorized the Legislature to create an industrial commission for the purpose of dealing with certain labor relations problems, that constitutional provision restricts the Legislature from ever after entrusting to that same commission, later created by it, authority to deal with, in such manner as the Legislature shall direct, the labor relations of governmental subdivisions. Such a construction is contrary to the fundamental nature of the state legislative power under our system of government. The position which the dissent takes is but an application of the maxim "expressio unius est exclusio alterius." That maxim has no application to the state legislative powers. The doctrine against restriction by implication of the legislative powers of state Legislatures rests upon a fundamental difference in the nature of the federal legislative power and that of the states. The federal Constitution is a grant of power. The state Constitutions are restrictions on powers. The state Legislatures have plenary legislative power except as is expressly denied them by the Constitutions or as is expressly reserved to the people themselves. In State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63, Judge Spencer discusses this fundamental. In that case this court was called upon to construe the provisions of the constitutional amendment then recently adopted which authorized the Legislature to authorize counties and cities to issue revenue bonds for industrial development. Art. XV, § 16, Nebraska Constitution (repealed 1972). This article had been adopted by the voters to avoid the constitutional restriction against lending the credit of the state or its subdivisions to private persons or corporations. An earlier industrial development act had been declared unconstitutional by this court for that reason. Article XV, section 16, of the Nebraska Constitution, was in part as follows: "Sec. 16. Notwithstanding any other

provision in the Constitution, the Legislature may authorize any county, incorporated city or village, including cities operating under home rule charters, *to acquire, own, develop, and lease* real and personal property to manufacturing and industrial enterprises and to issue revenue bonds for the purpose of defraying the cost of acquiring and developing such property by construction, purchase, or otherwise." (Emphasis supplied.) When, pursuant to this constitutional amendment, the Legislature enacted the enabling statutes, it authorized the municipalities not only to "own, develop, and lease real . . . property," but also to sell the property acquired and owned. It was argued that the Legislature could not authorize the sale of the property by the municipality because the constitutional provision merely authorized the municipality to "own, develop, and lease." This contention was rejected by this court. Judge Spencer, writing for the court, said: "Contention No. 4 raises the point that the amendment did not specifically mention the power to sell, so that L.B. 159 exceeds the authority granted by the amendment. We should not lose sight of the fact that the Constitution is not a grant but rather is a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution. Swanson v. State, 132 Neb. 82, 271 N. W. 264.

"We said in State v. Sheldon, 78 Neb. 552, 111 N. W. 372: 'In the construction of a governmental system upon the American plan, the broad outlines are furnished by the constitution, but all the details necessary to carry the powers of government into effect are provided by the action of the legislature. The provisions of the constitution, while in one sense creative, also limit and define the powers to be exercised by the various departments of the government; but, except so far as its authority is limited or defined by the constitution, the legislature of the state is as fully vested with governmental powers as the British parliament. See a discussion of this subject in State v. Nelson, 34 Neb. 169.'

"Certainly the right of the Legislature to grant the power of sale of property to a municipality has not been inhibited by the Constitution, and there is no merit to plaintiff's fourth contention."

In State ex rel. Sayre v. Moore, 40 Neb. 854, 59 N. W. 755, this court quoted from Cooley, Constitutional Limitations (4th Ed.), p. 210: "When a law of congress is assailed as void, we look into the national constitution to see if the grant of specified powers is broad enough to embrace it; but when a state law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the constitution of the United States, or of the state, we are unable to discover that it is prohibited. We look in the constitution of the United States for grants of legislative power, but in the constitution of the state to ascertain if any limitations have been imposed upon the complete powers with which the legislative department of the state is vested in its creation. . . . the state legislature has jurisdiction of all subjects on which its legislation is not prohibited. The law-making power of the state recognizes no restraints, and is bound by none, except such as are imposed by the constitution."

The principles we have enunciated above are generally followed. Particularly well-considered opinions include Earhart v. Frohmiller, 65 Ariz. 221, 178 P. 2d 436; and Penrod v. Crowley, 82 Idaho 511, 356 P. 2d 73.

M. R. GRIFFIN, DOING BUSINESS AS GRIFFIN INSTALLATION COMPANY, APPELLEE, V. GENEVA INDUSTRIES, INC., A FOREIGN CORPORATION, APPELLANT.
228 N. W. 2d 880

Filed May 8, 1975. No. 39710.

Contracts: Waiver: Estoppel. The parties to a contract may avoid a provision requiring prior written authorization for additional work where their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment of

the provision, or the party claiming the benefit of the provision is estopped to rely on it.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

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

Nelson, Harding, Marchetti, Leonard & Tate, for appellee.

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

BOSLAUGH, J.

This case arises out of a controversy concerning contracts for the installation of casework and related items. The defendant is a manufacturer who had entered into contracts to furnish casework and related items to be installed in hospitals being constructed in Hastings, Nebraska, and Lincoln, Nebraska. The plaintiff entered into contracts with the defendant to install the casework and related items in the hospitals.

The first cause of action concerned the contracts relating to the Hastings hospital. The trial court found the plaintiff should recover $239.21 on that cause of action. On the second cause of action, relating to the Lincoln hospital, the trial court found the plaintiff should recover $1,190.43. The defendant has appealed. There is no cross-appeal. Since each cause of action involves different issues they must be considered separately.

There are three written contracts involved in this action. The first contract, dated July 15, 1969, relates to the Hastings hospital. The second contract, dated October 7, 1969, relates to the fifth floor addition to the Hastings hospital. The third contract, dated May 9, 1969, relates to the Lincoln hospital. All the contracts are on forms prepared by the defendant and provide generally that the plaintiff will field check, unload, distribute, and install casework and related items on the job site designated in the contract.

All the contracts were prepared by the defendant and submitted to the plaintiff for his signature. When submitted to the plaintiff, the unsigned contracts relating to the Hastings hospital each contained a paragraph designated "Seventh" which provided: "All additions or omissions from or changes in the work as specified in the Drawings and Specifications must be approved by the Contractor, or his accredited representative, before proceeding with the work." Before signing and returning the contracts to the defendant, the plaintiff added the following language to paragraph Seventh: "However, additional compensation shall be payable in an amount based on time and material." Before signing and returning copies of the contracts to the plaintiff, the defendant had the following language added to that inserted by the plaintiff in paragraph Seventh: "only after receipt of a quotation which must be approved before any additional work is performed." The defendant's letter to the plaintiff returning signed copies of the contracts made no mention of the defendant's addition to paragraph seventh and the plaintiff claimed he did not know of the language added by the defendant.

The trial court found that the change made by the defendant in paragraph seventh was not a part of the contract. The defendant's first assignment of error is that this finding was erroneous. In the view that we take of the case it is not necessary to consider this assignment at length.

It is apparent that both parties to the contract contemplated and considered that additional work might be required and that the plaintiff would be entitled to additional compensation for additional work. The language which is in dispute relates only to the authorization for the additional work. This provision was subject to oral modification or waiver.

The contractual provision in dispute is similar to a requirement that alterations or extras must be ordered in writing. It is well-established that the parties to a

contract may avoid such a provision where their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment of the provision, or the party claiming the benefit of the provision is estopped to rely on it. Annotation, 2 A. L. R. 3d 620.

The evidence is clear that the defendant knew about the additional work performed by the plaintiff and its conduct indicated approval and authorization for the work to proceed. Under these circumstances the defendant cannot now contend that the plaintiff is not entitled to compensation because he failed to obtain prior approval of a quotation for the additional work. Where the parties ignore such a provision in the contract it will not furnish a defense to a claim for compensation for the additional work performed. McGowan v. Gate City Malt Co., 89 Neb. 10, 130 N. W. 965.

The particular items in dispute in the first cause of action related to extra work necessitated by defects in the cabinets supplied by the defendant and back charges against the defendant made by the general contractor. The defendant's claim that the extra work was necessary because of defective installation of the cabinets was not supported by the evidence. The trial court's findings that the plaintiff was entitled to recover $1,150 for extra work and that a portion of the back charges should be disallowed is fully supported by the evidence. The judgment in favor of the plaintiff in the amount of $239.21 on the first cause of action is affirmed.

In regard to the second cause of action the principal items in dispute consisted of extra work required to make the casework and related items conform to the requirements of the plans and specifications. As to one of these items, the defendant requested a quotation which was furnished by the plaintiff. However, the contract in regard to the Lincoln hospital did not contain the provision requiring prior approval of a quotation. The Lincoln contract required only approval of additional work by the contractor, or his accredited representative.

There were some conflicts in the evidence concerning the items in dispute which were resolved by the trial court. The evidence fully sustains his findings in regard to the second cause of action and the judgement for plaintiff in the amount of $1,190.43 is affirmed.

The judgment of the District Court is, therefore, affirmed.

AFFIRMED.

STERLING L. ANDERL, EXECUTOR OF THE ESTATE OF FRANK R. WILLSEY, DECEASED, APPELLEE, V. ETHEL F. WILLSEY AND PAULINE VARLEY, CONSERVATOR OF THE ESTATE OF ETHEL F. WILLSEY, APPELLANTS.

229 N. W. 2d 46

Filed May 8, 1975. No. 39722.

1. **Insurance: Witnesses.** A beneficiary under a life insurance policy is not ordinarily a representative of a deceased person within the meaning of the dead man's statute.
2. **Trial: Evidence.** When testimony is offered in the trial court and proper objection is not made nor preserved in motion for new trial, such objection will not be heard on appeal.
3. **Contracts: Husband and Wife.** Antenuptial agreements should be construed according to the intentions of the parties and the conditions and circumstances attending their execution.
4. ———: ———. A liberal construction of an antenuptial agreement will be indulged in order to carry out the intention of the parties.

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

Clark O'Hanlon and John R. O'Hanlon of O'Hanlon & Martin, for appellants.

Roy I. Anderson, for appellee.

Heard before SPENCER, BOSLAUGH, and BRODKEY, JJ., and HASTINGS and CLARK, District Judges.

CLARK, District Judge.

This is an action based on an antenuptial agreement. The proceeds of two insurance policies on the life of Frank R. Willsey in the sum total of $5,900 were paid by the insurer to defendant, Ethel F. Willsey, the surviving widow of Frank. Plaintiff, as executor of Frank's estate, seeks, by virtue of the antenuptial agreement, to require defendants to pay the proceeds to Frank's estate.

The trial court found for the plaintiff and entered judgment against defendants in the amount of $5,900 plus interest and costs.

We affirm the judgment of the District Court.

On October 4, 1971, Frank R. Willsey and Ethel F. Stewart entered into an antenuptial agreement which provided in part:

"1. That all properties of any kind or nature, real, personal or mixed, wherever the same may be found, which belong to each party, shall be and forever remain the estate of said party, including all interest, rents and profits which may accrue therefrom.

"2. That each party shall have at all times the full right and authority, in all respects the same as each would have if not married, to use, enjoy, manage, convey and encumber such property as may belong to him or her.

"3. That each party may make such disposition of his or her property as the case may be, by gift or will during his or her lifetime, as each sees fit; and in the event of the decease of one of the parties, the survivor shall have no interest in the property of the estate of the other, either by way of inheritance, succession, family allowance or homestead."

On October 12, 1971, Frank and Ethel, both about 82 years of age, were married. Frank had been previously married, and his spouse had predeceased him. Ethel had not been previously married. Frank died on August 11, 1972, leaving Ethel as his surviving widow. The two

policies involved here were group life insurance policies issued by the Equitable Life Assurance Society. Each policy named as the designated beneficiary Clara S. Willsey - wife. Clara died in 1966. Each of the policies provided that if there was no designated beneficiary surviving at the time of the insured's death, payment would be made to the first class of successive preference beneficiaries surviving. The first class of successive preference beneficiaries named in the policies was the widow of the insured.

Plaintiff was the nephew of Clara S. Willsey and was a specific and residual legatee under Frank's will as well as executor thereof. Frank's estate consisted of approximately $6,000 in personalty exclusive of any interest in the insurance proceeds. Ethel, at the time of her marriage to Frank, had personal property of the value of approximately $59,000.

Extensive testimony was introduced in the trial court showing that plaintiff and his wife were close to Frank and Clara socially and that especially after Clara's death they helped Frank on many occasions and that Frank confided in them.

Testimony was allowed, over the objection of defendants, on grounds of the dead man's statute, relating to conversations plaintiff and his wife had with Frank prior to the signing of the antenuptial agreement and prior to Frank's marriage to Ethel. The gist of this testimony, so far as it is pertinent here, was to the effect that the impending marriage was to be a "companionship marriage" and that Frank and Ethel were each to retain his own property. Further, Frank was quoted as saying, "There is something involved. I have got some insurance, about $6,000.00 worth of insurance," and that he considered the insurance as his property.

Further, plaintiff introduced testimony regarding a conversation between plaintiff and Ethel after Frank's death, in either September or October 1972. This testimony was to the effect that in response to a question as

to whether Ethel had ever received Frank's insurance, she stated that she was not sure if she had received it or not and, further, that she didn't want any of Frank's insurance or anything of his.

Other evidence was introduced by plaintiff to indicate that after their marriage Frank and Ethel lived in the apartment that Ethel had previously occupied and that they shared their living expenses more or less on an equal basis.

Defendants introduced testimony that beginning in October 1971, Ethel was getting very forgetful, and that she later became incompetent and was unable to testify at the trial. The conservator for Ethel was appointed April 1, 1973.

Evidence was further introduced by defendants that during the course of the marriage Ethel had named Frank as beneficiary in an insurance policy on her life. She also had had reissued a certificate of deposit in the amount of $2,000 which had previously been in her name only. As reissued, the certificate was payable to Frank and Ethel.

Defendants' assignments of error are in essence that the court erred in (1) allowing testimony of plaintiff in violation of the dead man's statute and the parol evidence rule, (2) in failing to interpret the insurance policies from within the four corners of the policies, (3) in failing to find that the insurer correctly paid the policy proceeds to Ethel, and (4) in finding that the antenuptial agreement created a binding promise on Ethel to let Frank's estate be the beneficiary under the policies.

Being an action in equity we try the case de novo on the record.

Defendants argue that the testimony of plaintiff and his wife relating to conversations with Frank should have been excluded by the trial court as prohibited under the dead man's statute.

The statute, so far as is pertinent here, provides:

"No person having a direct legal interest in the result of any civil action or proceeding . . . *when the adverse party is the representative of a deceased person,* shall be permitted to testify to any transaction or conversation had between the deceased person and the witness. . . . " § 25-1202, R. S. Supp., 1974. (Emphasis added.)

This court has previously held that a person claiming as beneficiary of a life insurance policy is not the representative of a deceased person within the meaning of the dead man's statute.

This court has stated: "At the very outset it is apparent that the statute is not applicable to the situation presented here. It is true the plaintiffs have a direct legal interest in the controversy, but the defendant is not the representative of a deceased person within the meaning of the statute. Whatever interest the defendant may have in the subject of this litigation is not based upon her representation of a deceased person. Her rights are based on a written obligation which matured at his death, an obligation which the deceased never had in his lifetime, and never could have been enforced by him. It came into existence upon his death, as an original obligation." Smith v. Pacific Mut. Life Ins. Co., 130 Neb. 501, 265 N. W. 534. See, also, Williams v. Volz, 131 Neb. 392, 268 N. W. 300.

In this case, Ethel was not the representative of Frank, and the testimony regarding conversations with Frank were properly admitted insofar as the dead man's statute is concerned. Defendants' contention in this regard is without merit.

Defendants also assign as error and argue in this court that the testimony regarding the conversations with Frank should be inadmissible as a violation of the parol evidence rule. It is noted, however, that this objection was not raised either in the trial or in defendants' motion for a new trial. This court has repeatedly held that where testimony is offered and admitted in evidence without proper objection such objection will

not be heard on appeal. See, Pauley Lumber Co. v. City of Nebraska City, 190 Neb. 94, 206 N. W. 2d 326; Parker v. Christensen, 192 Neb. 117, 219 N. W. 2d 235; George Rose Sodding & Grading Co., Inc. v. City of Omaha, 190 Neb. 12, 205 N. W. 2d 655.

The trial court not having been given the opportunity to rule on this objection, we will not consider it here.

We turn now to the intent of the parties in entering into the antenuptial contract. The record reflects that both parties were advanced in age and sought only a "companionship" marriage. Both prior to the marriage and after it, both Frank and Ethel indicated that it was their intentions that each should retain his own assets in their entirety. Frank paid one-half of the rent on their apartment and one-half of other living expenses. Frank indicated he considered the insurance policies as part of his assets and that this was part of his reason for having the agreement. Ethel stated she did not want Frank's insurance proceeds nor "anything else of his," thus indicating that her intent coincided with that of Frank in this regard. It is apparent that Frank believed this agreement obviated the necessity for a change of beneficiary.

Generally, the determination of the intention of the parties to an antenuptial contract is to be made by considering the conditions and circumstances surrounding the parties at the time the agreement was made. Since such an agreement is favored by public policy, it is to be construed liberally to effect the intention of the parties, irrespective of the ordinary legal construction of words used therein and of externals and the form used therein. See 41 Am. Jur. 2d, Husband and Wife, § 288, p. 237.

"Liberal construction will be given to marriage settlements in order to carry out the intention of the parties. The court will not be bound by technical rules and where necessary to carry out the presumed intent of the parties will use greater liberality of construction

than in the case of wills or deeds." 41 C. J. S., Husband and Wife, § 102, p. 575.

"Antenuptial contracts should be construed according to the intentions of the parties and the conditions and circumstances attending their execution." Caprette v. Spieth, 181 Neb. 11, 146 N. W. 2d 746.

". . . a liberal construction of the instrument (antenuptial agreement) will be indulged in order to carry out the intention of the parties." Rieger v. Schaible, 81 Neb. 33, 115 N. W. 560.

We find that it was the intent of both Frank and Ethel that Frank's insurance policies were to remain his property and that Ethel would not share in the proceeds thereof.

This is not an action against the insurer, but one in equity to enforce an agreement between the parties thereto. During the marriage Ethel had the benefit of the contract as both she and Frank understood it to be. Frank's total assets, including the insurance proceeds were only $12,000, whereas Ethel's assets were $59,000. She, having reaped the benefit of the contract, should not now be heard to complain about enforcement of the contract according to their intentions. See, Strickland v. Omaha Nat. Bank, 181 Neb. 478, 149 N. W. 2d 344; Rieger v. Schaible, *supra*.

The judgment of the District Court is affirmed.

AFFIRMED.

LOUIS S. CIRCO, APPELLEE, V. MARILYN M. SISSON, APPELLANT.

229 N. W. 2d 50

Filed May 8, 1975. No. 39724.

1. **Negligence: Trial.** The contributory negligence of a guest is ordinarily a question of fact for the jury.
2. **Negligence: Proximate Cause.** It is essential to the defense of contributory negligence that negligence of the plaintiff be

a proximate cause or a proximately contributing cause of the injury.

3. **Negligence: Motor Vehicles.** A guest is not required to use the same degree of care as the driver of the automobile. If a guest perceives danger, or should have perceived it under the circumstances shown by the evidence, a duty to warn the driver arises. Ordinarily, however, a guest need not watch the road or advise the driver in the management of the automobile.
4. ———: ———. It is not contributory negligence for a guest to sleep while riding in an automobile when he has no knowledge of negligent driving on the part of his host, or of impending danger on the highway.
5. **Assumption of Risk.** Assumption of risk is available as a defense when one voluntarily exposes himself to the injury, even though it plays no part in causing the injury.
6. **Assumption of Risk: Negligence.** The defense of contributory negligence and assumption of risk are not inconsistent defenses, although the evidence as to one may tend to prove the other.
7. **Constitutional Law: Motor Vehicles: Negligence: Statutes.** The guest statute does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States nor any provision of the Constitution of the State of Nebraska.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Robert D. Mullin of Boland, Mullin & Walsh, for appellant.

Emil F. Sodoro, David A. Johnson, and Ronald H. Stave, for appellee.

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

KELLY, District Judge.

This is an action by Louis S. Circo to recover damages for personal injuries suffered by him while riding as a guest in an automobile operated by Marilyn M. Sisson. The jury returned a verdict for Circo and against Sisson in the amount of $50,000.

On September 12, 1970, the plaintiff and two companions traveled from Omaha to Lincoln to attend the Nebraska-Wake Forest football game. The three gathered at a bar owned by the plaintiff at approximately 10:30 a.m. Some alcoholic beverages were consumed and additional alcoholic refreshments were taken with the three men. They proceeded to Lincoln, Nebraska, in an automobile owned by one of the three, Harold R. Blankenship. Upon arriving at Lincoln, the three then proceeded to an establishment known as Barry's Bar, whereupon all three consumed additional alcoholic liquor. While at Barry's Bar they encountered two ladies known to them.

The five persons then proceeded to Memorial Stadium where they viewed the football game. The plaintiff and Mr. Blankenship took a pint of whiskey with them, which was consumed by them prior to the ending of the first half of the football game. At half time, Mr. Blankenship left the company of the other persons and did not return.

After the game, Mr. Circo, his other companion, Mr. Johnson, the defendant, Mrs. Sisson, and her female companion, Miss Finnigan, returned to Barry's Bar where further alcoholic beverages were consumed by all. At about 5:30 p.m. to about 5:45 p.m., a uniformed Lincoln police officer, now Sergeant VanButsel, appeared at Barry's Bar inquiring as to the identity of Mr. Circo. The police officer notified Mr. Circo and the defendant, Mrs. Sisson, that their friend, Mr. Blankenship, was being detained at the Lincoln police station, where he had been since half time of the football game. The officer further stated that in his opinion Mr. Blankenship was intoxicated and would not be able to drive the people back to Omaha, whereupon Mr. Circo, Mrs. Sisson, and Sergeant VanButsel, went to the Lincoln police station and met with Mr. Blankenship and Captain Lightner. Sergeant VanButsel and Captain Lightner informed the parties that Mr. Blankenship could be released to them;

however, it was their opinion that neither Mr. Circo nor Mr. Blankenship should operate a motor vehicle. The two police officers observed the defendant and were of the opinion that she was not under the influence of alcoholic liquor and could drive the vehicle if she would. This the defendant agreed to do, and the police officers handed her the keys to Mr. Blankenship's automobile.

Sergeant VanButsel then returned the plaintiff, the defendant, and Mr. Blankenship to Barry's Bar in the police cruiser. Mrs. Sisson reentered Barry's Bar to inform her friend, Miss Finnigan, and Mr. Johnson, that she was going to return the plaintiff and Mr. Blankenship to Omaha. The police officer then explained the one-way streets of Lincoln to the defendant and followed the defendant as she proceeded west on Q Street to Eighth Street, south on Eighth Street to P Street, east on P Street to Tenth Street, and north on Tenth Street, a one-way street which led to the ramp of Interstate 180. The defendant and the two gentlemen then proceeded back to Barry's Bar, rather than leaving for Omaha. The three reentered Barry's Bar where they remained for from 1 to 1½ hours. The defendant denied that she consumed any further alcoholic beverages. At approximately 7:30 p.m., the plaintiff and the defendant returned to Mr. Blankenship's car, which was parked on the north side of Q Street, and proceeded to Omaha. The plaintiff and the defendant both testified that the plaintiff immediately went to sleep upon entering Mr. Blankenship's automobile. The defendant then drove the vehicle west to Eighth Street, south to P Street, east to Ninth Street, and north on Ninth Street, which is a one-way street heading south. Plaintiff then entered Interstate 180 going north in the south-bound lanes. Approximately 1.1 miles from the entry onto the ramp, defendant's vehicle had a head-on collision with a vehicle traveling south. The plaintiff suffered serious and extensive personal injuries and was unconscious for near-

ly 1 week thereafter. The plaintiff has no recollection of any events subsequent to entering the vehicle operated by the defendant.

Plaintiff brought suit in the District Court for Douglas County, Nebraska, alleging the proximate cause of his injuries to be the negligence of the defendant; the gross negligence of the defendant; and the operation of the motor vehicle by the defendant when she was operating the automobile while being under the influence of intoxicating liquor.

The defendant in her amended answer admitted the happening of the accident, admitted operating the vehicle in the wrong direction on Interstate 180, and admitted the injuries suffered by the plaintiff as a result of the accident. The defendant further admitted consuming intoxicating liquor over a period of several hours preceding said accident, that a test of her blood showed an alcohol content of 0.17 alcohol, and admitted having entered a plea of guilty to operating a motor vehicle under the influence of intoxicating liquor. Defendant further alleged that the proximate cause of the accident and plaintiff's resulting injuries and damages was the contributory negligence of the plaintiff in exposing himself to the danger of riding with the defendant when the plaintiff knew, or should have known, that the defendant had been consuming intoxicating liquor over a long period of time prior to the time that plaintiff elected to ride with the defendant and knew, or should have known, that defendant's ability to drive was thereby impaired. The defendant further alleged that the plaintiff voluntarily and consciously elected to ride with the defendant, thereby invoking the doctrine of assumption of risk.

The case was tried upon the issues as outlined above; submitted to a jury; and the jury returned a verdict of $50,000 damages in favor of the plaintiff against the defendant.

The case at bar has a great many similarities to the

case of Kaufman v. Tripple, 180 Neb. 593, 144 N. W. 2d 201, decided by this court in 1966. In the Kaufman case, the defendant, a wholesale beer distributor, had taken the plaintiff on a business trip, whereby the purpose was to promote the business of the defendant. The parties were together from approximately 10 a.m. until 11:30 p.m. During this period of time they had visited several taverns in smaller towns near Scottsbluff. The plaintiff in that case admitted to consuming some eight to nine bottles of beer between 5 p.m. and 11:15 p.m. While driving on Highway No. 92 and returning to Scottsbluff, the defendant fell asleep; left the roadway and wrecked the automobile operated by him. The plaintiff had made inquiry prior to getting into the vehicle as to the condition and ability of the defendant to operate his motor vehicle. After being assured by the defendant that he was of sufficient ability to operate the vehicle, the plaintiff then rode with him and went to sleep prior to the accident. The plaintiff had been with the defendant during all times of the defendant's consuming of alcoholic beverages.

In the Kaufman case our court held as follows: "The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. If the guest perceives danger, or if he should reasonably anticipate danger, the duty evolves upon the guest to warn the driver. Ordinarily, the guest is not required to watch the road or advise the driver in the management of the automobile. Sautter v. Poss, 155 Neb. 62, 50 N. W. 2d 547. See, also, O'Brien v. Anderson, 177 Neb. 635, 130 N. W. 2d 560; Bresley v. O'Connor Inc., 163 Neb. 565, 80 N. W. 2d 711. It is not contributory negligence for a guest to sleep while riding in an automobile when he has no knowledge of negligent driving on the part of his host, or of impending danger on the highway. Scott v. Service Pipe Line Co., 159 Neb. 36, 65 N. W. 2d 219. If a guest knows, or ought to have known, that

the host driver was under the influence of intoxicating liquor to such an extent as to create danger in riding with him, his voluntary exposure to such danger constitutes contributory negligence. Wisnieski v. Moeller, 165 Neb. 476, 86 N. W. 2d 52. Under the evidence in this case, contributory negligence, if any, was a question of fact for the jury and not one of law for the court. The trial court did not err in overruling the motion for a directed verdict on this point and in submitting the question of Kaufman's contributory negligence to the jury.

"Tripple also contends that the evidence shows as a matter of law that Kaufman assumed the risk of injury under the facts in this record and that his motion for a directed verdict should have been sustained on that ground. The defense of assumption of risk is not inconsistent with the defense of contributory negligence. It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributory cause of the injury while assumption of risk is a defense when one voluntarily exposes himself to injury, although it plays no part in causing the injury. It is here contended that, under the facts of this case, Kaufman knew or should have known that Tripple was not a safe driver when he entered Tripple's automobile and that he therefore assumed the risk of injury as a matter of law. A fixed state of facts is not shown by the evidence and the conflicts appearing therein were for the jury. The trial court did not err in submitting the issue of assumption of risk to the jury. 'The court further said that one who knows, appreciates, and deliberately exposes himself to a danger assumes the risks thereof. One cannot deliberately incur an obvious risk of personal injury, especially when preventative measures are at hand, and then hold the author of the danger for the ensuing injury.' * * * The motion for a directed verdict on the ground that Kaufman assumed the risk as a matter of law was properly over-

ruled. Whether or not the knowledge of a guest, that the host driver of an automobile has been drinking, will operate to prevent recovery of damages in a particular case depends upon all the facts and circumstances of the case, and is usually a question for the jury. Landrum v. Roddy, supra."

Our court stated in 1943, in the case of Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82: "The maxim 'volenti non fit injuria' means: If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom. The maxim is predicated upon the theory of knowledge and appreciation of the danger and voluntary assent thereto.

"Within the limits of its terms the maxim of 'volenti non fit injuria' is applicable to negligence actions in this jurisdiction.

"In actions based on negligence the defense of assumption of risk under the maxim 'volenti non fit injuria' is not inconsistent with the defense of contributory negligence.

"Under the facts of this case the question of whether or not the conduct of the appellee is such as to defeat any right to recover, to which she may be entitled, is one of contributory negligence and should be submitted to the jury."

In the present case the testimony of the police officers viewing the defendant, 1 to 1½ hours prior to the accident, was to the effect that the defendant did not appear to be under the influence of alcoholic liquors and was capable of operating a motor vehicle.

The further testimony of witnesses who observed the defendant during the 1 to 1½ hours that the defendant returned to Barry's Bar, was to the effect that she did not appear to be under the influence of intoxicating liquor and that these witnesses did not observe her con-

sume additional alcoholic beverages upon her return to Barry's Bar from the police station.

The testimony of the defendant was that she had consumed approximately three drinks in Barry's Bar prior to going to the football game and three to four drinks after the football game and prior to going to the police station, and no alcoholic beverages after having been to the police station.

Although the blood test of the defendant taken subsequent to the accident, together with the plea of guilty to the charge of operating a motor vehicle while under the influence of alcoholic liquor, would indicate that the defendant was under the influence of intoxicating liquor, the question is: Could reasonable minds differ as to whether or not the plaintiff, as a matter of law, knew, or should have known, the defendant was intoxicated to the degree that reasonable minds could not differ in determining that the defendant was too intoxicated to drive a motor vehicle.

The testimony of the police officers, and their delivery of the keys to the motor vehicle to the defendant would indicate that persons, who are somewhat expert in judging the impairment of a motor vehicle operator, were of the opinion that she could operate the vehicle. The testimony of the other witnesses indicated that in their opinion the defendant was capable of operating a motor vehicle immediately prior to the accident.

In addition to the above-described testimony, it is noteworthy that no witness, at any time, testified that the defendant staggered when she walked, slurred her speech, or showed any outward symptoms of being intoxicated.

It appears obvious that this question then becomes a question for the jury to determine. The jury was properly instructed upon the defenses raised by the defendant, to wit: Contributory negligence, by instruction No. 7, and assumption of risk, by instruction No. 8.

Since this was a question for the jury to determine,

and the jury was properly instructed by the court, the jury's finding on behalf of the plaintiff amounted to a determination of the facts.

The plaintiff has attempted to raise the question of the constitutionality of the guest statute, section 39-6,191, R. R. S. 1943. The question has recently been settled in the case of Botsch v. Reisdorff, *ante* p. 165, 226 N. W. 2d 121.

The judgment of the District Court is affirmed.

AFFIRMED.

DICK F. HADEN, APPELLANT, V. HOCKENBERGER & CHAMBERS COMPANY, A CORPORATION, ET AL., APPELLEES.
DONALD HADEN, THROUGH AND BY HIS FATHER AND NEXT FRIEND, DICK F. HADEN, APPELLANT, V. HOCKENBERGER & CHAMBERS COMPANY, A CORPORATION, ET AL., APPELLEES.
228 N. W. 2d 883

Filed May 8, 1975. Nos. 39767, 39768.

1. **Trespass: Infants.** A person on the premises of another, without the permission of the owner, who is of sufficient age, mentality, experience, and ability to observe, realize, and avoid a particular danger or peril is an adult trespasser and cannot recover under the special rule pertaining to children.
2. **Trespass: Nuisances: Waters.** The attractive nuisance doctrine has no application to pools, ponds, or other bodies of water, artificial or natural, where there exist no unusual traps or hazards.
3. **Trespass: Nuisances: Infants.** The attractive nuisance doctrine does not apply to machinery in a static condition unless there is evidence that the machinery is enticing and inherently dangerous to indiscriminating children of tender years.

Appeals from the District Court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

Robak & Geshell, for appellants.

Jewell, Otte, Gatz & Collins, Walker, Luckey, Whitehead & Sipple, Noyes W. Rogers, Walter, Albert, Lein-

inger & Grant, and Moyer & Moyer, for appellees.

Heard before WHITE, C. J., BOSLAUGH, and MCCOWN, JJ., and LYNCH and BURKE, District Judges.

LYNCH, District Judge.

Dick Haden and his son Donald filed separate actions against the defendants for damages resulting when Donald dived from a parked drag line into an artificial lake.

The defendants filed separate motions for summary judgment in each case which were submitted to the trial court on the pleadings and depositions of Donald Haden, his companion, Donal Geis, and president of defendant Hockenberger & Chambers Company, Willis M. Ferguson. The motions were sustained, the plaintiffs appealed, and the cases were consolidated for presentation to this court.

The facts which are clear and uncontroverted are as follows: Hockenberger & Chambers Company owned a development area which included a lake. Gerald Loeffler, doing business as Loeffler Construction Company, had a drag line parked adjacent to the lake. At the time of the accident Donald Haden was 16 years, 9 months old, a senior in high school, who participated in track, was active in the Civil Air Patrol, worked and managed his own money, drove the family automobile, and was considered of average intelligence. On September 17, 1972, Donald and Donal Geis went to the lake, waded in the water, checked its depth, and climbed to the cab of the drag line from where Donald plunged head first into the water, suffering severe injuries. The two had been swimming in the lake several times during the summer, there were no foreign objects on the lake's sandy bottom, it was not practical to fence the area, "No Trespassing" and "Keep Out" signs had been posted, and Mr. Ferguson had received a request to fence the lake. Donald and his companion were trespassers.

The plaintiffs contend that the pond and drag line, individually and together, constituted an attractive nui-

sance, and that the defendants were negligent in failing to anticipate that children would be attracted to dive from the drag line into the lake and in failing to warn and to adopt adequate safety precautions.

The defendants denied that the attractive nuisance doctrine applied in these cases, alleged that the sole proximate cause of the accident was the negligence of the plaintiff, Donald Haden, and contended further that the only duty owed to him as a trespasser was to refrain from willful or wanton negligence.

The plaintiffs correctly argue that this court has adopted the variously referred to "attractive nuisance," "turntable," "infant trespasser," or "special rule" doctrine as enunciated in Restatement, Torts 2d, § 339, Artificial Conditions Highly Dangerous to Trespassing Children. See Gubalke v. Estate of Anthes, 189 Neb. 385, 202 N. W. 2d 836. This rule imposes liability on property owners for injury to trespassing children when five requirements are satisfied. Three of the essentials are, in substance, (1) the condition is one which the possessor realizes will involve an unreasonable risk of death or serious harm to children; (2) the children do not realize the risk involved in coming within the area; and (3) the burden of eliminating the danger is slight compared with the risk to children involved.

We quote from 62 Am. Jur. 2d, Premises Liability, § 179, p. 457: "The rule that a child may not recover for injuries under the special rule where he was clearly aware of the danger involved applies especially in the case of injuries suffered by a child old enough to be aware of the dangers of swimming, diving, or other activities in or about water." Also, at § 174, p. 450: "It has also been reasoned that the special rule should not be extended to ponds, * * * since they are, in fact indispensable for the maintenance of life and property and are practically impossible to render harmless." And, at § 169, p. 444: "The attractive nuisance doctrine has frequently been said not to apply to common or ordinary

objects, on the ground that while such objects may be attractive to children they are not inherently dangerous, * * *." At p. 445: "The attractive nuisance doctrine will generally not be applied to useful machinery in a static condition. And moving machinery has been held not to be an attractive nuisance in the absence of evidence that such machinery was enticing to young children."

As early as Richards v. Connell, 45 Neb. 467, 63 N. W. 915 (1895), this court held in affirming a dismissal on demurrer: "The owner of a vacant lot upon which is situated a pond of water or dangerous excavation is not required to fence it, or otherwise insure the safety of strangers, old or young, who may resort to said premises not by invitation, express or implied, but for the purpose of amusement or from motives of curiosity." Another case dismissed on demurrer in the trial court and affirmed on appeal is Spence v. Polenski Bros., Schellak & Co., 110 Neb. 56, 193 N. W. 101 (1923), in which it was stated at pages 60 and 61: "By the great weight of decisions, our own included, the doctrine announced in the Turntable cases has never been carried to the extent of including a pond within its scope."

It is the opinion of this court that a person on the premises of another, without the permission of the owner, who is of sufficient age, mentality, experience, and ability to observe, realize, and avoid a particular danger or peril is in fact and law an adult trespasser and cannot recover under the special rule pertaining to children. It is also the view of this court that the attractive nuisance doctrine has no application to pools, ponds, or other bodies of water, artificial or natural, where there exist no unusual traps or hazards; nor does it apply to useful machinery in a static condition unless there is evidence that the machinery is especially enticing and inherently dangerous to indiscriminating children of tender years.

The established evidence excludes, as a matter of law, the plaintiffs and the premises from the special rule per-

mitting recovery of damages by trespassers without proof of willful or wanton negligence. It follows that no material issues of fact remain, therefore the judgments of the District Court sustaining the motion for summary judgment are affirmed.

AFFIRMED.

NOLAN L. BERRY, JR., APPELLANT, V. CHARLES L. WOLFF, WARDEN, NEBRASKA PENAL COMPLEX, APPELLEE.
228 N. W. 2d 885

Filed May 8, 1975. No. 39777.

Criminal Law: Probation and Parole: Time. When subsequent to a defendant's conviction a statutory change is made in the law governing parole and the defendant thereafter violates his parole, the amendatory law is applicable and is not ex post facto in its application.

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

T. Clement Gaughan and Richard L. Goos, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

NEWTON, J.

This is a habeas corpus proceeding wherein the question presented is whether the application of section 83-1,111 (5), R. R. S. 1943, as amended in 1972, is ex post facto as to the defendant who had been convicted and placed on discretionary parole before the amendment was effective. Judgment was entered against the defendant in the District Court and it is affirmed.

Section 83-1,111 (5), as amended in 1972, provided for mandatory parole and then stated: "Nothing herein shall require the mandatory parole of an offender who has violated a discretionary parole within twelve months of the date when his parole would otherwise be mandatory." The former act limited the 12-month period to 3 months.

Defendant violated his parole *after* the amended act became effective. The violation occurred within the 12-month period but not within the 3-month period and defendant contends he is entitled to be released.

It is generally held that where an offense is committed prior to a statutory change, the amendment is not applicable. See, State ex rel. Woodward v. Board of Parole, 155 La. 699, 99 So. 534; Love v. Fitzharris, 460 F. 2d 382 (9th Cir., 1972).

The foregoing rule is not applicable where a defendant on parole commits another offense or otherwise violates his parole *after* the amendatory statute has become effective. Somewhat analogous are statutes increasing second-offense penalties after a first conviction but before a second. Such acts are not ex post facto when applied to a second offense. See, State v. Steemer, 175 Neb. 342, 121 N. W. 2d 813; Oliver v. United States, 290 F. 2d 255 (8th Cir., 1961). The same is true regarding convictions prior to the passage of an habitual criminal act. See Taylor v. State, 114 Neb. 257, 207 N. W. 207.

There are other decisions directly in point. In Commonwealth ex rel. Wall v. Smith, 345 Pa. 512, 29 A. 2d 912, it was held: Where relator was released on parole after he had served 7½ years of lumped consecutive 5 and 2 year minimum sentences, with 10 and 4 year maximums, and after pleading guilty to a felony was declared a parole violator under the amendment to the parole act requiring such violators to serve the remainder of their terms in addition to the term imposed for the crime whose commission breaks the parole, relator's imprisonment as a parole violator was not illegal because the

sentence he was serving when he was paroled was imposed before the amendment was enacted, where the amendment did not differ from act effective when relator was first sentenced and was enacted prior to commission of the later felony.

In State ex rel. Kincaid v. State Parole Board, 53 N. J. Super. 526, 147 A. 2d 817, it is held: "The State may, with full propriety, after releasing a prisoner on parole, adopt legislation which tells him, in effect, that if he subsequently commits a crime the revocation of his parole will be attended with the penalty of service of a greater portion of original sentence than that fixed by law when he was paroled. * * *

"Statutory amendment relative to parole violations providing for service of greater portion of original sentence than that fixed by law in effect at time of previous paroles was not violative of paroled prisoner's constitutional rights so long as punishment for previously committed crime was not increased." See, also, Gildea v. Commissioner of Correction, 336 Mass. 48, 142 N. W. 2d 400; Annotation, 95 A. L. R. 2d, § 16, p. 1290.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. ROLLAND NORMAN ET AL., APPELLEES.
229 N. W. 2d 55

Filed May 8, 1975. No. 39806.

1. **Aiders and Abettors: Misdemeanors. One may be guilty of aiding and abetting the commission of a misdemeanor.**
2. **Aiders and Abettors. One incapable of committing a specific crime may nevertheless be guilty of aiding and abetting its commission.**

Appeal from the District Court for Valley County: EARL C. JOHNSON, Judge. Reversed and remanded.

J. Marvin Weems and Harold Mosher, for appellant.

Leo F. Clinch, for appellees.

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

NEWTON, J.

This is an error proceeding filed by the county attorney of Valley County. Defendants were charged with aiding and abetting certain minors to be in possession of alcoholic liquor. Three questions are presented. First, was the appeal properly taken? Second, can one aid and abet a misdemeanor offense? Third, can an individual personally incapable of committing an offense be an aider and abettor? Motions to quash the informations were sustained in the District Court. We reverse the judgment of the District Court.

At the outset we call attention to the fact that had the defendants been charged under section 53-180 R. R. S. 1943, the problems presented could have been avoided.

In regard to the jurisdictional question, examination of the transcript reveals that the various steps necessary to appeal under section 29-2315.01, R. R. S. 1943, were timely and properly taken.

It appears that one may be guilty of aiding and abetting the commission of a misdemeanor. Prior to the 1923 amendment our statute on aiding and abetting pertained only to felonies but the common law rule was followed. "In misdemeanors there are no accessories. Those whose conduct is such that it would constitute them accessories before the fact, if the principal offense were a felony, are, if it be a misdemeanor, guilty as principals." Wagner v. State, 43 Neb. 1, 61 N. W. 85. See, also, Skiles v. State, 85 Neb. 401, 123 N. W. 447; Stumpff v. State, 122 Neb. 49, 239 N. W. 212; 21 Am. Jur. 2d, Criminal Law, § 124, p. 200. Section 28-201, R. R. S. 1943, now provides: "Whoever aids, abets or

procures another to commit any offense may be prosecuted and punished as if he were the principal offender." It is no longer limited in its application to felonies but covers all *offenses*. An offense is a crime *or misdemeanor*. See Black's Law Dictionary (4th Ed.), p. 1232.

With reference to whether one who is incapable of committing a specific crime may be an aider and abettor, attention is called to 21 Am. Jur. 2d, Criminal Law, § 116, p. 196, which provides: "There are some offenses which are so defined by statute or by the common law that they may be committed only by certain persons or classes of persons. But a person not within the class of those by whom the crime may be personally perpetrated may, by aiding and abetting the commission of the offense, also render himself criminally liable. Thus a woman may be punished for aiding or abetting the commission of rape, a husband may be an accessory to the crime of rape upon his own wife, and a person who aids and assists the owner of property in burning it may be convicted under a statute making it an offense for the owner of property to burn it with the intent to defraud an insurer. Similar rules prevail as to the commission of embezzlement and other crimes." See, also, State v. Girt, 115 Neb. 833, 215 N. W. 125; Annotation, 131 A. L. R. 1322.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

LORETTA HADLOCK, DOING BUSINESS AS KOUNTRY KITCHEN, 13 WEST RAILROAD STREET, KEARNEY, NEBRASKA, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

229 N. W. 2d 887

Filed May 8, 1975. No. 39851.

1. **Intoxicating Liquors: Municipal Corporations: Administrative**

Law: Licenses. Under the statutes and rules applicable to the City of Kearney, a resolution recommending either issuance or refusal of a retail liquor license by the Nebraska Liquor Control Commission requires for adoption a majority vote of all elected members of the city council.

2. **Intoxicating Liquors: Administrative Law: Licenses.** Where the Nebraska Liquor Control Commission, within statutory time limitations, receives written allegations or evidence of facts which, if true, could constitute valid grounds for denial of a pending application for a retail liquor license, the commission has authority to require and hold a hearing on such application.
3. ———: ———: ———. The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably.
4. **Intoxicating Liquors: Administrative Law: Records.** After an administrative hearing, the Nebraska Liquor Control Commission must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised.
5. ———: ———: ———. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary.
6. **Intoxicating Liquors: Administrative Law: Licenses.** In an administrative hearing on an application for a retail liquor license not required by subsection (1) of section 53-133, R. R. S. 1943, where the evidence fails to establish any valid grounds for denial of the application, the provisions of section 53-132(1), R. R. S. 1943, require the Nebraska Liquor Control Commission to cause a license to be issued in the manner provided by law as a matter of course.
7. **Intoxicating Liquors: Administrative Law: Appeal and Error: Licenses.** Any decision of the Nebraska Liquor Control Commission granting or refusing to grant a license or permit for the sale of alcoholic liquors may be reversed, vacated, or modified by the District Court on appeal.

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

Andrew J. McMullen, for appellant.

Paul L. Douglas, Attorney General, and Robert R. Camp, for appellee.

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

McCOWN, J.

This is an appeal from a judgment of the District Court setting aside an order of the Nebraska Liquor Control Commission denying plaintiff a retail liquor license, and remanding the cause to the Nebraska Liquor Control Commission for a new hearing. The plaintiff has appealed. Plaintiff's contentions on appeal are directed solely at the directions to the Liquor Control Commission on remand. Plaintiff contends that the commission should be directed to issue a license to the plaintiff rather than to hold a new hearing.

On July 5, 1974, the plaintiff filed an application for a Class C liquor license with the Nebraska Liquor Control Commission. The application was as an individual, doing business as "Kountry Kitchen," a restaurant in Kearney, Nebraska. Statutory notice of hearing before the council was duly published. On July 23, 1974, the Kearney city council, which has five elected members, held a hearing to consider the application and a recommendation on it by the city to the commission. After oral presentations and discussion, a resolution that the hearing be closed and the council recommend denial of the license was moved and seconded. On the roll call vote, two council members voted aye; one voted nay, one councilman did not vote; and one councilman was absent. On the following day a summary of the council minutes, including the vote upon the resolution, was forwarded to the Nebraska Liquor Control Commission. In the transmittal letter the summary was referred to as "council action relative to hearing on the application of Loretta Hadlock dba 'Kountry Kitchen' * * *."

Upon receipt of the notice of council action, the Liquor Control Commission set the matter for hearing before

the commission on August 7, 1974. Notices of hearing stated that the hearing was being held due to the action of the local governing body recommending denial of the application. The plaintiff was the only witness who appeared at the hearing before the Liquor Control Commission on August 7, and her testimony fully supported the application. The evidence was undisputed that the plaintiff was a fit and proper applicant qualified to hold a retail liquor license. The application and supporting documents and the summary of the resolution of the Kearney city council were introduced by stipulation. There was no other evidence or testimony offered or received. On August 19, 1974, the Nebraska Liquor Control Commission found that the local governing body recommended denial of the application and that the application should be denied and entered its order of denial.

The plaintiff appealed to the District Court. No additional witnesses were called and all prior proceedings were received into evidence. The parties also stipulated that there was no protest filed before the Nebraska Liquor Control Commission in connection with plaintiff's application. The District Court found that the order of denial should be set aside and the matter remanded to the Nebraska Liquor Control Commission for a new hearing de novo with respect to the application of the plaintiff, and entered its judgment accordingly.

Plaintiff has appealed contending that the Liquor Control Commission should be directed to issue a license to the plaintiff rather than to hold another de novo hearing. We agree.

The statutory framework for granting or denial of liquor licenses places the regulatory power exclusively in the Liquor Control Commission except as specifically delegated elsewhere. The basic procedural requirements are spelled out in sections 53-131 through 53-134, R. R. S. 1943. In general the statutes provide that upon receipt of an application for a license at a location in a city, the commission shall notify the municipal clerk of

the receipt of the application and enclose a copy. No license is then to be issued by the commission until the expiration of at least 30 days from the date of mailing the application, during which period the local governing body of such city, village, or county may make and submit to the commission recommendations relative to the granting or refusal to grant such license.

Section 53-134(7), R. R. S. 1943, generally provides that on receipt of the notice and copy of the application by the city, the local governing body shall fix a time and place at which a hearing will be had bearing upon the propriety of the issuance of the license. Notice of the hearing must be published as specified and it must be held within specified time periods. After such hearing, the local governing body shall cause to be spread at large in the minute record of their proceedings a resolution recommending either issuance or refusal of said license. The clerk of the city shall thereupon mail to the commission a copy of the resolution. The section specifically provides that failure to comply with its provisions shall not render void any license issued by the commission.

The critical section involved here is section 53-132(1), R. R. S. 1943, which provides: "Except as provided in subsection (1) of section 53-133, upon the expiration of thirty days from the date of mailing notice, as provided in section 53-131, the commission shall cause a retail license to be signed by its chairman, attested by its secretary over the seal of the commission and issued in the manner provided in subsection (2) of this section as a matter of course."

Subsection (1) of section 53-133, R. R. S. 1943, provides: "(1) The commission shall set for hearing before it any application for a retail license relative to which it has received:

"(a) Within thirty days from the date of mailing such application * * * a recommendation of denial from the city, village, or county, as the case may be;

"(b) Within three days after the receipt of a recommendation from the city, * * * or, if no recommendation is received, within thirty days from the date of mailing such application to the city, village, or county clerk, objections in writing by not less than three persons residing within said city, village, or county, as the case may be, protesting the issuance of said license * * *.

"(c) Within thirty days from the date of mailing such application * * * objections by any one of the duly appointed inspectors of the commission, protesting the issuance of said license."

It is stipulated that no objections were filed and provisions (b) and (c) are therefore not involved here.

The plaintiff contends that the purported action of the city council of Kearney here was a nullity and was ineffective to constitute a recommendation of denial from the city, and therefore section 53-132, R. R. S. 1943, was applicable and required the issuance of the license as a matter of course.

Rule 3 of the rules of proceedings of the Kearney city council provides: "Quorum; when majority vote required. Three members of the council shall constitute a quorum. A majority vote of all members elected shall be required to pass any measure or elect to any office." Identical language is found in section 19-615, R. S. Supp., 1974.

Section 16-404, R. S. Supp., 1974, provides: "All ordinances and resolutions or orders for the appropriation or payment of money shall require for their passage or adoption the concurrence of a majority of all members elected to the council * * *."

Section 53-134, R. R. S. 1943, requires from the local governing body "a resolution recommending either issuance or refusal of said license." Under the statutes and rules applicable to the City of Kearney, a resolution recommending either issuance or refusal of a retail liquor license by the Nebraska Liquor Control Commission requires for adoption a majority vote of all elected

members of the city council. The vote here was clearly ineffective to constitute any official action of the governing body. It did not constitute a recommendation of denial from the city as specified in section 53-133 (1) (a), R. R. S. 1943, nor did it require that a hearing be set in accordance with the mandatory requirement of that section. This does not mean, however, that the Nebraska Liquor Control Commission had no authority to set the matter for hearing and hold a hearing under these circumstances. The commission should not be required to verify the validity and accuracy of reports received from the clerks of governing bodies of cities, villages, and counties as to official action of such governing bodies before setting and holding an authorized or mandated hearing. The power to regulate and control alcoholic liquors is vested exclusively in the Nebraska Liquor Control Commission except as specifically provided otherwise by statute. Where the Liquor Control Commission, within statutory time limitations, receives written allegations or evidence of facts which, if true, could constitute valid grounds for denial of a pending application for a retail liquor license, the commission has authority to require and hold a hearing on such application.

The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. Its discretion is to be exercised reasonably and not whimsically nor capriciously. As in the case of other administrative bodies, the Nebraska Liquor Control Commission, after an administrative hearing, must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. Where the record of the proceedings contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. See, Eleven Eighteen Co. v. Nebraska Liquor Control Commission, 191 Neb. 572,

216 N. W. 2d 720; Brandeis Inv. Co. v. State Board of Equalization & Assessment, 181 Neb. 750, 150 N. W. 2d 893; Godden v. Department of Public Welfare, *ante* p. 269, 226 N. W. 2d 627.

In an administrative hearing on an application for a retail liquor license not required by subsection (1) of section 53-133, R. R. S. 1943, where the evidence fails to establish any valid grounds for denial of the application, the provisions of section 53-132(1), R. R. S. 1943, require the Nebraska Liquor Control Commission to cause a license to be issued in the manner provided by law as a matter of course. See, also, State ex rel. Smith v. Nebraska Liquor Control Commission, 152 Neb. 676, 42 N. W. 2d 297.

Here the Nebraska Liquor Control Commission found that the local governing body had recommended denial of the application, and it based its own decision on that assumed fact. If true, that fact would have constituted valid grounds for denial of the application. However, there is no evidence to support that finding, nor is there any other evidence in the record which could have constituted valid grounds for denial. To the contrary, the evidence established that the purported recommendation of denial by the city counsel was wholly ineffective to constitute official action by the city. At best it could only be treated as a failure to act. Under such circumstances, the order of denial was arbitrary and unreasonable.

The District Court was entirely correct in setting aside the order of denial. Under the facts here, however, on remand the commission should have been directed to issue a license to the applicant in the manner provided by law as a matter of course. Section 53-1,116(5), R. R. S. 1943, provides in part: "Any decision of the commission granting or refusing to grant * * * a license or permit for the sale of alcoholic liquors, * * * may be reversed, vacated, or modified by the district court of the county where the applicant for a license * * * re-

sides * * * on appeal by any party to the hearing or rehearing before the commission." The directions on remand here should therefore be modified.

The judgment of the District Court in setting aside the order of the Nebraska Liquor Control Commission denying plaintiff's application for a retail liquor license was correct and is affirmed. The directions of the District Court to the Nebraska Liquor Control Commission on remand are vacated, and the cause is remanded to the District Court with directions to remand the cause to the Nebraska Liquor Control Commission with directions to cause a retail liquor license to be issued to the plaintiff in the manner provided by law as a matter of course. As so modified, the judgment of the District Court is affirmed.

AFFIRMED AS MODIFIED.

STATE EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MARVIN L. HOLSCHER, RESPONDENT.
230 N. W. 2d 75

Filed May 15, 1975. No. 39054.

1. **Public Officers and Employees: Fees.** Laws 1971, L.B. 743, which amended section 77-1918, R. R. S. 1943, was to be effective so far as compensation was provided for county attorneys as soon as it could become operative under the Constitution of the State of Nebraska.
2. **Public Officers and Employees: Fees: Time.** The fee provided for county attorneys in section 77-1918, R. R. S. 1943, is not payable until the tax foreclosure decree is entered and the property sold pursuant to such decree.
3. **False Pretenses.** Mere negligence on the part of the claimant is not enough to sustain a conviction under section 23-135.01, R. R. S. 1943.
4. **Prosecuting Attorneys.** A maxim sanctioned by centuries of experience is that ignorance of the law is no excuse. This maxim is particularly applicable to a county attorney who should make himself fully conversant with the duties of his office.

5. **Attorneys at Law: Prosecuting Attorneys: Disciplinary Proceedings.** Misconduct of an attorney acting in an official capacity has been held to constitute ground for his suspension or disbarment.
6. ———: ———: ———. Respondent was guilty of extreme negligence in his failure to familiarize himself with section 77-1918, R. R. S. 1943. The fact that he was extremely busy does not absolve him of this responsibility.
7. **Attorneys at Law: False Pretenses: Disciplinary Proceedings.** The gravamen of Disciplinary Rule 7-102(A) (3) and (5) is the intentional concealment, failure to disclose, or knowingly making a false statement.
8. **Attorneys at Law: Prosecuting Attorneys: Disciplinary Proceedings.** Disciplinary Rule 8-101(A) (2) prohibits a lawyer who holds public office from using that office to influence or attempt to influence a tribunal to act in favor of himself or a client.
9. **Attorneys at Law: County Boards: Disciplinary Proceedings: Words and Phrases.** A county board is a tribunal embraced within the ambit of Disciplinary Rule 8-101.

Original Action. Judgment of censure accordingly.

M. J. Bruckner, for relator.

John E. North of McGrath, North, Dwyer, O'Leary & Martin, for respondent.

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

SPENCER, J.

This is an original disciplinary proceeding brought in the name of the State of Nebraska on relation of the Nebraska State Bar Association against Marvin L. Holscher, a lawyer duly admitted and licensed to practice his profession in this state.

Respondent was charged with the violation of Rules DR 7-102(A) (3) and (5), and DR 8-101(A) (2) of the Code of Professional Responsibility. The referee appointed herein has filed a report recommending censure or reprimand. Relator has filed exceptions to that report. We disagree with some of the conclusions

of the referee, but accept his recommendations as to penalty.

Respondent was elected county attorney of Scotts Bluff County in the general election held in November 1970. At the time he took office there were in excess of 400 outstanding tax sale certificates left from previous administrations. He was also faced with the prosecution of a large number of criminal cases resulting from a drug investigation which had been going on in Scotts Bluff County for the previous 3 months. Because of a statutory requirement that felony cases must be tried within 6 months of the filing of the information, respondent devoted his time and attention to the criminal cases, paying little attention to the tax foreclosure problems, although the county commissioners were putting pressure on him to commence action on them. Respondent, at the time of his election, had never handled a tax foreclosure case and was unfamiliar with the necessary legal procedures.

The 1971 Legislature passed L.B. 743, which amended section 77-1918, R. R. S. 1943. It became effective May 22, 1971. Prior to this amendment, section 77-1918, R. R. S. 1943, provided that it was the duty of the county attorney to commence action to foreclose the lien of delinquent taxes when ordered by the county board, and to promptly foreclose any tax sale certificates issued by the county. No fee in addition to his regular salary was authorized. As amended, the section provided: "The county board shall have authority to direct the county attorney to commence foreclosure of such liens or certificates, or it may designate another attorney to commence such actions, and is authorized to pay any reasonable fee for such foreclosures, to be assessed as costs, but in the event the county attorney is designated to bring the action the fee shall be fifty dollars for each cause of action in addition to his salary, to be retained by him, but it shall not be paid to the

county attorney until the decree is entered and the property sold pursuant to such decree."

The referee specifically found that respondent was aware the Legislature had passed a bill changing existing law to permit county attorneys foreclosing tax sale certificates to be paid a $50 fee for each certificate, and had discussed the change with other county attorneys, but he did not know the bill was designated as L.B. 743, nor had he ever read or analyzed the bill after it was passed. He discussed fees for the foreclosure of tax sale certificates with the county commissioners, and in May of 1971, made an oral agreement with them providing for payment of a $50 attorney's fee and $30 for abstracting on each tax certificate. There was no discussion as to when payment would be due.

Respondent thereafter investigated the tax certificate situation and found that the 5-year statute of limitations on 36 certificates would expire on June 1, 1971. He asked for and received from the county commissioners permission to employ another attorney to work with him on these foreclosures. No additional fee was allowed for this attorney. Respondent made his own arrangement with him.

The 36 tax sale certificates on which the statute of limitations was about to become applicable were consolidated into 7 cases and filed June 1, 1971. On November 8, 1971, respondent filed a claim for $1,440 with the county for payment for his services on these certificates. Nothing had been done in processing the foreclosures by that date except the filing of the petitions. Twenty-three of the certificates in the first four cases were redeemed. From June 1, 1971, to March 1972, no further action was taken by respondent on tax foreclosures. In March 1972, he prepared and submitted to the commissioners a written resolution to replace the oral one authorizing him to proceed with tax foreclosures. This resolution was passed by the commis-

sioners on March 20, 1972. Thereafter several additional tax foreclosures were filed.

Claims for services were filed by respondent in all cases prior to publication, entry of a decree, and confirmation of sale. As to some of the certificates, the property was redeemed after the filing of the foreclosure and no sale resulted. In some instances respondent actually filed his claim for services after the petitions had been prepared in his office but before the date the petitions were actually filed in the District Court. In all the claims filed with the county board, respondent used the terminology "Foreclosure of tax sale certificates," and then certified the authenticity of the claim.

Shortly after October 16, 1972, respondent learned that objections were being made to his claim. On October 27, he discussed the matter with the Attorney General of Nebraska. The referee found that this was the first time respondent thoroughly examined the provisions of L.B. 743, and realized that he had erroneously filed claims for his services in foreclosing tax sale certificates. On October 31, 1972, respondent received a county warrant in payment of a $2,000 claim which he immediately marked "Returned for cancellation," and delivered it to the county clerk. The total amount of the balance of claims improperly filed and paid was $12,640. Respondent, by means of a bank loan, repaid this amount to the county. The three commissioners of Scotts Bluff County cosigned his note.

In November 1972, charges were filed against respondent with the Committee on Inquiry for the Seventeenth Judicial District. Hearing was held by the committee in January 1972. The record was thereafter referred to the Advisory Committee of the Nebraska State Bar Association. That committee concluded that probable cause existed for disciplinary action against respondent, and this proceeding was filed.

The provisions of the Code of Professional Respon-

sibility alleged to have been violated are as follows:

DR 7-102(A) (3): "Conceal or knowingly fail to disclose that which he is required by law to reveal."

DR 7-102(A) (5): "Knowingly make a false statement of law or fact."

DR 8-101(A) (2): "Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client."

L.B. 743, § 3, specifically states it was attempting to provide adequate compensation for county attorneys and that it desired the act to be effective as soon as it could become operative under the Constitution of the State of Nebraska. The respondent was then the duly qualified and acting county attorney of Scotts Bluff County, having served 5 months into his term. Article III, section 19, Constitution of Nebraska provides, so far as material herein: "* * * nor shall the compensation of any public officer * * * be increased or diminished during his term of office." Ignoring the question of whether the respondent could have accepted payment for the foreclosures even after he completed them, by filing his claims he was in violation of the provisions of section 77-1918, R. R. S. 1943. The statute specifically provides the fee shall not be paid to the county attorney until the decree is entered and the property sold pursuant to such decree.

As the referee suggests, the payment of respondent's claim required the combined action of the county attorney in filing the claim, the board of commissioners in approving the same, and the county treasurer in issuing the warrant to pay it. It may be said that all parties concerned were concurrently negligent in the performance of their duties in this regard. Compounding the problem is the fact that the county attorney has the duty of advising all county officials as to the law. By his own admission he did not know the law and took no steps to ascertain what it was. Obviously, the county commissioners and the treasurer assumed that the

county attorney knew what he was doing. Removal from office is the penalty imposed upon the county attorney, the treasurer, and any member of a county board who shall willfully fail, neglect, or refuse to perform his duties under section 77-1918, R. R. S. 1943. Here it appears the negligence was shared by all.

Section 23-135, R. R. S. 1943, provides that claims against a county must be filed with the county clerk within 90 days after materials are furnished or labor is performed. Section 23-135.01, R. R. S. 1943, is a penal statute prescribing punishment for filing a false claim. So far as material herein, it provides: "Whoever shall file any claim against any county as provided in section 23-135, knowing said claim to contain any false statement or representation as to a material fact or whoever shall obtain or receive any money or any warrent for money from any county knowing that the claim therefor was based on a false statement or representation as to a material fact, if the amount claimed or money obtained or received, or if the face value of the warrant for money shall be one hundred dollars or more shall, upon conviction thereof, be imprisoned in the Nebraska Penal and Correctional Complex not more than five nor less than one year."

Criminal sanctions may be imposed only if the claimant knew the claim contained a false statement or false representation or he received money or a warrant for money knowing the claim for which he received it was based on a false statement or representation. In other words, there must have been a criminal intent to defraud the county by the use of false statements or representations. Mere negligence on the part of the claimant is not enough to sustain a conviction under section 23-135.01, R. R. S. 1943, no matter how gross it might have been. This, however, is not a criminal prosecution. Respondent filed his claim for services prematurely, in some instances even before a tax foreclosure was even filed. We cannot believe that re-

spondent would not know this was improper procedure. At the very least it would be conduct so carelessly and recklessly negligent that we would have to find respondent did it knowingly. Otherwise we might as well forget the Code of Professional Conduct. The referee found otherwise. We disagree and find the respondent in violation of DR 7-102(A) (5) in the certification to the claims filed.

Respondent seeks to excuse himself on the ground that he was ignorant of the provisions of section 77-1918, R. R. S. 1943, as amended. The amendment became effective on May 22, 1971, which was after he had taken office. As the referee suggests, respondent leans on a broken reed. He had served previously as a deputy county attorney and was an experienced lawyer in general practice prior to his election. He knew in advance of that election that the county commissioners were expecting the county attorney to foreclose all delinquent tax certificates, yet he made no effort to familiarize himself with the law governing that subject, with specific reference to fees, either before or after taking office.

Before he made his agreement with the county commissioners respondent knew that section 77-1918, R. R. S. 1943, had been amended by the Legislature and the law on foreclosure fees had been changed, yet he made no attempt to ascertain what the law was or how it had been changed by the amendment nor how it might affect him personally. He gave as a reason his preoccupation with the prosecution of a number of criminal cases on which the statute of limitations might run. This is very unpersuasive and his failure to check the statute is inexcusable.

We have repeatedly recognized the ancient maxim that ignorance of the law is no excuse. It is a maxim sanctioned by centuries of experience. See Satterfield v. State (1961), 172 Neb. 275, 109 N. W. 2d 415. It applies with even greater emphasis to an attorney at

law who is expected to be learned in the law. It should be particularly applicable to a county attorney who should make himself fully conversant with the duties of his office. Misconduct of an attorney acting in an official capacity has been held to constitute a ground for his suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Wiebusch (1951), 153 Neb. 583, 45 N. W. 2d 583. It is inexcusable for an attorney to attempt any legal procedure without ascertaining the law governing that procedure. Of all classes and professions the lawyer is most sacredly bound to understand and uphold the law. Respondent was guilty of extreme negligence in his failure to familiarize himself with section 77-1918, R. R. S. 1943, as amended. The fact that he was extremely busy with criminal prosecutions does not absolve him of this responsibility. It would have taken comparatively little time to have read the statute as amended.

It is equally hard for us to understand how any county attorney would believe that a county should pay for services before they were actually completed. We are equally unpersuaded by the contention that most of his work had been done by the time a petition was filed. Our own experience is otherwise. Unquestionably, respondent failed to discharge his duties in the proper manner.

Disciplinary Rule 7-102(A) (3) provides that a lawyer shall not intentionally conceal or knowingly fail to disclose that which he is required by law to reveal. The gravamen of DR 7-102(A) (3) therefore is the intentional concealment and failure to disclose. Giving the respondent the benefit of the doubt, the evidence in this case does not support a finding of an intentional concealment by respondent. On the record the allegations under DR 7-102(A) (3) are not proven and that charge should be dismissed.

Disciplinary Rule 8-101, providing, so far as material here: "(A) A lawyer who holds public office shall

not: * * * (2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client," has not been proved herein. The charge must be construed to be that respondent used his position as county attorney to influence the board of county commissioners of Scotts Bluff County to approve his claim for services in foreclosing the delinquent tax certificates. We hold that a county board is a tribunal embraced within the ambit of DR 8-101. While it was the duty of the county attorney to advise the county board relative to the law involved, the question is, did he use his influence to get it to violate the law? There is no evidence that the respondent made any overt attempt to influence the county board to approve his claims for services or used his position as county attorney in any way to persuade or coerce the board to do so. The most that can be said is that the board assumed that respondent was acting properly and legally when he filed the claims. We agree with the referee, the evidence does not support the claim that the respondent used his position to influence the board, and dismiss the charge under DR 8-101.

We find the respondent guilty of a violation of DR 7-102(A) (5), but sustain the findings of the referee as to DR 7-102(A) (3) and DR 8-101(A) (2) of the Code of Professional Conduct. Respondent was not charged, as he should have been, with gross negligence and the lack of proper preparation. It would have been more appropriate herein to have included DR 6-101(A) (2), which reads as follows: "A lawyer shall not: * * * (2) Handle a legal matter without preparation adequate in the circumstances." It is more in line with respondent's irresponsible conduct. Respondent clearly would have been in violation of this provision of the Code. He admits that he did not know the law. He knew the statute had been amended and made no attempt to ascertain its provisions. It is inexcusable for an attorney to attempt a legal procedure without en-

deavoring to ascertain the law governing that procedure. DR 6-101(A) (3) proscribes that type of conduct.

In fairness to respondent, we must observe that his predecessors in the county attorney's office created his predicament at the time he took office. They ignored DR 6-101(A) (3) which covers neglecting a legal matter entrusted to them. As a part of the duties of the office, delinquent taxes were to be foreclosed at the request of the county commissioners.

To respondent's credit, we note that he conscientiously and promptly tried to rectify his mistake. Other than his conduct herein, he has been a sincere, honest, and aggressive public official. On the basis of respondent's violation of DR 7-102(A) (5) he is subject to discipline. On the record before us, we determine that censure is an appropriate penalty. We feel what we have said herein is a sufficient censure of respondent's failure to fully live up to his responsibility as a lawyer. We therefore censure respondent for his conduct, with the admonition that respondent thoroughly study the Code of Professional Responsibility.

Costs, including the fee of the referee, are taxed to the respondent.

JUDGMENT OF CENSURE ACCORDINGLY.

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

I concur with the portion of the opinion which finds the respondent not guilty of violations of DR 7-102(A) (3) and DR 8-101(A) (2). I dissent from that portion of the opinion which finds the respondent guilty of a violation of DR 7-102(A) (5). I further disagree with some of the wholly unnecessary dicta in the majority opinion.

I agree that the respondent was negligent in not determining the content of section 77-1918, R. R. S. 1943 (Reissue 1971), Laws 1971, L.B. 743, previous to filing the various claims for services rendered. Negligence, however, is not the charge made against him and of which the majority opinion of this court finds him guilty.

He is found guilty of *knowingly* making a *false* statement of *law* or *fact*. Such finding, in my judgment, is completely contrary to the clear weight of the evidence, contradicts the justifiable findings of fact by the referee, and, in my judgment, is unsupportable both on the basis of the evidence and the applicable law. Lawyers who are brought before this court are entitled to no better treatment than other litigants, civil or criminal, but they are clearly under rudimentary notions of due process entitled to be tried under the pertinent applicable rules and not subjected to unfair treatment under rules made for the occasion and which will probably never again be followed.

The majority opinion does not state all the pertinent facts and it therefore gives a distorted perspective of the transaction here involved. For a period of 17 years prior to the respondent's election as county attorney, no foreclosure of delinquent real estate taxes had taken place in Scotts Bluff County. The statute in force from 1961 until the enactment of L.B. 743, insofar as it is pertinent, was as follows: "It shall be the duty of the county attorney, as promptly under all the circumstances as it is reasonably possible so to do, to institute suit to foreclose the lien of the taxes *when ordered by the county board,* and to promptly foreclose any tax sale certificate issued to the county as soon as action can be properly brought on any such certificate." The elected part-time county attorneys apparently were never ordered by the county commissioners to foreclose and did not do so. Although the commissioners attempted to hire outside counsel to handle foreclosures they were apparently unable to procure such service at prices they were willing to pay. No doubt this state of affairs was somewhat common throughout the state and was probably the reason for the amendment of section 77-1918, R. R. S. 1943. As amended the pertinent part of section 77-1918, R. R. S. 1943, provided: "The county board shall have authority to direct the county

attorney to commence foreclosure of such liens or certificates, or it may designate another attorney to commence such actions, and is authorized to pay any reasonable fee for such foreclosures, to be assessed as costs, but in the event the county attorney is designated to bring the action the fee shall be fifty dollars for each cause of action in addition to his salary, to be retained by him, but it shall not be paid to the county attorney until the decree is entered and the property sold pursuant to such decree. No fee shall be allowed the county attorney for such foreclosures in counties having a population of more than one hundred thousand inhabitants." The amendment bore the emergency clause and became effective May 22, 1971. The statute, both before and after the amendment, further provided that for the willful failure or refusal to perform their duties under the section, the affected officials, the commissioners, the treasurer, and the county attorney were subject to removal from office.

Some time prior to the respondent's election in 1970, he was approached by the county commissioners who apparently advised him of the state of affairs with reference to delinquent tax sales certificates and respondent at that time committed himself to take action in that area. When he took office in January of 1971, there were pending in the county a large number of felony count prosecutions, estimated at between 125 and 150, including large numbers of drug violations. The early disposition or trial of these cases became urgent when the Legislature enacted, effective April 30, 1971, a statute which directed discharge of all defendants in pending felony cases who were not tried within 6 months from April 30, or in cases thereafter filed within 6 months from the date of the filing of the information. During this same period of time the respondent became aware that the period during which foreclosures of certain of the tax sales certificates must be commenced expired June 1, 1971.

A necessary preliminary step to such foreclosures was the making of a title search from the courthouse records in connection with each property involved. This necessitated examining the deed records, mortgage records, state and federal tax lien records, all in the office of the register of deeds, judgment records in the office of the clerk of the District Court, and where death of any party was known or suspected, an examination of the probate records in the office of the county judge. The respondent brought to the attention of the commissioners the urgency of the situation in connection with certain certificates and the commissioners authorized him to employ an outside attorney to assist him with the necessary title searches and the preparation of the petitions for foreclosure in these urgent cases. This was done and both the respondent and the retained attorney worked on these cases and they were filed on the day of the deadline. Thereafter the respondent continued to work on the foreclosures "on his own time" pursuant to the agreement with the commissioners, and by June 26, 1973, the entire foreclosure process had been completed with confirmed sales in 135 cases and redemptions in 37 cases, with 23 more cases being redeemed after that date. The net result, as testified to by the commissioners, was that more than $100,000 of delinquent taxes was collected by Scotts Bluff County. The respondent filed claims for his services as the work progressed. The first claim was filed on November 5, 1971, and the last on October 16, 1972. The claims totaled $14,640 and the amounts conformed to the agreement made with the commissioners.

At the time the respondent received a warrant for the last $2,000 of the foregoing amount, the Auditor of Public Accounts called to the attention of all parties concerned what he believed to be the illegal nature of the payments. Before the matter came to his attention through the Auditor, the respondent, however, had heard "through the grapevine" that someone was objecting

to his claims. His first reaction was one of anger and he held up filing five petitions (25 foreclosures) until the matter should be resolved. Thereafter he became aware of the restriction in the statutes and he then consulted the Attorney General of the State of Nebraska to whose attention the Auditor had called his discoveries. Thus it appeared to the respondent for the first time that the filing of the claims was premature in all cases and that in those cases where redemption had been made or would be made no fee at all could be paid even though the desired result had been accomplished and a great deal of work had in fact been done. The Auditor had taken the position that no fee at all could be paid because of the constitutional limitations prohibiting increases in compensation of a public official during his term of office.

It is quite evident the Legislature intended that the added compensation be paid to incumbent county attorneys if it constitutionally could be, otherwise there was no reason at all for the emergency clause in Laws 1971, L.B. 743. The Attorney General agreed that the payment of fees was premature, but concluded that the constitutional question was an open one. His response to the Auditor on that point was as follows: "We think an argument can be made either way on the constitutionality of the legislative act involved, L.B. 743 of the 1971 Legislature. The question has been raised in several counties by county attorneys themselves, and in each case we urged him to take the matter up with his District Judge since it involved a matter pending in that court. We have not heard that any Judge has felt that the act is unconstitutional. The argument for constitutionality is based on the fact that the Legislature in L.B. 743 struck all of the language making it a mandatory duty of the county attorney to handle tax foreclosures. The act also placed certain additional burdens on the county attorney and the county board with regard to removal from office, so the argument can rightfully

be made that the entire situation has changed and that the money may rightfully be paid to the county attorney under the reasoning followed by our court in such cases as Dunkel v. Hall County, 89 Neb. 585, Afflerbach v. York County, 95 Nebr. 611, and Iler v. Merrick County, 96 Neb. 114." It is clear that both the Committee on Inquiry and the Advisory Committee concluded that if the payment of the $50 fee during the term of an incumbent was the only question involved, the respondent would not properly be subject to discipline.

After his visit with the Attorney General in Lincoln on October 27, 1972, the respondent, on November 3, proposed in a letter to the Attorney General and to a representative of the Auditor's office that he continue the foreclosures and pursue them and others to completion and give credit on future completed work for those already redeemed prior to sale and for which he had collected but could not legally do so. This method of reimbursing the county was abandoned when members of the bar of Scotts Bluff County objected after having "been consulted by several taxpayers" and threatened suit unless immediate reimbursement was made. The respondent then, with the county commissioners as his cosignors, borrowed money from a bank and made repayment in full. He then continued the foreclosures with the results indicated.

In January 1973 these disciplinary proceedings were commenced. The county commissioners at that time sent to the Committee on Inquiry a communication in which they stated their understanding of the oral agreement for fees they had made with the respondent for doing the foreclosure work. This statement said, among other things: "About June 1st, 1971, Mr. Holscher started filing these tax foreclosures. During the last 6 months of 1971, Mr. Holscher was handling several drug cases and he was not doing much tax foreclosure work. We again crowded him to continue with these tax foreclosures.

"During 1972 Mr. Holscher continued processing the tax foreclosures. The Board has received periodic reports from Holscher on the status of the foreclosure filings. The board understood that there were a large number of certificates which had to be foreclosed and the decrees would be taken at a later time and the unredeemed properties sold. The Board was happy that these old certificates were finally being foreclosed and as a result of this, large sums were being paid to the County Treasurer on delinquent taxes as a result of these foreclosures. Mr. Holscher's claims for services were paid when presented since he had performed substantial services for the County on his own time in accordance with the previous agreement.

"Although a mistake has apparently been made and the fees should not have been paid until the properties were sold, we believe that this was an honest mistake and we believe that Mr. Holscher had no intent to deceive the County.

"Mr. Holscher has always been honest and truthful with the Board on all matters and we believe that he was honest and truthful on the tax foreclosures. He has performed his agreements with the Board in the past as we are confident that he will continue to do so in the future."

The gravamen of the charge of which the majority opinion finds the respondent guilty is that he *knowingly* made false representation of fact or law in the representation of a client, specifically in the submission of his bill for services. This writer's assertion that such finding is unfounded requires an examination of both the law and the evidence.

We first examine the law. In order to make the finding it does, the court, having first set forth the proper definition then, without any citation of authority whatsoever, departs from the generally accepted meaning of the word "knowingly." That word imports knowledge of the falsity of the facts represented to be

true. This is the generally accepted meaning of the term. It must necessarily be the meaning of the term as used in the Code of Professional Responsibility. The code itself does not define the term, probably because the meaning is essentially self-evident. It means "having knowledge." Greenway v. State, 8 Md. App. 194, 259 A. 2d 89. Disciplinary actions are, of course, not criminal proceedings, but most certainly are penal and can and do frequently result in one of the most severe of penalties, loss of the means of livelihood either for a time or permanently. Usually, also, the underlying charge involves a claimed violation of statute which defines a particular crime. The criminal law concept of the term is the most apt meaning as well as the ordinary dictionary definition. It implies awareness of the fact or the law and it is clearly distinguishable from what one ought to know or from presumed knowledge. We set forth a few definitions and applications by courts of various jurisdictions. The word "knowingly" in a statute punishing one who willfully and knowingly mutilates and destroys his selective service registration certificate means intentionally, willfully, understandingly. United States v. Smith, 249 F. Supp. 515. Under a statute providing that an officer who "knowingly" keeps any false account or makes any false entry or erasure in any account of money received by him is guilty of an offense, the quoted word imports something more than carelessness and signifies guilty knowledge or evil or fraudulent intent. People v. McHugh, 63 N. Y. S. 2d 319, 271 App. Div. 135. Under a statute making it a criminal offense to sell, offer for sale, possess or "knowingly" transport a machine gun, the quoted word signifies knowledge of existence of fact that the firearm transported is a machine gun and is not to be confused with criminal intent or with knowledge that the act is a violation of law. People v. Daniels, 118 Cal. App. 2d 340, 257 P. 2d 1038. Under a statute making it a misdemeanor to "knowingly"

make a false statement while requesting to be registered as a qualified voter, elector, who was charged with making a false statement as to his residence in registration affidavit, "knowingly" signed registration affidavit aware of the fact that it set out his residence at his office address which was a place different from his true and actual place of abode even though elector truthfully disclosed his actual residence and someone other than the elector filled in answers in the affidavit. Ingram v. State (Okla. App.), 275 P. 2d 334. Terms such as "willful" and "knowingly," in a criminal statute, are to be taken as meaning deliberately and with knowledge. Standard Oil Co. of Texas v. United States, 307 F. 2d 120. The word "knowingly" is synonymous with "intent to defraud" and means with knowledge, consciously, intelligently, willfully. United States v. Martinez, 73 F. Supp. 403, 407. Where the president of a corporation did not know of the obstruction of a public road, and had no part therein, he is not guilty of willfully or knowingly obstructing such road. State v. White, 96 Mo. App. 34, 69 S. W. 684. Doing or omitting to do a thing "knowingly" and "willfully" implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. Felton v. United States, 96 U. S. 699, 24 L. Ed. 875. In a corrupt practices statute providing that any person who shall "knowingly" make or publish or cause to be published any false statement in relation to any candidate or proposition to be voted upon, which statement is intended to or tends to affect any voting, shall be guilty of a misdemeanor, the quoted word refers to the falsity of statement, and not to the act of publishing, and to find a violation of the statute it must be determined that the violator knew that the statement published was false. Bank v. Egan, 240 Minn. 192, 60 N. W. 2d 257. Where a statute provides that a person who "knowingly" receives greater fees than the law allows shall pay to the person aggrieved 10 times the excess to be recovered

in an action on the statute, etc., it was held that the word "knowingly," when used in the prohibitory statute, is used to import a knowledge of the essential facts, from which the law presumes a knowledge of the legal consequences arising therefrom; the word being also used as in such section in the sense of "intentionally," so that where a tax collector received fees in excess of those allowed by section 6262, but in accordance with a usual custom obtaining in the town, and not with knowledge that the fees were illegal, he was not liable for the penalty. Crawford v. Joslyn, 83 Vt. 361, 76 A. 108. The word "knowingly" in a statute making it a misdemeanor to "knowingly" possess or deal in a motor vehicle which has the engine serial number removed or defaced means "having knowledge." Greenway v. State, *supra*. A person may not, however, physically close his eyes for the purpose of avoiding seeing the defacement which he otherwise knows is there. Greenway v. State, *supra*.

So much for the law. Now let us turn to the matter of the evidence in this case. As applied to the circumstances before us, what is the particular knowledge involved? The knowledge that some statement of fact or law was false. What fact? The court-appointed prosecutor tried the case upon the theory that the false representation was that the claimed file containing the words "foreclosure of tax sale certificate" was a representation that the foreclosure proceedings had been completed. The words themselves do not necessarily indicate that meaning. They can describe merely the general nature of the services which were being performed. The uncontradicted evidence in the record is that when the claims were filed and paid all parties concerned knew that the foreclosures were still in process and that none of the properties had been sold and the sales confirmed. The commissioners all testified that from time to time the respondent discussed informally the progress of the foreclosures with them.

They understood that the respondent would complete the foreclosures of all certificates which were not redeemed during the foreclosure process. They knew the properties had not been sold. They were pleased with the services because the foreclosure proceedings were resulting in the collection of large amounts of delinquent taxes. It is clear that no representation by the respondent was made that the proceedings were complete. The theory under which the prosecutor proceeded is clearly unfounded.

The majority opinion is somewhat ambiguous, but it seems to find that the certification on the claim form is false. There is no contention that any part of the claim had been paid previous to the filing of the document. This then cannot be the falsity upon which the majority relies. It must therefore be that the majority rely upon the statement "the above account is just and true." The account, of course, is true. The amounts sought conformed exactly to the amounts agreed upon by the respondent and the county commissioners. The remaining statement is "the above account is just." Is that a representation of fact? Is it a statement of law? Appearing as it does on a claim form used by the county in connection with all claims, it can only mean that the amount claimed is reasonable. The record establishes by uncontradicted evidence that the amounts are reasonable. The $50 fee is reasonable by statutory definition and the amount claimed for title searches is reasonable by reason of evidence in the record which is also wholly uncontradicted and indeed the amount is such that this court can and ought to take judicial notice of its reasonableness. Obviously the statement that the claim is just is not a statement of law. The defendant had not been asked to give an opinion on the law. He was not purporting to make such a statement and, as found by the referee, there was merely an assumption both on his part and on the part of the commissioners that the claim and payments were law-

ful. The referee correctly found that the respondent "negligently" filed the claim not knowing that he was not under the statute entitled to be paid until the sales had been made.

The majority opinion calls attention to the provisions of section 23-135.01, R. R. S. 1943, which defines the felony of filing a false claim against the county and imposes a penalty of 1 to 5 years. If, as the majority opinion says, he is not guilty of violating that statute, why is attention called to it? On the other hand, if the majority really believes that he knew he was doing wrong, surely a mere reprimand is not a sufficient discipline.

Section 77-1918, R. R. S. 1943, as amended, related wholly to the amount and method of payment of fees to the attorney. One could do the foreclosure proceedings wholly ignorant of the contents of section 77-1918, R. R. S. 1943, for the procedures are prescribed by many other provisions of the statutes in Chapters 77 and 25. I would call attention to the fact, of which we may, I believe, take judicial notice, that when the foreclosures were commenced the session laws were not yet published. No one could pull a book from his shelf and determine the details of the amendment. It would have still been necessary at that time and for a considerable time thereafter to have written to the Clerk of the Legislature to get a copy of the pertinent legislative bill.

Most lawyers would not suspect that such a bill, authorizing payment of fees, would prescribe times and conditions for payment where outside counsel is employed different from those which apply when the county attorney is employed and the fee is authorized to be paid to him. Least of all would one suspect that the law contained a provision that if the proceedings were carried clear to the point of sale and practically all the work that had been completed that all right to any compensation whatever would be forfeited by

redemption at that stage. This is the effect of the statute so far as the county attorney is concerned. Yet outside counsel can be paid any reasonable amount, either in advance or in installments as the work progresses and also without forfeiture of compensation should there be a redemption at the last moment.

I have dealt with the above matters at some length because they help demonstrate the absence of moral turpitude in the respondent's conduct. The statute, which the respondent in his ignorance violated, might well be said, when viewed in the light of accepted principles of distributive justice, is an unjust one for reasons we have discussed. That, of course, would not justify a knowing and deliberate violation of the statute by respondent, but his violation was not knowing and deliberate.

The majority opinion says, referring to the premature filing of the claim: "We cannot believe that respondent would not know this was improper procedure." What I have already said is responsive to that particular statement. I simply add the record shows that even in those few cases where the claims were filed before the petitions, the petitions had been prepared and were ready for filing. The preparation of the petitions involves a substantial amount of time and work, even though considerably more remains to be done before the fees would be fully earned.

The majority opinion characterizes the respondent's conduct in the words "so carelessly and recklessly negligent that we would have to find the respondent did it knowingly." Negligent, yes; reckless, hardly. One must judge the degree of negligence, at least in part, on the basis of the relative importance of the matter involved. Handling the foreclosures correctly was an important matter. The time of payment of fees was a relatively unimportant matter affecting principally the respondent. On a relative scale it made little difference to the county whether the fees were paid when the work began, or in

installments, or when the work was finished. The important thing was that the work proceed correctly and expeditiously.

The majority opinion attacks the respondent's predecessors in office for ignoring disciplinary rule 6-101 (A) (3). If the predecessors did, then we on our own initiative must launch disciplinary proceedings against the predecessors. The fact, however, is the county attorney has no duty under the statutes to handle the foreclosures unless "ordered" to do so by the county board. There is no evidence in the record that the predecessors were ever ordered to foreclose. The record supports a contrary inference.

Although the respondent was not charged with violating DR 6-101(A)(2), he admits facts which make him guilty of such violation. On that basis I concur in the reprimand. If I believed that the record supported a finding of guilt of violation of DR 7-102(A)(5) then no mere reprimand would suffice. Only suspension or disbarment would be in order. The finding of the majority and the discipline imposed by them are not consistent.

I am authorized to say that McCown, J., joins in this concurrence and dissent.

ROYAL INDEMNITY COMPANY, A CORPORATION, APPELLANT, V. AETNA CASUALTY AND SURETY COMPANY, A CORPORATION, ET AL., APPELLEES.
229 N. W. 2d 183

Filed May 15, 1975. No. 39603.

1. **Torts: Contribution.** To the extent that Tober v. Hampton, 178 Neb. 858, 136 N. W. 2d 194, and Farmer's Elevator Mut. Ins. Co. v. American Mut. Liability Ins. Co., 185 Neb. 4, 173 N. W. 2d 378, announced the rule that there may be no contribution between negligent joint tort-feasors, those cases are overruled.
2. ———: ———. A right to equitable contribution exists among

judgment debtors jointly liable in tort for damages negligently caused, which right becomes enforceable on behalf of any party when he discharges more than his proportionate share of the judgment.

3. **Torts: Contribution: Insurance: Subrogation.** Even in the absence of a contractual policy provision so providing, where an insurer of a joint judgment debtor jointly liable in tort for damage negligently caused discharges more than its insured's proportionate share of the common liability, such insurer is subrogated to the right of its insured to recover contribution from the other judgment debtors.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed in part, and in part reversed and remanded.

Harry B. Otis of Gaines, Spittler & Otis, for appellant.

John R. Douglas of Cassem, Tierney, Adams & Henatsch, for appellee Aetna Cas. & Sur. Co.

Harry L. Welch of Gross, Welch, Vinardi, Kauffman & Day, for appellees Iowa Nat. Mut. Ins. Co. and Fitzwater.

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

BRODKEY, J.

The underlying facts in the three cases which give rise to this appeal are set out in the opinion of this court in Libbey-Owens Ford Glass Co. v. L & M Paper Co., 189 Neb. 792, 205 N. W. 2d 523 (1973), and will not be repeated here.

The appeal in this case is from an order of the District Court sustaining the separate demurrers filed by the respective defendants to the petition in an action filed by the plaintiff, Royal Indemnity Company, the liability carrier of Yale & Towne, Inc., one of the defendants in the action previously referred to. The present action was instituted for the purpose of recovering contribution from Aetna Casualty and Surety Company, insurance

carrier for L & M Paper Company; from Iowa National Mutual Insurance Company, the insurance carrier for Phil D. Fitzwater, and from Phil D. Fitzwater individually, who was the only insured made a party to the action. In Libbey-Owens Ford Glass Co. v. L & M Paper Co., *supra*, however, the insured defendant was there designated as "Phil D. Fitzwater and Gerald E. Gathmann, doing business as All Makes Forklift Service." It appears that Gerald E. Gathmann has since died, but the administratrix of his estate Roberta J. Gathmann, was not made a party defendant.

In its petition in this case, Royal Indemnity sets out the relationship between the respective insurance carriers and their insureds, and alleges that a consolidated jury trial was held in three separate actions, in which the respective plaintiffs were Henningsen Foods, Inc., O. J. Miller, and Libbey-Owens Ford Glass Company. Plaintiff alleges that on December 22, 1971, following the jury trial in which defendants Aetna and Iowa actively participated, three separate judgments in favor of the above-named plaintiffs were entered against all the defendants in those actions. The jury found that all the defendants were guilty of active negligence proximately causing plaintiffs' damages. The petition further alleges that the jury returned verdicts in favor of Henningsen Foods, Inc., in the amount of $380,596.88 in favor of Libbey-Owens Ford Glass Company in the amount of $43,434.47; and in favor of O. J. Miller in the amount of $45,000. Plaintiff alleges that the defendants in that former case thereafter unsuccessfully appealed to the Supreme Court of Nebraska, following which the several plaintiffs instituted proceedings to collect the judgments from Royal Indemnity alone by way of garnishment proceedings against the plaintiff. Plaintiff then alleges that it has fully discharged the obligations of its insured by paying the judgments in full and is therefore subrogated to the rights of its insured against the other joint tort-feasor judgment debtors. It alleges it is equit-

ably entitled to be reimbursed by L & M Paper Company, through its insurance carrier, Aetna, and by Phil D. Fitzwater, individually and through his insurance carrier, Iowa, in the amount of one-third from each, of the total amount of the judgments and accrued costs paid by it; and plaintiff therefore prays for judgment against the defendant, Aetna, for the amount of $173,437.67; and against the defendants, Iowa, and its insured, Phil D. Fitzwater, for the same amount.

The three defendants separately demurred to the petition of Royal Indemnity. Following a hearing on the matter, the District Court determined that each of the separate demurrers should be sustained. The court thereupon entered an order dismissing plaintiff's petition. Plaintiff's motion for rehearing was overruled, and it then perfected its appeal to this court.

The issues in this action, raised by the separate demurrers of the above-named defendants, were whether or not there may be contribution between joint tort-feasors in Nebraska, and also whether the direct action by plaintiff against the liability insurance carriers in this case is permissible. The demurrers also allege a defect of parties defendant to the action.

This case necessitates an examination and determination of the present status in Nebraska of the frequently annouced rule that there can be no contribution between joint wrongdoers or tort-feasors, and that one of several persons who become liable to another for a wrong cannot enforce contribution from his cowrongdoers, although he is compelled to discharge the whole or more than his share of such liability; and particularly whether that doctrine applies between parties jointly charged with mere negligence, as in the present case, rather than with willful or intentional acts. In this appeal, Royal Indemnity asserts that Nebraska ignores and disregards the historical development of the doctrine, has misinterpreted its scope and applicability, and has

incorrectly applied the doctrine in the recent cases decided by this court.

The law regarding the right to contribution between joint wrongdoers appears to be an offshoot from, and an exception to, the general rule of contribution. The general rule is that one who is compelled to pay or satisfy the whole or bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them the payment of their respective shares. 18 Am. Jur. 2d, Contribution, § 1, p. 6; Exchange Elevator Co. v. Marshall, 147 Neb. 48, 22 N. W. 2d 403 (1946); Restatement, Restitution, § 81, p. 360. The exception to the general rule appears to have originated in England in 1799 in the well-known case of Merryweather v. Nixan, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (1799), where the court denied contribution, apparently because of the fact that the tortfeasors in that case were intentional wrongdoers. See Restatement, Restitution, § 85, p. 387; Reath, Contribution Between Persons Jointly Charged With Negligence—Merryweather v. Nixan, 12 Harv. L. Rev. 176. The rule of Merryweather v. Nixan, *supra,* was subsequently limited in its scope and application by the case of Adamson v. Jarvis, 4 Bing. 66, 130 Eng. Rep. 693 (1827), where the court stated: "* * * the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be *presumed to have known that he was doing an unlawful act.*" (Emphasis supplied.) To the same effect see Betts v. Gibbins, 2 Ad. & E. 58, 111 Eng. Rep. 22 (1834); Pearson v. Skelton, 1 M & W 504, 150 Eng. Rep. 533 (1836). Thereafter, in 1894, the English court, speaking through Lord Herschell, declined to follow the rule of Merryweather v. Nixan, *supra,* where the liability of the tortfeasors was grounded on negligence. Palmer v. Wick & Pulteneytown Steam Shipping Co., 1894 App. Cases 318

(1894). In the United States, however, the distinction between intentional and negligent wrongdoers, which was recognized in the English courts, was not generally accepted, with the result that many jurisdictions in this country have extended the joint tort-feasor exception to deny contribution among joint tort-feasors, regardless of whether their conduct involved willful or intentional misconduct, or mere negligence. See Annotation, 60 A. L. R. 2d 1366, § 3(a) at 1373. On the other hand, many other jurisdictions in this country have permitted contribution among joint tort-feasors, either as a matter of statutory law, or as a matter of common law. See 18 Am. Jur. 2d, Contribution, § 41, p. 60; Annotation, 34 A. L. R. 2d 1107; Annotation 60 A. L. R. 2d 1366, § 4(a), at 1377. It appears that approximately 23 jurisdictions have either adopted the Uniform Contribution Among Tort-feasors Act, approved by the Conference of Commissioners on Uniform State Laws in 1939, or have adopted their own independent acts to accomplish the same or similar purposes. A few states which originally adopted the rule permitting contribution as a result of judicial decision, have subsequently adopted statutes providing for the same or similar rules.

The history of the doctrine in Nebraska has been checkered and unclear. A detailed discussion of the historical development of the doctrine in Nebraska, including an analysis of specific cases, may be found in Busick, Contribution and Indemnity Between Tort-feasors in Nebraska, 7 Creighton L. Rev. 182 (1974), and Comments, The Rule Against Contribution and Its Status in Nebraska, 37 Neb. L. Rev. 820 (1958). Early cases in this jurisdiction strongly indicate that Nebraska followed English Law, and would permit contribution among joint tort-feasors where the party seeking contribution had *not* been guilty of intentional wrongdoing. The earliest case dealing with the problem was Johnson v. Torpy, 35 Neb. 604, 53 N. W. 575 (1892), where the court stated: "In determining whether the right of con-

tribution exists in favor of one wrong-doer against another the test is, must the party demanding contribution be presumed to have known that the act for which he has been compelled to respond was wrongful? If not, he may recover against one equally culpable, but otherwise he is without remedy." In that case the court cited as authority Adamson v. Jarvis, *supra.* See, for example, Torpy v. Johnson, 43 Neb. 882, 62 N. W. 253 (1895); Sharp v. Call, 69 Neb. 72, 95 N. W. 16 (1903). However, it was not until the case of First National Bank v. Avery Planter Co., 69 Neb. 329, 95 N. W. 622 (1903), that this court actually permitted contribution among parties that it regarded as joint tort-feasors. This was done under the theory that the parties had "acted in good faith without any intention of committing a trespass." To the same effect see Schappel v. First National Bank, 80 Neb. 708, 115 N. W. 317 (1908). Some authorities have interpreted these cases as establishing the rule in Nebraska that there may be contribution among joint tort-feasors. See, Comments, The Rule Against Contribution and Its Status in Nebraska, 37 Neb. L. Rev. 820; George's Radio, Inc. v. Capital Transit Co., 75 App. D. C. 187, 126 F. 2d 219 (1942). To the contrary, see language and reasoning of Judge Delehant in Andromidas v. Theisen Bros., 94 F. Supp. 150 (D. Neb., 1950). However, for a critique of that case, see Busick, Contribution and Indemnity Between Tort-feasors in Nebraska, 7 Creighton L. Rev. 182.

Since the decision of this court in Schappel v. First National Bank, *supra,* in 1908, there have been *only* two other cases in which this court has had occasion to consider and discuss the issue of contribution between joint wrongdoers. These were the cases of Tober v. Hampton, 178 Neb. 858, 136 N. W. 2d 194 (1965), and Farmers Elevator Mut. Ins. Co. v. American Mut. Liability Ins. Co., 185 Neb. 4, 173 N. W. 2d 378 (1969). These are the two cases referred to and criticized by Royal Indemnity. In Tober v. Hampton, *supra,* the plaintiffs sought re-

covery for damages to their home resulting from a gas explosion allegedly caused by a leak in the gas main. It was their claim that the leak resulted from the actions of an employee of the defendant while excavating for the construction of a sewer. The District Court dismissed the plaintiffs' cause of action on the ground that they were not the real parties in interest, and the court specifically found that plaintiffs had entered into a "settlement" with the gas company. Upon appeal this court affirmed the dismissal by the District Court. It appears that plaintiffs and the gas company had executed a "loan agreement," under the terms of which the gas company paid $3,500 to the plaintiffs, said "loan" being "repayable only out of any net recovery" obtained by the plaintiffs from the defendant, Hampton. In its opinion, this court recognized that such "loan agreements" are commonplace and valid between insurers and insureds for the purpose of allowing an insurance company to pay the full amount of a claim, while permitting the insured to remain the real party in interest. See, Shiman Bros. & Co. v. Nebraska National Hotel Co., 143 Neb. 404, 9 N. W. 2d 807 (1943); Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., 162 Neb. 47, 75 N. W. 2d 366 (1956). Since, under the facts of that case, the loan agreement was not between an insurance company and its insured, this court concluded that the plaintiffs were not the real parties in interest in that action; and, accordingly, dismissed their petition. The court specifically found that defendant Hampton and the gas company were joint tort-feasors, and in effect held that a "loan agreement" would not have the same "real party in interest" effect where joint tort-feasors were involved as it has where an individual insurance company has entered into such a "loan agreement" with its own insured. The reasoning behind the distinction was that to allow such a result would be to excuse the joint tort-feasor who was a party to the "loan agreement" from having to pay any amount as compen-

sation for damages to the injured party resulting from the negligence of the joint tort-feasors. In that situation it is clear that one joint tort-feasor would be reimbursed under the loan agreement, while the other joint tort-feasor would end up paying the entire amount of the loss. It would appear, therefore, that in Tober v. Hampton, *supra,* the court declined to hold that the plaintiffs were the real parties in interest under their "loan agreement" with the gas company in order to avoid the result of *indemnification* between the joint tort-feasors, which the court regarded as impermissible. Although the case principally involved the matter of "indemnification" rather than "contribution," the court proceeded further to discuss the issue of "contribution," apparently on the assumption that even if the Tobers were to be regarded as the real parties in interest under the "loan agreement," and if it further developed that the amount of their loan from the gas company under the "loan agreement" exceeded the amount of a judgment recovered by them from Hampton, then Hampton would be entitled to a reduction of, or credit upon, that judgment to the extent of the excess. Upon the basis of that assumption, and after what the court termed a "cursory review" of the prior authorities in Nebraska, the court apparently proceeded to adopt the rule denying contribution among negligent joint tort-feasors. In so doing, the court also expressly overruled First National Bank v. Avery Planter Co., *supra,* and Schappel v. First National Bank, *supra,* to the extent that those cases were in conflict with the rule enunciated in Tober v. Hampton, *supra.* Since, as previously stated, Tober v. Hampton, *supra,* primarily involved the question of indemnity, and only involved the question of contribution tangentially, the necessity of the court's ruling on the issue of contribution is unclear. See dissenting opinion of Smith, J., in Tober v. Hampton, *supra*; and also Busick, Contribution and Indemnity Between Tort-feasors in Nebraska, 7 Creighton L. Rev. 182. It is

also interesting to note that a concurring opinion in that case suggests that the "loan agreement" should have simply been regarded as a settlement. In any event, even if we now hold that contribution between negligent joint tort-feasors is permissible, the result in Tober v. Hampton, *supra,* would remain unchanged.

We now consider the latest and only other opinion decided by this court which in any manner discusses the question of contribution among negligent joint tort-feasors. In the case of Farmers Elevator Mut. Ins. Co. v. American Mut. Liability Ins. Co., *supra,* Farmers Cooperative Association and Wilmac Construction Company entered into a construction contract under which Wilmac was to remodel and renovate the facilities of Farmers Co-op. One Strand, an employee of Wilmac, was injured on the job and brought a negligence action against Farmers Co-op in federal District Court. Farmers Co-Op filed a third party complaint in that action against Wilmac apparently based upon a clause in the construction contract which provided: "Contractor shall further *save and hold harmless* the owner from any claim, liability, action, or cause of action arising out of the performance of this contract based upon the negligence of the contractor, his agent or employees." (Emphasis supplied.) It was obviously the theory of Farmers Co-op that the negligence of the contractor, Wilmac, had caused the injury to Strand. Ultimately, Strand recovered a judgment in the amount of $200,000 against Farmers Co-op. Thereafter, Wilmac consented to entry of judgment against it on the third party claim in the amount of $272,955.74 in the federal court action. Following the judgments rendered in the federal court action, above referred to, Farmers Elevator Mutual Insurance Company and Farmers Cooperative Association brought a declaratory judgment action in the District Court for Douglas County to determine the liability of one of the defendants, Empire Insurance Company, which was the liability insurer of Wilmac, to pay the amount

of the judgment in federal court on the third party claim of Farmers Co-op. Although it is possible that the case might have quite simply been disposed of on the grounds that a clause in the insurance policy of Empire Insurance Company provided that the policy did not apply "to liability assumed by the insured under any contract or agreement," nevertheless, the court proceeded to point out that even if that clause were ignored, the result would still be the same since Farmers Co-op and Wilmac were joint tort-feasors. The court stated: "Both joint tort-feasors being active wrongdoers, contribution or indemnity cannot be maintained by one against the other." Again, however, as with the case of Tober v. Hampton, *supra,* it is not entirely clear to what extent the issue of contribution was decisive of that case. It is equally arguable that the result in the Farmer's Elevator case would remain unchanged even if we adopt the rule that contribution among negligent joint tort-feasors is permissible.

However, even assuming that Tober v. Hampton, *supra,* and Farmers Elevator Mut. Ins. Co. v. American Mut. Liability Ins. Co., *supra,* may be interpreted as authority for the rule in this state that there may be no contribution between negligent joint tort-feasors, we must now consider the question of whether justice and equity require a change in that rule.

The rationale relied upon in denying contribution among intentional wrongdoers, and apparently also the rationale applied to deny contribution in such cases as Andromidas v. Theisen Bros., *supra,* and Tober v. Hampton, *supra,* is that it would be against public policy "to adjust equities between wrongdoers, or to allow a person to found an action on his own wrongdoing." 18 C. J. S., Contribution, § 11, p. 15. However, it has been pointed out that "* * * this reason fails when the tort committed against the third party was due only to *inadvertance,* without any intent on the part of the tort-feasors to injure him." Best v. Yerkes, 247 Iowa 800, 77

N. W. 2d 23 (1956). (Emphasis supplied.) It has been stated: "In most of such cases the reason for the application of the no-contribution rule was said to be based on the principle that the knowledge of a person that he is responsible for all the consequences of a wrong will serve to restrain him, and will thus induce persons to guard themselves a little more warily against participation with others in acts which might produce tort liability. That there may be some basis for this theory in cases in which persons directly contemplate the commission of a wrongful act is obvious, but that it applies equally in cases of unintentional wrong strains one's credulity. To believe that the rule of no contribution will tend to make a careless person careful, or that a motorist who is not deterred from carelessness by fear of personal danger will be affected in his conduct by a legal rule of no contribution between joint wrongdoers, seems to us wholly fanciful." George's Radio, Inc. v. Capital Transit Co., 75 App. D. C. at 188, 126 F. 2d at 220. We are convinced that although it is sound policy to deny contribution among parties who jointly engage in intentional wrongdoing, as was done, for example, in Johnson v. Torpy, *supra,* the rationale for such a denial cannot be extended to apply to cases such as that now before us. Furthermore, we are aware of no other persuasive theory which would operate to justify the extension of the rule denying contribution to cases involving negligent joint tort-feasors. We are thus left only with the consideration that "* * * general principles of justice require that in the case of a common obligation, the discharge of it by one of the obligors without proportionate payment from the other, gives the latter an advantage to which he is not equitably entitled." George's Radio, Inc. v. Capital Transit Co., 75 App. D. C. at 189, 126 F. 2d at 221. Thus, an eminent authority has pointed out the "* * * obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, uninten-

tionally responsible, to be shouldered by one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free." Prosser, Law of Torts (4th Ed.), § 50, p. 307. For further critique of the Nebraska rule, see Busick, Contribution and Indemnity Between Tort-feasors in Nebraska, 7 Creighton L. Rev. 182. It is clear, then, that the arguments in favor of the recognition of a rule permitting at least some form of contribution among negligent joint tort-feasors are very persuasive. In addition, we do not believe that the adoption of such a rule by this court would consist of an invasion by us of the realm of legislative discretion. In this respect, we must agree with the court in Hawkeye-Security Ins. Co., Inc. v. Lowe Construction Co., 251 Iowa 27, 99 N. W. 2d 421 (1959), which pointed out that: "The common-law rule frequently said to deny contribution between joint tort-feasors was evolved by courts. If, as we think, this rule should be limited to cases where there is intentional wrong, moral turpitude or concerted action, it seems to be entirely proper for us to so limit the rule without waiting for the legislature to do so." We, therefore, hold that in this jurisdiction there is no absolute bar to contribution among negligent joint tort-feasors; and also, as in this case, that a right to equitable contribution exists among judgment debtors jointly liable in tort for damages negligently caused, which right becomes enforceable on behalf of any party when he discharges more than his proportionate share of the judgment. To the extent that Tober v. Hampton, *supra,* and Farmer's Elevator Mut. Ins. Co. v. American Mut. Liability Ins. Co., *supra,* contain language inconsistent with the rule announced herein, they are overruled. In all other particulars, those cases are hereby expressly reaffirmed.

There remains only the need to clarify the situation in regard to the parties involved herein. A copy of

plaintiff's insurance policy does not appear in the record of this case and we are therefore unable to determine whether or not there is any contractual provision contained in that policy giving subrogation rights to the plaintiff in the event of payment of an insurance claim. However, even assuming that there is no such specific policy provision, the common law rule is that where an insurer of a joint judgment debtor jointly liable in tort for damage negligently caused discharges more than its insured's proportionate share of the common liability, such insurer is subrograted to the right of its insured to recover contribution from the other judgment debtors. See Annotation, 75 A. L. R. at 1490, and Annotation, 171 A. L. R. at 272. Hence, Royal Indemnity must be regarded as the real party in interest to assert the right of contribution of its insured, Yale and Towne, Inc., against the joint judgment debtors of that insured. Neither Aetna nor Iowa National seriously claim that Royal Indemnity is not subrogated to the rights of its assured, but both companies maintain that by law and the provisions of their respective liability insurance contracts, neither Royal Indemnity, nor its insured Yale and Towne, Inc., can bring a direct action against them. They point out that there is no contractual or statutory provision, or rule of court, authorizing a direct action against a liability insurance carrier, and, in fact, such a direct action violates the provisions of their respective policies, and hence their demurrers against plaintiff's petition were properly sustained. While there are a few jurisdictions that permit direct actions against liability insurance carriers in situations such as this, Nebraska does not have a statute to that effect, or other decision or rule authorizing such direct action. The legal principle governing this situation is set out in 44 Am. Jur. 2d, Insurance, § 1575, p. 460, as follows: "As a general rule, and in the absence of a contractual or statutory provision, or a rule of court, authorizing a direct action against, or the joinder of, a liability insurer, there is no

privity between an injured person and the tort-feasor's liability insurer, and the injured person has no right of action at law against the insurer and therefore cannot join the insured and the liability insurer as parties defendant." Moreover, the respective insuring agreements of the defendants are set out in the record, and both policies provide that the insurance company will pay all sums which the insured shall become legally obligated to pay as damages, and also further require as a condition precedent to an action against the insurance company that "the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial * * *." There is also a provision in the respective policies prohibiting joining the insurance company as a codefendant in any action to determine the insured's liability. Although it is true that the plaintiffs in the Libbey-Owens Ford Glass Company case did obtain judgment against the insureds of the defendant insurance companies, it is likewise true that neither the present plaintiff, Royal Indemnity, nor its insured, Yale and Towne, Inc., have obtained any judgment against Aetna's assured, L & M Paper Company, nor did they obtain judgment against Iowa National's insured, Phil D. Fitzwater, who is also a defendant in this case, and the only insured made a party to this action. Neither Aetna Casualty and Surety Company nor Iowa National Mutual Insurance Company were defendants in the Libbey-Owens Ford Glass Company case, nor was any judgment rendered against either of them in the original action. It is clear, therefore, that they are improper defendants in this action, in spite of the fact that their insureds may ultimately be able to recover against them on their liability policies for the amounts for which they may be held liable. For that reason, the order of the District Court must be regarded as correct to the extent that the court sustained the separate demurrers of Aetna Casualty and Surety Company and Iowa National Mutual Insurance

Company, and dismissed Royal Indemnity's petition against them. However, the remaining defendant in this action, Phil D. Fitzwater, as a partner in All Makes Forklift Service, one of the joint judgment debtors in the prior lawsuits, must be regarded as a proper defendant herein from whom Royal Indemnity may seek contribution of a proportionate share of the judgment paid by it. As such partner he is also individually liable on the judgment, since the petition alleges there are no firm assets from which to collect the judgment. Thus, we believe the District Court erred in dismissing the action as against Phil D. Fitzwater. The order of the District Court must, therefore, be affirmed in sustaining the demurrers of Aetna Casualty and Surety Company and Iowa National Mutual Insurance Company, but must be reversed as to Phil D. Fitzwater, and the cause remanded for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

SPENCER, J., dissenting.

I respectfully suggest that the majority opinion ignores the rule of stare decisis and invades the legislative arena.

Whatever doubt there may have been as to the scope of the rule in this state regarding the right of contribution among negligent joint tort-feasors, the matter was resolved and laid to rest by this court in the case of Tober v. Hampton (1965), 178 Neb. 858, 136 N. W. 2d 194, and in the subsequent case of Farmers Elevator Mut. Ins. Co. v. American Mut. Liability Ins. Co. (1969), 185 Neb. 4, 173 N. W. 2d 378. Those cases recognized and stated the rule in Nebraska to be that there is no contribution between negligent joint tort-feasors.

Approximately 20 years ago an attempt was made to change this rule legislatively. The effort failed. So far as I have been able to determine, the rule has been changed in 28 jurisdictions. In 23 of them it was done

legislatively, and only in 5 was it done by judicial decision. It occurs to me that those of us who denounce the attempts by the legislative branch of government to encroach into the executive and the judicial areas should exercise restraint by practicing what we preach. This was a proper area for legislative consideration. I refuse to join my colleagues in encroaching into the legislative arena.

HERBERT SHERDON, DIRECTOR, COMMUNICATIONS AND ACCOUNTING DEPARTMENT, NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, V. JERRY DANN ET AL., APPELLANTS, NEBRASKA LODGING ASSOCIATION, INTERVENER-APPELLEE.
229 N. W. 2d 531

Filed May 15, 1975. No. 39650.

1. **Public Service Commissions: Telecommunications: Commerce.** The exercise of jurisdiction by the Federal Communications Commission over the terms and conditions governing the interconnection of customer-provided telephone equipment to the nationwide telephone network has established the primacy of federal authority and preempts conflicting or inconsistent state regulation.
2. ———: ———: ———. The action of the Federal Communications Commission does not foreclose any state from taking action of its own in the telephone interconnect area so long as such action does not derogate the interstate rulings.
3. ———: ———: ———. Federal action in the telephone interconnect area does not foreclose any state from the full exercise of its investigatory powers with respect to the effects of interconnection as related to the quality of telephone service or the regulation by the state of intrastate rate structures and revenue requirements for services subject to its jurisdiction.

Appeal from the Nebraska Public Service Commission. Reversed and dismissed.

Einar Viren of Viren, Epstein & Leahy, for appellants.

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

Charles P. Huff of Davis, Polsky, Hull & Denny, for intervener-appellee.

Bert L. Overcash of Woods, Aitken, Smith, Greer, Overcash & Spangler, for amicus curiae.

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

MCCOWN, J.

This proceeding before the Nebraska Public Service Commission was instituted by an agent of the commission against the defendants, Jerry Dann and Willard Friedman, doing business as Ben Franklin Motel. The complaint alleged that the defendants were offering telephone service to the public for hire without having obtained a certificate of public convenience and necessity therefor, in violation of section 75-604, R. R. S. 1943. The Nebraska Public Service Commission found that the defendants' actions were in violation of section 75-604, R. R. S. 1943, and ordered the defendants to cease and desist from offering telephone service without a certificate of public convenience and necessity. The defendants have appealed.

In January of 1972, in connection with the construction of a motel on the Interstate Highway near Omaha, the defendants leased from RCA Service Company a complete telephone interconnection system to be installed in the new motel building. The motel began operations in the summer of 1972, and was a telephone customer of Northwestern Bell, the certificated telephone company furnishing exchange telephone service to the public for the area in and near Omaha, Nebraska. From the beginning defendants made no charge to guests for any local calls, but during 1972 and 1973, the motel did make a 20 cent charge to its guests for each interstate or intrastate toll call. Beginning January 1, 1974, how-

ever, all charges to guests for intrastate or interstate long distance toll calls were discontinued and thereafter no charges were made to guests for telephone calls except for the amount of the regular toll charges of Northwestern Bell. The telephone equipment leased by defendants from RCA and installed in defendants' motel building was interconnected to Northwestern Bell under tariffs filed by Northwestern Bell with the Federal Communications Commission and the Nebraska Public Service Commission. The federal tariff applied to interstate and foreign communications, and the Nebraska tariff applied to intrastate communications. Both tariffs apply to the interconnection and use of customer-owned or customer-provided in-house telephone facilities and equipment. The tariffs of Northwestern Bell containing the regulations and charges for such connections were each approved by the respective commissions. The operations challenged here have been under the authorization of those tariffs.

In the summer of 1973, the Nebraska Public Service Commission requested an opinion from the Attorney General of the State of Nebraska as to whether Nebraska certificated telephone companies could restrict and limit their interconnection service to interstate communications as required by rulings of the Federal Communications Commission but also prohibit intrastate use of such interconnection except as authorized by the Nebraska Public Service Commission. It also inquired whether the use of customer-provided in-house equipment for tenants and guests required a certificate of public convenience and necessity. An opinion by the Attorney General answered both questions affirmatively and advised that a customer-provided in-house system could not be maintained and operated by a motel without appropriate certification by the Nebraska Public Service Commission. It is important to note that under Nebraska statutes and decisions, no motel operator could ever obtain a certificate if there is a telephone com-

pany serving the area that is willing to furnish the equipment for the in-house system.

This action against the defendants was commenced October 29, 1973. Hearing was held on January 10, 1974. On April 15, 1974, the Nebraska Public Service Commission issued its opinion and findings. It found that the in-house communication system in the defendants' motel provided by RCA could not be maintained and operated without a certificate of public convenience and necessity from the Nebraska Public Service Commission, and ordered the defendants to cease and desist from offering such telephone service without a certificate of public convenience and necessity. The defendants' appeal here is from that order.

Additional background information is essential. Prior to 1968, most, if not all, telephone companies had filed tariffs which prohibited the connection or use of customer-owned or supplied devices or attachments, and restricted such equipment to that owned by the telephone company. In 1968, in Carterfone, 13 FCC 2d 420, the Federal Communications Commission held that an A. T. & T. tariff of that sort was unreasonable and unlawful in that it prohibited the use of interconnecting devices which did not adversely affect the telephone system. It adopted a court-approved rule that such a tariff prohibition was an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." The commission also pointed out that telephone companies were not precluded from adopting reasonable standards to prevent harmful interconnection. The new and revised tariffs filed by A. T. & T. following Carterfone, presently in effect, permit the interconnection and use of customer-provided terminal devices or communication systems to the telephone message toll and exchange network, subject to certain conditions. One such condition is that any network control signaling unit must be furnished, installed, and maintained by the

telephone company (with certain exceptions). This condition and other restrictions have been approved by the Federal Communications Commission as not in conflict with the Carterfone ruling. Because the Carterfone case and the implementing tariffs filed under it operate upon the terms and conditions under which the customer-owned or provided equipment may be connected to the telephone network and because that network is used in common for intrastate and interstate services, A. T. & T. recognized that uniform interconnection practices must apply to both interstate and intrastate services. Bell system companies therefore not only filed revised tariffs with the Federal Communications Commission but "also filed conforming revisions to their foreign attachment tariffs on file with the several state commissions applicable to intrastate services." Presumably Northwestern Bell's tariff here was filed with the Nebraska Public Service Commission in accordance with that policy. No carrier, state commission, or other party pursued judicial review of the Carterfone decision nor challenged the jurisdiction of the commission to make that ruling or to accept the tariffs filed in response thereto.

On September 7, 1973, the Federal Communications Commission instituted a proceeding on the question of whether and to what extent the actions taken by the commission on interconnection of customer-provided communications equipment to the nationwide switched public telephone network have preempted state action in this area. That action partially stemmed from the opinion of the Nebraska Attorney General heretofore referred to and a proposed rule of the North Carolina Utilities Commission which would generally prohibit interconnection of customer-owned or provided equipment to the commercial system of any telephone company doing business in that state. The opinion of the Federal Communications Commission was released on February 5, 1974. See In re Telerent Leasing Corp. FCC 74-109,

Docket No. 19808. It clearly upheld the priority and primacy of federal regulation over conflicting state regulations on interconnections, and specifically dealt with the Nebraska factual situation. The case is currently pending on appeal in the Fourth Circuit.

The real issue in the case before us involves the right of telephone customers to use customer-owned or customer-provided in-house telephone equipment and interconnect it to the exchange telephone system of the certificated telephone company. The state regulatory agencies take the position that they may directly or indirectly prohibit the connection of such customer-provided equipment for all intrastate communications, even though that action is directly contrary to valid and effective rules and regulations of the Federal Communications Commission. Federal law indisputably requires such interconnections to be permitted under reasonable specified conditions for all interstate and foreign communications. North Carolina takes the direct approach of proposing to adopt a rule prohibiting interconnection of customer-provided equipment for intrastate communications, directly contrary to the federal rules and regulations dealing with interstate and foreign communications. Nebraska, however, takes the indirect approach of attempting to block interconnection and use of customer-provided in-house communications systems in the case of hotels or motels upon the ground that they are providing telephone service for guests for hire without a certificate of public convenience and necessity. It ignores the practical fact that such a certificate cannot be obtained under current Nebraska law if the certificated carrier is willing to provide the equipment, which, of course, it is.

It is undisputed that Congress granted to the Federal Communications Commission the sole and exclusive jurisdiction over interstate and foreign telephone service, including jurisdiction to regulate interconnection of customer-provided equipment with common carrier facilities

for interstate and foreign service. It is also undisputed that the Federal Communications Act reserves to the states jurisdiction over intrastate telephone and telegraph communications. The telephone systems, regulated nationwide by the Federal Communications Commission, and statewide by various state regulatory agencies in each of the individual states, now constitute a unified and nationwide network of interconnected telephone exchanges. Telephone exchange plant facilities, particularly customer or subscriber stations and lines, including in-house systems such as are involved here, are used in common and indivisibly for all local and long distance telephone calls, and for both intrastate and interstate, as well as foreign commerce. The issue here is whether the Federal Communications Commission's exercise of jurisdiction to establish the rights of customers to use and interconnect customer-owned or provided in-house telephone facilities preempts conflicting and inconsistent state regulations. We believe that it does.

It is contended that Congress reserved to the states the exclusive right to regulate exchange and other intrastate telephone services, including the use of customer-owned equipment interconnected with such services, and that the states are not barred from taking action concerning customer interconnections, even though such action may derogate or conflict with the Federal Communications Commission rulings. There is no explanation as to the practical effects of such conflicting federal and state rulings except to suggest that separate facilities could be provided for interstate and intrastate services or that perhaps the Federal Communications Commission should simply defer to state commissions as to the appropriate ruling. Such a result is, we believe, legally, logically, and practically unsupportable.

It should be noted here that federal statutes have provided for the use of a federal-state joint board procedure to resolve separation matters with respect to telephone common carrier property. Those provisions were made

mandatory in 1971, and the amendments again stressed the primacy of federal jurisdiction by reserving to the Federal Communications Commission the final decision-making powers. Title 47 U. S. C. A., § 410 (c), of the Federal Communications Act. Currently the Federal Communications Commission has established a joint board pursuant to the provisions of section 410 to address itself to the question of whether customer interconnection should be liberalized beyond that currently permissible and, if so, what conditions, rules, regulations, and other requirements should be imposed in connection with such further liberalization. Interstate & Foreign MTS & WATS, 35 FCC 2d 539, 542.

Where the same instrumentalities serve both interstate and intrastate commerce jointly, and the two categories of service are as inextricably intertwined as they are here, the United States Supreme Court in related types of situations has consistently held that Congress has power to assume not only some control but paramount control insofar as interstate commerce is involved, and that it may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. See Colorado v. United States, 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 787. The Supreme Court, in dealing with the issue of federal regulation as preemptive of state regulatory power in a particular field of commerce, has consistently held: "A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U. S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248.

The Supreme Court of Georgia likewise has adopted and applied the same principles in a conflict situation under the Federal Communications Act. The Federal Communications Commission granted an application by

Western Union to discontinue telegraph service on an intrastate line located solely in Georgia, which, together with an office, handled both interstate and intrastate messages. Thereafter the Georgia Public Service Commission obtained a judgment against Western Union on the ground that it had failed to get approval from the Georgia commission before abandoning intrastate service. The Supreme Court of Georgia held that Congress had preempted the area and said: "* * * the consequence of the State's position would mean that, for the telegraph company to comply with both Federal and State regulations, it would have to maintain two separate offices, one for interstate messages and another for intrastate service * * *. Such conflict of dual control would thwart one of the main purposes of the Communications Act, viz.; 'to make available as far as possible to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire * * * communication service with adequate facilities at reasonable charges.'" Western Union Telegraph Co. v. State, 207 Ga. 675, 63 S. E. 2d 878.

This court has very recently held that the commerce clause of the Constitution of the United States delegates to Congress the power to regulate interstate commerce, and that the power to regulate interstate commerce is plenary in nature and embraces matters which are intrastate in nature but which affect interstate commerce. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co., *ante* p. 59, 225 N. W. 2d 401. In that case we said: "At the outset we point out it is well-settled law that all federal regulations done in pursuance of one of Congress' delegated powers are capable of preempting any state legislation or regulation on the same subject."

If Nebraska or any other state were to bar interconnection of customer-provided equipment for intrastate service in derogation of a federal rule, the telephone common carrier would be placed in the untenable posi-

tion of having to violate either the state ruling or the federal ruling. If each state were to be free to establish its own rules governing interconnection for the purposes of intrastate services, uniform, nondiscriminatory interstate services throughout the country would be made difficult, if not impossible. Because of the indivisibility of the nationwide telephone network, it is impossible from a practical, economic, and operating standpoint for a telephone common carrier to comply with conflicting federal and state regulations.

It should be noted further that under Title 3 of the Federal Communications Act, the Federal Communications Commission is given exclusive jurisdiction under the act to license radio facilities. In Nebraska, as in every other state, the telephone companies and many of their interconnecting customers are users of radio facilities, and as to all such facilities are subject solely to the regulatory jurisdiction of the Federal Communications Commission.

For the foregoing reasons we believe that the exercise of jurisdiction by the Federal Communications Commission over the terms and conditions governing the interconnection of customer-provided telephone equipment to the nationwide telephone network has established the primacy of federal authority and preempts conflicting or inconsistent state regulation. The decision of the Federal Communications Commission, FCC 74-109, Docket No. 19808, In re Telerent Leasing Corp. (released February 5, 1974), reflects its assertion of federal primacy in the area and should be followed until modified or withdrawn under appropriate federal judicial determination.

The action of the Federal Communications Commission does not foreclose any state from taking action of its own in the telephone interconnect area so long as such action does not derogate the interstate rulings. Neither the rulings or orders of the Federal Communications Commission on the interconnection issue nor any tariffs filed in compliance with them "prevent any State

from providing additional options to customers with respect to interconnection provided that they are alternatives to, rather than substitutes for, the requirements specified in the interstate tariffs, and provided further that such regulations accomplish the protective objectives of the interstate tariff regulations and in no way permit interference with or impairment of interstate services." See In re Telerent Leasing Corp., *supra* Neither does federal action in the interconnect area foreclose any state from the full exercise of its investigatory powers with respect to the effects of interconnection as related to the quality of telephone service or the regulation by the state of intrastate rate structures and revenue requirements for services subject to its jurisdiction.

Our ruling on the basic issue eliminates the necessity for extensive discussion of the order of the Nebraska Public Service Commission here. The actions of the defendant motel operators in operating an in-house telephone system are identical, whether the equipment and facilities in their building are owned by Northwestern Bell, or by RCA Service Company, or by the defendants themselves. To require the defendants to hold a certificate of public convenience and necessity for that operation if anyone other than Northwestern Bell owns the equipment is arbitrary as well as legally prohibited under federal regulations. It is equally arbitrary to permit the other 22 Nebraska customers of Northwestern Bell to operate in-house telephone systems of their own without a certificate, but to refuse to permit the defendants to operate their own in-house system solely because the defendants operate a motel business. The present operations of the defendants have been carried on in compliance with and under the authority of a specific tariff filed with and approved by the Nebraska Public Service Commission, as well as by the Federal Communications Commission. For the Nebraska Public Service Commission to enjoin that operation now because the defendants

do not have a certificate of public convenience and necessity, which they have never had, and which they cannot obtain in the present state of the facts and the law, is arbitrary and discriminatory. As the Federal Communications Commission observed in its Telerent opinion and order: "We do not believe that hotels or motels should be treated any differently from other businesses so far as the ownership, operation and interconnection of their own equipment or systems are concerned."

The Nebraska Public Service Commission had no jurisdiction to enter its order of April 15, 1974, ordering the defendants to cease and desist from offering or providing the telephone service involved here without a certificate of public convenience and necessity, and its order was arbitrary and discriminatory. The action of the commission is reversed and the cause dismissed.

REVERSED AND DISMISSED.

NEWTON, J., dissenting.

I find I cannot agree with the opinion of McCown, J. Title 47 U. S. C. A., section 152 (b), provides: "Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, * * *."

Title 47 U. S. C. A., section 221 (b), provides: "Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority."

In General Telephone Co. of Southwest v. United

States, 449 F. 2d 846, at 855, it is stated: "We agree with the reasoning of our sister circuit which was, inter alia, that '(t)he exclusion embodied in Section 2 (b) (2) was meant to protect State jurisdiction over local telephone facilities which could place interstate calls through their connection with major toll lines; this interstate facet of the company's operation was incidental to its primary local service,' 413 F. 2d at 402." (General Telephone Co. of Cal. v. F. C. C., 413 F. 2d 390.)

We are dealing here with the right of the Nebraska Public Service Commission to control the interconnection of customer-owned or provided equipment to the communication equipment of a telephone company. The situation is similar to that presented by local telephone facilities, such as rural lines, which can place interstate calls through their connection with major toll lines. Federal Communications Commission control in such instances is clearly barred by the federal statutes. Under modern conditions any subscriber to such a rural line can dial direct on long distance whether it be intrastate or interstate. Nevertheless, the Nebraska Public Service Commission has control of such lines to the exclusion of the Federal Communications Commission. Wherein does this type of service differ from that offered by a motel supplying telephone service to guests in its rooms? The guests have both local and interstate service available on a basis similar to that of a rural subscriber. In neither case is there any harm done to any interstate communication system and in the absence of any such detrimental effect there is no necessity or reason for Federal Communications Commission interference.

The opinion of McCown, J., is based primarily on In re Telerent Leasing Corp., FCC 74-109, Docket No. 19808. This case has been appealed and it would appear that there exists a serious likelihood that the Federal Communications Commission will be held to have overstepped its authority.

MODERN PLUMBING & HEATING, INC., A CORPORATION, APPELLEE, V. JOURNEY WEST CAMPGROUND, INC., A CORPORATION, APPELLANT.
229 N. W. 2d 192

Filed May 15, 1975. No. 39713.

1. **Mechanic's Liens.** A mechanic's lien action is tried de novo in the Supreme Court.
2. **Appeal and Error: Trial: Evidence.** Upon appeal in actions in equity, when the testimony of witnesses orally examined before the court upon the vital issues is conflicting, this court will, while trying the case de novo, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
3. **Trial: Evidence: Pleadings.** Formal unequivocal judicial admissions which waive any evidence by the adverse party on the admitted matter are conclusive on the pleader. Ordinary evidentiary admissions in pleadings may be overcome by evidence explaining an apparent inconsistency, such as showing the pleader's ignorance of the contents of the pleadings, his misunderstanding of the facts, or mistake on his part.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Wright & Simmons, for appellant.

Holtorf, Hansen, Kovarik & Nuttleman, for appellee.

Heard before WHITE, C. J., BOSLAUGH, and MCCOWN, JJ., and LYNCH and BURKE, District Judges.

LYNCH, District Judge.

The defendant-appellant, Journey West Campground, Inc., employed plaintiff-appellee, Modern Plumbing & Heating, Inc., to furnish the material and plumbing work for the construction of a trailer campground. In its petion to foreclose a mechanic's lien, the plaintiff alleged performance of a written contract as orally modified and failure of the defendant to pay the balance due of $6,944.96. The defendant's answer denied that the agreement was modified, and alleged that the plaintiff failed

to complete the water installations contracted for, and that plaintiff did defective work for which defendant asked $27,611.88 in its counterclaim.

The trial court decided that the parties had executed a written contract which was orally modified and substantially performed by the plaintiff; that the contract price was $15,993.35, the defendant should be credited for changes and deletions of the value of $2,443.64, and the plaintiff should be allowed $116.20 for additional labor and material; that damages allowable to the defendant amounted to $837.82; that defendant had paid to plaintiff the sum of $7,465.37; and that there is due to plaintiff the sum of $5,362.72, which constitutes a lien upon the defendant's property.

The defendant contends on appeal that there was no competent proof of an oral modification of the contract and that the undisputed evidence established a failure of substantial performance by the plaintiff.

Although the transaction included installation of plumbing, fixtures, and facilities for two mobile homes, a headquarters building and the campground, the dispute pertains principally to water connections to the individual campsites, a $2,548.70 item in plaintiff's bid. The plaintiff actually positioned 25 risers to supply 50 water outlets or hookups.

Documentary evidence included the plaintiff's bid, engineer's blueprint, and a sketch drawn by Roy Reid, president of the defendant company. Reid's undated drawing apparently depicting 108 campstalls was disputed as a component of the original agreement. None of the exhibits specifies or indicates the exact number of water risers or outlets to be installed or the total of camper spaces to be provided with water.

Plaintiff's witnesses interpreted the engineer's plans as calling for about 60 camper stalls. Larry Prickett, plaintiff's supervisor, testified that when the plumbing work began on the campground the parties agreed that 28 water risers, each riser to serve 2 camper compartments,

would be placed. Reid testified that he thought the plaintiff agreed to install 108 water sites. The testimony is in substantial agreement that as the work progressed on the area Reid staked out the individual camp spaces, islands, and approximate positions of the water, sewer, and electrical systems. Prickett's testimony that Reid marked an "X" on the ground to locate each water riser was not controverted.

In its reply brief the defendant states that: "A key element of Defendant's position on this appeal is that Plaintiff admitted, by inference from its pleadings, that the original Contract between the parties called for approximately one hundred water sites." The claimed admission was contained in a subparagraph of plaintiff's answer to the defendant's counterclaim and is as follows: "Allege that specifications were provided to the plaintiff to prepare his bid on this job, however, the plaintiff was advised that the bid was to be prepared upon approximately one-half (½) of the camper stalls that were shown on the original specifications and therefore modifications necessarily were made in the bid to adjust to the defendant's request." The pleading continued on to allege in the same paragraph that when work began the defendant informed the plaintiff that the number of campsites was reduced and defendant placed stakes where the water connections were to be located.

The defendant argues that by this allegation in the pleadings the plaintiff admitted that the original contract called for 100 water sites; that this is a judicial admission which is final and conclusive on the plaintiff; and that the plaintiff actually installed 50 water sites and, therefore, did not substantially perform the contract.

It is stated in 30 Am. Jur. 2d, Evidence, § 1099, p. 264: "Admissions in pleadings may be overcome by evidence explaining the apparent inconsistency, such as evidence showing the pleader's ignorance of the contents of the pleading, his misunderstanding of the facts, or mistake

on his part, * * *." In 31A C. J. S., Evidence, § 381, p. 920, it is stated: "Unequivocal judicial admissions are generally conclusive on the party, but not, it is sometimes held, on the court. Some cases distinguish formal judicial admissions intended to limit the issues and those which serve as ordinary evidence in the case, the former being held conclusive, but not the latter." This court held in Vermaas v. Heckel, 170 Neb. 321, 102 N. W. 2d 647, that: "A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true."

The allegation in the plaintiff's pleading so heavily relied upon by the defendant as constituting an admission was neither unequivocal nor unexplained, and it is obvious from the record that it was not intended by the litigants nor accepted by the trial court as a substitute for evidence and as conclusive relative to the water-hookup issue. The statement was not final and binding but capable of explanation as any evidentiary admission against interest.

Section 25-1925, R. R. S. 1943, provides in substance that in appeals in suits in equity the Supreme Court shall retry the issues of fact and upon trial de novo reach an independent conclusion without reference to the conclusion reached in the District Court. In Occidental Savings & Loan Assn. v. Cannon, 184 Neb. 659, 171 N. W. 2d 166, it was stated that a mechanic's lien action is tried de novo in the Supreme Court. It was held in Jones v. Dooley, 107 Neb. 162, 185 N. W. 307, that: "Upon appeal in actions in equity, when the testimony of witnesses orally examined before the court upon the vital issues is conflicting, this court will, while trying the case de novo, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather

than the opposite." See, also, Magill v. Magill, 114 Neb. 636, 209 N. W. 241; Schuller v. Schuller, 191 Neb. 266, 214 N. W. 2d 617.

It is apparent from the record that as a result of numerous meetings and negotiations the parties never accomplished a complete unambiguous contract. The documentary evidence and the testimony are convincing that whatever the original intentions or plans may have been, they were materially modified without benefit of scrivener. The defendant's contention that plaintiff's pleadings contain a fatally conclusive admission is without merit. A review of the entire record confirms that the conflicting testimony concerning the number of water hookups contemplated preponderates in favor of the plaintiff. The findings and judgment of the District Court are affirmed.

AFFIRMED.

MIDTOWN PALACE, INC., A NEBRASKA CORPORATION, APPELLANT, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

229 N. W. 2d 56

Filed May 15, 1975. No. 39725.

1. **Nudity: Obscenity: Words and Phrases.** Nudity and obscenity are not synonymous. A nude performance does not become an obscene performance unless, taken as a whole, it appeals predominantly to the prurient interest, a shameful interest in nudity or sex beyond the customary limits of candor, it describes in a patently offensive way sexual conduct specifically proscribed by state law, and, taken as a whole, it lacks serious artistic value as determined by the average person applying contemporary community standards.
2. **Municipal Corporations: Ordinances: Intoxicating Liquors: Powers: Nudity.** A city may proscribe sexually oriented performances, not otherwise obscene or illegal, in establishments which it licenses to sell liquor by the drink.
3. **Municipal Corporations: Ordinances: Intoxicating Liquors:**

Powers: Nudity: Obscenity. A city ordinance which prohibits nudity in a liquor establishment is not rendered void by a statute which reserves solely unto the state the power to control obscenity.

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

William G. Line of Kerrigan, Line, Martin & Hanson, for appellant.

Herbert M. Fitle and Gary P. Bucchino, for appellee.

Heard before SPENCER, BOSLAUGH, and BRODKEY, JJ., and HASTINGS and CLARK, District Judges.

HASTINGS, District Judge.

By this action, plaintiff seeks a declaratory judgment that ordinance No. 18.04.070 of the City of Omaha has been rendered void by reason of the provisions of sections 28-926.11 to 28-926.33, R. S. Supp., 1974, and to enjoin the defendant City of Omaha from instituting any proceedings against the plaintiff under the provisions of that ordinance. The trial court found that plaintiff was not entitled to any relief and ordered the petition dismissed. We affirm that judgment.

Plaintiff is a holder of a Class C liquor license issued by the Nebraska Liquor Control Commission authorizing plaintiff to sell alcoholic liquor by the drink. Plaintiff operates a night club and according to its petition, "believes it is entitled to put on live performances consisting of so-called topless dancing wherein female dancers dance with uncovered breasts." The ordinance in question provides in part as follows: "18.04.070 Grounds for revocation or suspension. A retail license to sell alcoholic liquors, which this Council is legally empowered to revoke, may be either revoked or suspended by the City Council whenever it shall find, after notice and hearing as provided by law that the holder of any such license has violated . . . any . . . ordinance of the City now existing or hereafter passed, enacted in the interest of

good morals and decency; or for any one or more of the following causes: . . .

"6. It shall be cause for revocation or suspension as herein provided if the licensee, . . . shall allow any live person to appear, or have reasonable cause to believe that any live person shall appear in any license premises in a state of nudity, to provide entertainment, to provide service, to act as hostess, manager or owner, or to serve as an employee in any capacity.

"For the purpose of this Subsection, the term 'nudity' shall mean the showing of the human male or female genitals, pubic area or buttocks or the human female breast including the nipple or any portion below the nipple with less than a full opaque covering. . . ."

The word obscene is defined by section 28-926.11, R. S. Supp., 1974, as follows: "(9) Obscene shall mean: (a) Work, material, conduct or live performance which taken as a whole predominantly appeals to the prurient interest, a shameful or morbid interest in nudity, sex or excretion, which goes beyond customary limits of candor in description or representation of such matters, (b) work, material, conduct or live performance which depicts or describes in a patently offensive way sexual conduct specifically set out in sections 28-926.11 to 28-926.33, and (c) work, conduct, material or live performance which taken as a whole lacks serious literary, artistic, political or scientific value as determined by the average person applying contemporary community standards; . . .

"(14) Sexual conduct shall mean acts of masturbation, homosexuality, sodomy, sexual intercourse, or prolonged physical contact with a person's clothed or unclothed genitals, pubic area, or buttocks or, if such person be female, breast; . . . ."

Section 28-926.33, R. S. Supp., 1974, provides as follows: "In order to provide for the uniform application of sections 28-926.11 to 28-926.33 within the state, it is intended that the sole and only regulation of the commercial dis-

tribution of any work, material, conduct or live performance described as obscene shall be under sections 28-926.11 to 28-926.33, and no municipality, county, or other governmental unit within this state shall make any law, ordinance or regulation relating to obscenity, or licenses or taxes respecting the obscene work, material, conduct or live performance as regulated by the state under sections 28-926.11 to 28-926.33. All such laws, ordinances, regulations, special or discriminatory taxes, or licenses, whether enacted or issued before or after sections 28-926.11 to 28-926.33, shall be or become void, unenforceable, and of no effect upon March 25, 1974."

The case was tried on a brief written stipulation of facts which admitted that the live performances of topless dancing which plaintiff believed that it was entitled to put on would violate the ordinance in question and if plaintiff permitted such performances on its premises defendant's city council would hold a hearing to determine if the ordinance had been violated and if it did so find, could suspend or revoke plaintiff's license.

The sole issue presented by this appeal is whether the ordinance in question seeks to define and prohibit obscenity and if it does, defendant concedes that it would be void and unenforceable because of the provisons of section 28-926.33, R. S. Supp., 1974.

Nudity and obscenity are not synonymous. A nude performance does not become an obscene performance unless, taken as a whole, it appeals predominantly to the prurient interest, a shameful interest in nudity or sex beyond the customary limits of candor, it describes in a patently offensive way sexual conduct specifically proscribed by state law, and, taken as a whole, it lacks serious artistic value as determined by the average person applying contemporary community standards. See, Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419; § 28-926.11, R. S. Supp., 1974.

The ordinance does not declare nudity to be obscene nor delineate it as a crime. It does attempt to control

nudity as a technique in selling liquor. This is a legitimate object. As stated in Paladino v. City of Omaha, 471 F. 2d 812: "We understand the rule in LaRue to be that under the twenty-first amendment, the state (or city) may proscribe sexually oriented performances, not otherwise obscene or illegal, in establishments which it licenses to sell liquor by the drink."

This court has recognized that an ordinance may prohibit conduct in a liquor establishment which might not otherwise fit the definition of obscene, as stated in Major Liquors, Inc. v. City of Omaha, 188 Neb. 628, 198 N. W. 2d 483: "Is the restriction against females dancing when 'topless' or seminude an unreasonable regulation of businesses engaged in dispensing alcoholic liquors? We conclude that it is not. . . . One who consumes alcoholic liquors necessarily succumbs to their influence for the time being. He is more susceptible to ideas and emotions generated by the environment and much more likely to accept what transpires in a lewd or obscene manner than if he viewed the same degree of nudity in an art gallery or witnessed the same activities on the legitimate stage."

We conclude, as did the trial court, that a city ordinance which prohibits nudity in a liquor establishment is not rendered void by a statute which reserves solely unto the state the power to control obscenity. The judgment of the District Court is affirmed.

AFFIRMED.

VIRGIL V. YELKIN, APPELLEE V. BONNIE E. YELKIN, APPELLANT, CLIFFORD E. CONNER AND LEVA R. CONNER, DEFENDANTS-APPELLANTS.
229 N. W. 2d 59

Filed May 15, 1975. No. 39774.

1. **Contracts: Foreclosure: Vendor and Purchaser.** A contract for

sale of real estate may not be strictly foreclosed where it is clear that the value of the property greatly exceeds the amount due.

2. Divorce: Parties: Property. Third persons may be joined in an action for dissolution of a marriage where it is necessary to determine interests in property to be awarded the parties to the marriage, or their interests may be adversely affected.
3. Divorce: Alimony. In determining an award of alimony, the trial court must consider the circumstances of the parties, the duration of the marriage, and the ability of the supported party to engage in gainful employment.

Appeal from the District Court for Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Dennis E. Martin of McGrath, North, Dwyer, O'Leary & Martin, for appellant.

James B. Cavanagh of McGrath, North, Dwyer, O'Leary & Martin, for defendants-appellants.

Monen, Seidler, McGill, Festersen & Koley, for appellee.

Heard before SPENCER, CLINTON, and BRODKEY, JJ., and FLORY and WHITE, District Judges.

WHITE, District Judge.

This is an appeal from a decree of the District Court dissolving the marriage of the petitioner and respondent, assigning the property of the marriage, and determining the rights of certain persons, joined in the action, to the residence of the parties. The parties to the marriage do not dispute the court's finding that the marriage was irretrievably broken. The facts of the case will be set out below.

Respondent, Bonnie E. Yelkin, and petitioner, Virgil V. Yelkin, were married on December 23, 1953, each of the parties having previously been married. Mrs. Yelkin's first marriage ended when her former husband was killed in World War II. Mr. Yelkin had been divorced at the time of his marriage to the respondent, had one

child of that first marriage, and at the time of the marriage and for some time thereafter was under an obligation and did discharge a child support and alimony obligation to his former wife.

The trial court dissolved the marriage, awarded the custody of the parties' minor child to the respondent, and ordered the petitioner to pay $150 per month child support until the daughter reached her majority on September 28, 1974. The child support payments have terminated and are not an issue in this case. The court ordered the petitioner to pay to the respondent permanent alimony at the rate of $200 per month for 36 months from October 1, 1974, and divided the property of the parties as follows: The petitioner was awarded the furniture and personal effects in his possession, the 1968 Thunderbird, a one-half interest in federal and state tax refunds for the years 1972 and 1973, and any personal checking accounts. The respondent was awarded the bulk of the household furnishings, the 1964 Ford, a one-half interest in the 1972 and 1973 federal and state income tax refunds, and her personal property in the form of personal checking accounts and personal items. The court further found that the parties, after making an allowance for an outstanding claim, each should be entitled to one-half of the proceeds of an interest in real estate which had been used as the parties' residence during the time of the marriage. Petitioner was further awarded his interest in a retirement annuity to which he had contributed during the period of his employment at the former University of Omaha, now the University of Nebraska at Omaha. The respondent has appealed, questioning the sufficiency of the alimony award, failure of the trial court to award her an interest in the pension annuity fund, and asserting that the court had no jurisdiction to make a division of the proceeds of the residence property.

After the petition had been filed, the respondent, by answer prayed for the equitable division of the property

and a dissolution of the marriage. The petitioner thereupon, on motion, requested that the appellants, Clifford E. Conner and Leva R. Conner, be joined as necessary parties to a determination of this suit. A summons was served and the appellants, Clifford E. Conner and Leva R. Conner, timely raised objection to the joinder suggesting that any issue between them and the parties was not germane to the principal subject of the action, that is the dissolution of the marriage.

The court permitted the joinder. The evidence discloses that in September 1956, the petitioner and respondent entered into a contract with William E. Conner and Leva R. Conner, whom the record shows were the parents of the respondent, Bonnie Yelkin. The contract was drawn by the appellant, Clifford E. Conner. Virgil and Bonnie Yelkin executed to William E. Conner and Leva R. Conner a note in the principal sum of $2,000, and undertook to pay a certain mortgage of $13,500, principal and interest, as well as taxes as they accrued on a residence property. The home became the residence of the parties.

William E. Conner and appellant Clifford E. Conner were partners in a real estate construction business and had built a number of homes of which the subject property was one. As a part of the same transaction, William E. Conner paid to Clifford E. Conner the sum of $2,500 as the difference in what was assumed to be the market value of the residence at the time of the contract, of $19,500. Title to the residence was retained in William E. Conner and Leva R. Conner under the terms of the agreement until such time as all the obligations under the contract were discharged.

William E. Conner died holding title to this residence in joint tenancy with his wife, Leva R. Conner. Leva R. Conner then executed a deed to herself and Clifford E. Conner, her son, as joint tenants. At the time the petition for divorce was filed, the title to the real estate was so held. Without notice to petitioner and during

the pendency of the divorce, Clifford E. Conner apparently determined that the contract was in default and sold the property to a third party. The net proceeds were $27,696.85. He claims on behalf of himself and Leva R. Conner the entire amount.

The trial court determined that the appellants, Clifford E. Conner and Leva R. Conner, had no interest in the residence property except the claim for the $2,000, plus accrued interest, which amount was awarded Leva, that no grounds for forfeiture existed, and that the proceeds should be held and divided as the court ordered in the decree.

The first assignment of error relates to the joinder of Clifford E. Conner and Leva R. Conner. It is conceded by all parties to this case that the language of the joinder statute does not cover the joinder of the Conners in an action of dissolution. However, case law suggests that where it is necessary to procure justice for third persons whose property interest may be adversely affected in a divorce action, joinder is permitted. See Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430, where E. James Kula, a son of the plaintiff and defendant, was permitted to intervene to assert an interest in real estate, the title to which was held in his parents. See, also, Harris v. Harris, 151 Neb. 191, 36 N. W. 2d 849, to the same effect. We find no error in the court's order permitting joinder.

The agreement provided in substance that the note executed was to be credited as a payment on the dwelling situated on Lot 12, Block 16, West Dodge Addition, Douglas County, Nebraska, and located at 8608 Cuming Street, Omaha. In paragraph 2 the agreement provided that the monthly payments as made by the Yelkins to Nebraska Savings and Loan Association on the first mortgage will be credited to Virgil V. Yelkin and Bonnie E. Yelkin as equity. Paragraph 3 provided that in the event of the death of William E. Conner, or William E. Conner and Leva R. Conner simultaneously, the note re-

ferred to in paragraph 1 and the amount of the equity, over and above the balance due on the mortgage, became the sole property of Bonnie E. Yelkin and or her heirs. Paragraph 4 provided that if the petitioner and respondent "fail to meet the obligation of said payments on the above note and the principal balance due Nebraska Savings and Loan Association of Omaha, Nebraska on the above described property, the equities in their favor will be in default and their interest in the above described property will be null and void." Paragraph 5 provided it is further agreed and understood that in the event of sale of the above-described property for a price exceeding $19,500, remuneration will be made on an equitable basis to William E. Conner and Leva R. Conner for their consideration in this agreement.

The evidence indicates that petitioner and respondent made the mortgage payments, paid real estate taxes, and paid the hazard insurance on the property as they became due up to March 1973. The petitioner then paid, pursuant to the court's order, temporary child support and alimony payments directly to the respondent in the amount of $300 per month and discontinued making mortgage payments. It is conceded by all parties that William E. Conner died on January 18, 1963, and that the $2,000 note referred to in the agreement was not paid and remains unpaid to this date. Without formal demand or notice to either petitioner or respondent, Clifford E. Conner listed the property for sale sometime after February 1973, and subsequently conveyed the property to a Marilyn W. Bishop. The real estate agent listed on the uniform purchase agreement, the Town and Country Investment Company, is operated by Clifford E. Conner, a Nebraska licensed real estate broker. The appellant, Clifford E. Conner, claims on behalf of himself and the other appellant, Leva R. Conner, complete right to the proceeds of the house which the evidence discloses to be in excess of $27,000. At the time of the sale, there remained unpaid on the original mort-

gage of $13,500, the sum of $2,777.34. The respondent, Bonnie E. Yelkin, claims no interest in the sale proceeds and testified that they belonged to her mother, appellant Leva R. Conner, and her brother, appellant Clifford E. Conner.

The appellants Conners' second assignment of error relates to the trial court's order determining that these appellants were not entitled to strict foreclosure and awarding to appellant Leva R. Conner, the joint payee on the original note, the $2,000 note and accrued interest, and imposing a constructive trust on the proceeds thereof over the amount of the mortgage and necessary expenses of sale, and awarding the net proceeds to the petitioner and respondent, one-half to each.

It is an elementary principal of law that equity abhors forfeitures and especially so as in this case where the value of the real estate is substantially in excess of the amount owed. Riffey v. Schulke, *ante* p. 317, 227 N. W. 2d 4. In this case the amount owed was somewhat less than $6,000 and the house sold for $32,500. We find no error in the court's determination.

Next the Conners assert that they are entitled to an equitable division of the proceeds of sale over $19,500 pursuant to paragraph 5 of the contract. The court determined that the provision was so vague and uncertain as to be unenforceable. The agreement must be construed most strictly as against the persons who drew the agreement, in this case the appellant Clifford E. Conner, acting as agent for his father, William E. Conner, and his mother, Leva R. Conner. This court is not permitted to speculate or to supply terms to the contract that the parties have not seen fit to set forth. We agree with the trial court's finding that the provision is so vague as to be unenforceable.

The next assignment of error relates to the awarding of the proceeds of a retirement income policy to the petitioner, which had a value at the time of trial of $27,000. The evidence discloses that the pension fund

has no cash surrender value and can be drawn out at a rate not to exceed a maximum of 10 percent per year after the member has retired at age 65. The evidence further discloses that petitioner is now 62 years of age and he is suffering from a progressive kidney failure associated with acute lobular glomerulonephritis. It is the opinion of his physician whose report was received in evidence without objection as follows: "Mr. Yelkin has a serious kidney condition confirmed by us and by the Mayo Clinic and requires intensive medical care with rather strong medications which can develop complications. It is my opinion that the prognosis for complete cure is very poor, and he will never have a cure and at best the condition can be controlled where he does have not too much edema or too much kidney failure which would interfere with the nutrition and produce high blood pressure, heart weakness and similar complications. . . . I am sure that his life expectancy is considerably reduced by this. . . . It is my recommendation to him that he give serious thought to retiring and there by not jeopardizing his health by his attempts to work full time as a coach."

Respondent is now 51 years of age. During the marriage she engaged in part-time work as an interior decorator. Her earnings at the highest reached the sum of $5,000 during the year 1963. The respondent's health is excellent.

The petitioner's association with the University of Nebraska at Omaha has been with the athletic department in the capacity as director of athletics, coach, and associate professor. He has no other particular occupations or skills. The petitioner was 62 years of age at the time of trial.

In determining an award of alimony, the trial court must consider the circumstances of the parties, the duration of the marriage, and the ability of the supported party to engage in gainful employment. § 42-365, R. R. S. 1943. The alimony awarded the respondent is

well within the standard established by this court and the statute.

Further assignments of error have been examined and found to be without merit. The judgment of the trial court in all respects is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GIZELLE PEARLE GRAVES, APPELLANT.

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

229 N. W. 2d 538

Filed May 15, 1975. Nos. 39831, 39832.

1. **Searches and Seizures: Police Officers and Sheriffs.** A policeman's knowledge of a suspect's reputation is a practical consideration of everyday life upon which an officer or magistrate may properly rely in assessing the reliability of an informant's tip.
2. **Searches and Seizures: Affidavits: Controlled Substances.** For an affidavit based upon a tip from an informant to be sufficient, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible.
3. **Searches and Seizures: Affidavits.** Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area.
4. **Searches and Seizures: Evidence: Arrest.** The information supplied to a judicial officer issuing a search warrant on a sworn complaint may be supplemented by additional information which the arresting officers themselves have or have acquired before the arrest and which is corroborative of the complicity of the arrestee in the crime.
5. **Searches and Seizures: Affidavits.** An affidavit for a search

warrant may be based on hearsay information and need not reflect direct observations of affiant so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusion.

6. **Sentences: Criminal Law.** In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.

Appeals from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Michael T. Levy, for appellants.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

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

SPENCER, J.

Defendants, who waived a jury trial, were convicted of unlawful possession of heroin. They were each sentenced to the custody of the Director of Correctional Services for a period of 2 years. They assign as error: (1) The denial of their pretrial motions to suppress tangible incriminating evidence seized by the police during a search pursuant to a warrant; and (2) in sentencing them to the custody of the Director of Correctional Services rather than to a term of probation. We affirm.

The primary question in this case is the validity of a search warrant based on the affidavit of Melvin M. Berney, which stated in pertinent part: "That he has just and reasonable grounds to believe, and does believe, that there is concealed or kept as hereinafter described, the following property, to-wit: Opium or its derivatives, Cocaine, or any other illegally possessed Drugs, and Instruments for the administering of these drugs either home-made or manufactured.

"That said property is concealed or kept in, on, or about the following described place or person, to-wit: 1538 North 18th Street, Omaha Douglas County, Ne-

braska. A two Story, White, Wooden Framed, Single Family Dwelling.

"That said property is under the control or custody of Jessie Brown and/or John Doe and/or Jane Doe.

"That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: On 28 June 1973 Federal Bureau of Investigation agent Vic Harvey telephoned Lt. Jack Swanson of the Omaha Police Division and related that agent Harvey has an informant who has proven their reliability in the past by providing information to the F.B.I. that has proven reliable and accurate and this informant stated that a party name Jessie Brown who lives at 1538 North 18th Street is expecting a large shipment of Heroin. This shipment is supposed to arrive sometime today June 28 1973.

"At about 7:30 P M June 28 1973, F.B.I. agent Harvey telephoned Lt. Swanson again and advised Lt. Swanson that this same reliable informant had just called back and stated that Jessie Brown has received the shipment of Heroin and its in the house at 1538 North 18th Street. Officers of the Omaha Police Division have been conducting an investigation into Jessie Brown of 1538 North 18th Street in connection with his Heroin involvement for about the past two weeks. Through the investigations by the Omaha Police Division and through different officers talking to reliable informants that have provided information to the officers in the past that have led to Felony Narcotics Arrests. These informants and these investigations have led the members of the Omaha Police Division, Vice and Narcotics Unit to believe that Jessie Brown is very active in Heroin dealing in the Omaha area and he was expecting a large shipment of Heroin. Through the information by the F.B.I. informant and the Omaha Police investigation, Officers are of the opinion that concealed inside of 1538 North 18th Street is a quantity of Heroin which is contrary to the laws of the State of Nebraska. Due to the fact that 1538 North

18th Street is a modern dwelling, officers believe that there are toilet facilities inside and if the Police Officers have to announce themselves, the Contraband could be easily destroyed, thus the officers are Requesting that a No Knock Search Warrant be issued."

A search warrant was issued on the basis of the affidavit. A search pursuant to the warrant resulted in the discovery and seizure of heroin and the arrest of the defendants. At the suppression hearing, Lieutenant Swanson, mentioned in the affidavit, verified the information contained in the affidavit, and elaborated on it by adding the information that the F.B.I. informant had been in the house and had seen the heroin in the house.

Defendants' first assignment of error is the overruling of the motion to suppress the evidence. Defendants' motion to suppress is based on Aguilar v. Texas (1964), 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, and Spinelli v. United States (1969), 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637. Aguilar is not in point on the facts. The affidavit there was one short paragraph reciting that the police had received reliable information from a credible person and did believe that narcotics were being kept on the premises to be searched, for sale and use contrary to law. The affidavit in the instant case is much more detailed than in Aguilar. That case is not controlling herein.

While the affidavit in Spinelli was more detailed, it was still held to be inadequate. Spinelli, however, has been seriously undermined by United States v. Harris (1971), 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723. As we observed in State v. Rice (1972), 188 Neb. 728, 199 N. W. 2d 480: "A reputable legal scholar has stated that Harris 'appears to go far in the direction of eroding the force of Aguilar and Spinelli.' 45 Conn. B. J., note 51, p. 345." The majority in Harris specifically repudiated Spinelli to the extent that it prohibited the use of a policeman's knowledge of a suspect's reputation. Mr. Justice Burger there said: "We cannot conclude

that a policeman's knowledge of a suspect's reputation —something that policemen frequently know and a factor that impressed such a 'legal technican' as Mr. Justice Frankfurter—is not a 'practical consideration of everyday life' upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip. To the extent that Spinelli prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation."

If we correctly gauge defendants' attack on the affidavit, it is hinged on their contention that because it did not state the informant had actually seen the heroin in the premises, the affidavit must be suppressed. This is not fatal if the tip is corroborated by other information in the hands of the police and if the tip itself as reflected in the affidavit justifies an inference of personal knowledge. Even in Spinelli, the court said: "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

We held in State v. Glouser (1975), *ante* p. 190, 226 N. W. 2d 328: "For an affidavit based upon a tip from an informant to be sufficient, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible."

The affidavit establishes that the informant was credible because he had given reliable information in the past. The police knew that Jessie Brown was active in

heroin in the Omaha area. They knew from other informants he was expecting a large shipment. When the information was communicated to them by the F.B.I. that one of their reliable informants advised that a shipment was arriving for Jesse Brown, it confirmed the information they already had. They had actually been expecting it a week earlier at the same location where the informant told them it would be delivered for cutting. When that same reliable F.B.I. informant communicated the information that the shipment had now actually arrived, and that the heroin was at 1538 North 18th Street, Brown's residence, there was sufficient indicia of reliability to give probable cause for action. As the court said in Harris: "In evaluating the showing of probable cause necessary to support a search warrant, against the Fourth Amendment's prohibition of unreasonable searches and seizures, we would do well to heed the sound admonition of United States v. Ventresca, 380 U. S. 102 (1965):

" '(T)he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.' 380 U. S., at 108.

"Aguilar in no way departed from these sound principles."

The evidence at the suppression hearing established that the informant actually had been in the house and

had seen the heroin. As we said in State v. Rice (1972), 188 Neb. 728, 199 N. W. 2d 480: "The information supplied to a judicial officer issuing an arrest warrant on a sworn complaint may be supplemented by additional information which the arresting officers themselves have or have acquired before the arrest and which is corroborative of the complicity of the arrestee in the crime."

Testimony at the suppression hearing also developed the fact that the police had been informed by reliable informants that when Brown received a shipment of heroin, he used the residence at 1538 North 18th Street for cutting purposes.

We hold that the affidavit for the search warrant was sufficient on the facts in this case. The first report by the informant was that the heroin was expected. The second report, a few hours later, was that it had arrived. Coupled with the known facts on Brown, that the police department had been conducting an investigation of his heroin involvement for the previous 2 weeks, and the further fact that the residence at 1538 North 18th Street had previously been used for cutting purposes, the reports do not have the ring of a "casual rumor circulating in the underworld." Viewed in a common sense light, the magistrate was entitled to infer from the affidavit that the informant was basing his report on something substantial and not mere rumor. The reasonable inference from the affidavit was that the informant had seen the heroin at 1538 North 18th Street. When we consider the other reports received by the police concerning the expected shipment and Brown's general involvement in heroin, probable cause was shown.

Defendants attack the affidavit as being double hearsay. As we said in State v. Glouser (1975), *ante* p. 190, 226 N. W. 2d 328: "An affidavit for a search warrant may be based on hearsay information and need not reflect direct observations of affiant so long as the magistrate is informed of some of the underlying circum-

stances supporting the affiant's conclusion." It is not unusual that an affiant in an affidavit for a search warrant may be communicating information related to him by fellow officers. In United States v. Hill (5th Cir., 1974), 500 F. 2d 315, the court said: "That the tip and reliability of source four were communicated to affiant by another officer is of no decisional moment. * * * Such personal observations of a fellow officer pursuing the same investigation can be presumed reliable. * * * The fact Phillips rather than his fellow officer imparted this particular information to the magistrate in no way attenuates its accuracy or the credibility of the informant."

In United States v. Welebir (4th Cir., 1974), 498 F. 2d 346, the court in note 2, page 349, lays down the rule that the affiant can base his information on information supplied by fellow officers even if it is also based on hearsay. In State v. Howard (1972), 188 Neb. 494, 197 N. W. 2d 641, this court said: "We observe that an affidavit for search warrant is not defective simply because it is based on hearsay, so long as the affidavit discloses a substantial basis for crediting the hearsay. Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697; * * *." The trial court properly denied the defendants' motion to suppress the evidence.

Defendants' next assignment of error is that the District Court committed reversible error and abused its discretion in sentencing the defendants to the custody of the Director of Correctional Services for a period of 2 years rather than sentencing them to a term of probation. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. State v. Flaherty (1975), *ante* p. 275, 226 N. W. 2d 631. The record here fully supports the action of the District Court. There was no abuse of discretion.

The judgments are affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

McCOWN, J., dissenting.

The Supreme Court of the United States and this court have consistently held that the validity of a search warrant, such as the one involved here, depends upon the information set out in the affidavit. In State v. LeDent, 185 Neb. 380, 176 N. W. 2d 21, this court said: "In passing on validity of a search warrant the court may consider *only* information brought to the attention of the magistrate. For the affidavit of a tip from an informant to be sufficient the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible. Affidavits for search warrants must be tested in a common sense, realistic fashion." (Emphasis ours.) The majority opinion here requotes most of that language, reaffirmed in State v. Glouser, *ante* p. 190, 226 N. W. 2d 328, but entirely omits the first sentence of the quotation.

In the case at bar there was ample evidence in the affidavit that the informant was credible, but there was no information as to any "of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were." The majority opinion concludes that because apparently more than one informant had told the police that Jessie Brown was expecting a large shipment of heroin, therefore the number of informants justifies an inference of personal knowledge on the part of each of them. I can find no support anywhere for the conclusion that if there is more than one informant the affidavit does not have to reflect any of the underlying circumstances from which any informant concluded that narcotics were located where he claimed they were. If that conclusion were true, any statement by an informant that narcotics were present at any location would be in itself sufficient

to justify an inference of personal knowledge, and remove the necessity of showing any of the underlying circumstances except the previous reliability of the informant. The majority opinion recites that the evidence at the suppression hearing established that the informant actually had been in the house and had seen the heroin. That single fact, if contained in the affidavit, would have made it sufficient, but that information was not in the affidavit.

The issue becomes a clearcut one of whether this court may consider *only* information brought to the attention of the magistrate in the complaint and affidavit, or whether that information may be supported and supplemented by additional information not included in the affidavit. It is advisable, particularly in narcotics cases, to avoid any requirement that an affidavit must be so intimately detailed that it may reveal the identity or probable location of an informant. Nevertheless, it is only necessary that an affidavit state the fact that an informant is or has been in a position to observe or know of activities at or around the location involved or by the individuals concerned sufficient to lead the police to reasonably conclude that the information given to them was "more substantial than a casual rumor or an accusation based merely on an individual's general reputation."

An affidavit for a search warrant such as the one involved here "must be tested and interpreted by magistrates and courts in a common sense and realistic fashion." Any common sense and realistic interpretation of the affidavit in this case demonstrates that the affidavit did not inform the magistrate of any of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were. The majority opinion must therefore rest upon the fact that the evidence at the suppression hearing was sufficient to validate an otherwise insufficient affidavit. That conclusion may be entirely appropriate but it

clearly departs from the rules previously followed by the Supreme Court of the United States and by this court. Stripped of excess verbiage, the affidavit here, insofar as "underlying circumstances from which the informant concluded" were concerned, was the same as the affidavit in Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723. That case has not been overruled nor modified on the issue involved here.

STATE OF NEBRASKA, APPELLEE, V. THOMAS HENRY MAXWELL, APPELLANT.

229 N. W. 2d 195

Filed May 22, 1975. No. 39618.

1. **Instructions.** Section 25-1111, R. R. S. 1943, requires that requested instructions must be submitted in writing.
2. **Instructions: Criminal Law.** It is not proper to give an instruction on a lesser offense unless such an instruction is applicable and authorized by the evidence.
3. **Instructions: Criminal Law: Trial.** In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses.
4. **Verdicts: Criminal Law: Trial.** It is only when there is a total want of proof to support a material allegation of the information, or where the testimony in a criminal case is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that a court will be justified in directing a verdict of not guilty.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

PER CURIAM.

The defendant was convicted of burglary. He assigns as error the denial of a continuance, refusal of an orally requested instruction, and the overruling of a motion for a directed verdict. We affirm the judgment of the District Court.

As the jury was about to be impaneled the State was permitted to endorse the name of a handwriting expert on the information. The court assured the defendant that his attorney would have an opportunity before commencement of the trial, but after the jury was impaneled, to question the new witness. "A motion for continuance is addressed to the sound discretion of the court, and, in the absence of an abuse of discretion, its denial is not error." State v. Craig, 189 Neb. 461, 203 N. W. 2d 158. The new witness identified the signature on a pawnshop card as that of the defendant. That the signature was his was admitted by the defendant. It is evident the court did not abuse its discretion and that the defendant was not prejudiced.

At the conclusion of the trial the defendant orally requested that an instruction be given on the crime of receiving stolen property. Whether or not this is an included offense need not be determined. A review of the record discloses that there never was definite identification of any of the property taken in the burglary and the defendant denied he was guilty of receiving stolen property. Neither the information nor the evidence sustained such an instruction. Section 25-1111, R. R. S. 1943, requires that requested instructions must be submitted in writing. This was not done. It is not proper to give an instruction on a lesser offense unless such an instruction is applicable and authorized by the evidence. See Olney v. State, 169 Neb. 717, 100 N. W. 2d 838. In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses. See State v. Warner, 187 Neb. 335, 190 N. W. 2d 786.

Defendant argues that the evidence is insufficient to

sustain the verdict and that a verdict of acquittal should have been directed. The defendant was observed at the scene of the burglary removing some of the property stolen; he was identified as the individual so observed; he later pawned an article of the type taken; and an automobile hubcap similar to those on defendant's car was found at the scene. The evidence also revealed that a window in the building in question had been broken. The evidence is sufficient to sustain the defendant's conviction. It is only when there is a total want of proof to support a material allegation of the information, or where the testimony in a criminal case is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that a court will be justified in directing a verdict of not guilty. See State v. Edmonds, 182 Neb. 140, 153 N. W. 2d 364.

The judgment of the District Court is affirmed.

AFFIRMED.

BRODKEY, J., not participating.

SEALTEST CENTRAL DIVISION-OMAHA OF KRAFTCO CORPORATION, APPELLEE, V. DOUGLAS COUNTY BOARD OF EQUALIZATION ET AL., APPELLANTS.
229 N. W. 2d 545

Filed May 22, 1975. No. 39744.

Taxation: Omitted Property. In order to sustain an addition of property by tax assessors to a return as omitted property it must appear that specific items were added which were not assessed in the original assessment.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Donald L. Knowles and William T. Ginsburg, for appellant.

Charles S. Reed, for appellee.

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

NEWTON, J.

This is an action wherein the defendants allege that plaintiff failed to list part of its personal property for taxation for the years 1970, 1971, and 1972. Taxes for the current year 1973 were paid. Defendants increased assessments and assessed penalties for the years mentioned. Summary judgment was entered for plaintiff setting aside the additional assessments and penalties. That judgment is affirmed.

The question presented is whether plaintiff omitted listing a part of its personal property or simply undervalued it for prior years. Under section 77-412, R. R. S. 1943, in the case of omitted property the action taken by the Douglas County assessor and board of equalization is authorized but not in regard to undervalued property for prior years.

In the answer and cross-petition of the defendants it is alleged that the assessments for the 3 years in question "did not reflect the actual value of such personal property and should be corrected and amended to reflect such actual value." No objections were made in any of the years in question to the tax returns of plaintiff and taxes were levied and paid on the basis of the returns made. The property taxed is listed in each return as "Furniture, Fixtures, Mach., Tools & Equip." It was not itemized but listed in a lump sum. Neither the pleadings nor the record indicate that any specific items were omitted. When property is listed in bulk in this manner it is apparent that all the property within the classification mentioned has been listed though possibly undervalued.

In order to sustain an addition of property by tax assessors to a return as omitted property it must appear that specific items were added which were not assessed in the original assessment. In Star Iron & Steel Co. v.

Pierce County, 5 Wash. App. 515, 488 P. 2d 776, it is held: Where county's own tax form called for listings of value of classes of personal property, rather than individual items of property, value for which was included by corporate taxpayer as part of value of class of things to which they belonged, county could not be heard to say that individual items were omitted from list, and such items, rather than omitted property, constituted omitted value of property listed which could not be reassessed. See, also, Kentucky Tax Commission v. Airlene Gas Co. (Ky. App.), 328 S. W. 2d 832; Hunt v. District of Columbia, 108 F. 2d 10; State v. Thompson-Parker Lumber Co., 173 Okla. 22, 46 P. 2d 494.

In view of the complete failure of the taxing authorities to list or point out any specific items of property which were omitted from plaintiff's tax returns, the judgment of the District Court must be affirmed.

AFFIRMED.

DORIS MAE GREGG, APPELLANT, V. GENE ERVIN GREGG, APPELLEE.

229 N. W. 2d 546

Filed May 22, 1975. No. 39759.

1. **Divorce: Parent and Child.** In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered.
2. **Divorce: Alimony.** The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case and courts consider all pertinent facts in reaching an award that is just and equitable.
3. ———: ———. Upon the dissolution of a marriage, the court may order payment of alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, the duration of the marriage, and the ability of the supported party to engage in gainful employment.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed as modified.

Milton R. Larson, for appellant.

Frank E. Piccolo of Murphy, Pederson & Piccolo and LeRoy Anderson, for appellee.

Heard before SPENCER, BOSLAUGH, CLINTON, and BRODKEY, JJ., and RONIN, District Judge.

BRODKEY, J.

In this appeal, the petitioner-wife attacks certain provisions contained in the decree of the District Court dissolving the marriage between her and the respondent-husband, and assigns as error that the court erred in failing to award alimony to the petitioner, in awarding a disproportionate amount of the property acquired during the marriage of the parties to the respondent, and in awarding an insufficient amount for the support of the parties' minor children. We modify and affirm.

In her petition filed in this action, the wife, Doris Mae Gregg, alleged that the marriage between herself and her husband, Gene Ervin Gregg, was irretrievably broken and requested that the marriage be dissolved. She also sought a division of the property of the parties, an allowance of attorneys' fees and costs, and such other relief as "justice and equity may require." A trial was had and the District Court entered its final decree which is the subject of this appeal. In its decree the court found the marriage of the parties was irretrievably broken and ordered that the marriage be dissolved. It awarded the custody of the two minor children of the parties to the petitioner and ordered the respondent to pay $175 per month for each child, or a total of $350, as child support. The court also divided the property of the parties, awarding certain minor items of personal property to the respondent, and the home of the parties, together with its remaining contents, to the petitioner. It further awarded to the petitioner a 1972 Ford Torino

automobile, a checking account standing in her name, and a certain life insurance policy on her life. All the remaining property of the parties was awarded to the respondent, with the exception of checks totaling $1,704.30, representing refunds of federal and state income tax payments made by the parties. It was agreed by the parties, and the decree provided, that these tax refunds were to be divided equally between the parties and applied to the payment of the attorneys' fees of both parties. In its decree, the District Court specifically found that the value of the property awarded to the petitioner was approximately $30,000, and that the value of the remaining property of the parties awarded to the respondent, excluding property (grassland) inherited by him worth $44,800, had a value of $37,000. The District Court further found in its decree "that by reason of the age of the parties, the duration of the marriage, and the fact that respondent has inherited property having a value of $44,800.00, the petitioner should receive one half of all property of the parties other than said inherited property of respondent; * * *." Apparently in an effort to equalize the value of the property awarded to the respective parties, the District Court further ordered the respondent to pay the petitioner the sum of $3,600, payable at the rate of $300 per month for a period of 12 months, commencing on August 1, 1974; and also taxed the costs of the action against the respondent.

We now consider petitioner's assignments of error, previously set out. We have carefully reviewed the record in this case, and have concluded that the amount of the child support award was sufficient, and that the division of the property between the parties was equitable.

In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. Schwaninger v. Schwaninger, 192 Neb. 681,

223 N. W. 2d 829 (1974). In this case, the respondent was ordered to pay $175 per month for the support of each of his two children, or a total of $350 per month as child support. He was further ordered to pay all accumulated dental bills for the children and to continue to provide medical insurance coverage for the children at his expense. We have determined that the amount of child support in this case is adequate under the circumstances, and do not disturb that award.

The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case and courts consider all pertinent facts in reaching an award that is just and equitable. Bliven v. Bliven, 190 Neb. 492, 209 N. W. 2d 168 (1973); Schwaninger v. Schwaninger, *supra*. The petitioner herein particularly complains about the failure of the District Court to include the inherited property of respondent in its division of the property in its final decree. It is true that the District Court excluded the inherited property of respondent in making its approximately equal division of the property between the parties. However, it is clear from the decree itself, that the District Court considered the problem of the inherited property in reaching its initial decision to make the division of the property that it did, which was to divide the remaining property equally between the parties. Had the inherited property been considered in the total, it may well have been that the percentage of the total awarded to the petitioner might have been substantially less than one-half. Considering all the circumstances, we have determined that the division of the property made by the District Court cannot be said to have been unjust or inequitable, and that division must, therefore, be affirmed.

We turn now to what we deem to be petitioner's principal assignment that the District Court erred in failing

to make an award of alimony to her. The rule is well established that upon the dissolution of a marriage, the court may order payment of alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, the duration of the marriage, and the ability of the supported party to engage in gainful employment. § 42-365, R. R. S. 1943; Barnes v. Barnes, 192 Neb. 295, 220 N. W. 2d 22 (1974).

The respondent is now, and for many years has been, employed by the Nebraska Machinery Company. Prior to 1972, he was employed as a service and parts manager for that company, but was subsequently promoted to be a salesman for the company, and sold heavy equipment and machinery for it. His income, although ample, is not unlimited. We note, however, that a résumé of his yearly income appears in the record as exhibit B, and reveals that in 1970 he earned wages totaling $12,035; in 1971, his wages amounted to $12,444.94; in 1972 he earned $18,532.86; and in 1973 there was a substantial increase in earning power, as reflected by the figures shown on said exhibit in the amount of $26,522.89. This amounts to a total of $69,535.69 for the 4-year period. By dividing this figure by four, respondent concontends that his average earnings for the 4-year period was $17,383.92 per year. As previously pointed out, however, respondent was employed in a different and better position with the company during the years 1972 and 1973 and it would, perhaps, be more accurate for the purpose of determining his average yearly income, to eliminate the figures shown for 1970 and 1971, when he was employed as a service and parts manager for the company. His average in his present position for the years 1972 and 1973 would be considerably higher, amounting to $22,527.87. Counsel for respondent attempt to explain away the higher earnings figures shown on exhibit B on the ground that economic conditions were much better in 1973 than they are at present, and by further testimony from respondent that his

earnings for 1974 were substantially less than in 1973. Assuming the truth of their assertion, however, we are convinced that the respondent's earnings are and will be greater than the average gross income reflected by exhibit B for the 4 years in question and will be sufficient to make all payments required under the decree of the District Court. We also note, in passing, the record reveals that in addition to his wages, respondent has a yearly income of $1,600 from rental of the grassland which he inherited.

Petitioner was 42 years of age at the time of the hearing before the District Court. It appears that she had engaged in full-time employment from the time of her marriage to respondent in 1951 until 1957, when their first child was born. The children of the parties were 14 and 16 years of age respectively at the time of the hearing in the District Court. The record discloses that in September of 1973, petitioner again began to engage in employment on a part-time basis. She testified she had been working regularly from that time until the time of the hearing; and that she had realized average earnings of $300 per month from such part-time employment. Although she has demonstrated that she is capable of supporting herself, she has expressed a desire to take a 1-year program of vocational training in order to obtain employment as a practical nurse, and thereby substantially increase her earning capacity, as she does not desire to continue her house painting activities. We regard her intention to obtain such training as being most commendable under the circumstances, and believe that if she does, in fact, pursue such course, she should not suffer as a result of the consequent loss of earnings which would necessarily follow from her full-time application to vocational training. We therefore modify the decree to provide that if the petitioner shall decide to pursue a full-time course of vocational training, the respondent shall pay the sum of $300 per month for that purpose, said payments to continue for

1 year or until such course of vocational training is completed or otherwise terminated, whichever comes first, said payments to be made to the clerk of the District Court for the benefit of the petitioner. In all other respects, the decree of the District Court is affirmed.

AFFIRMED AS MODIFIED.

MARGARET M. THACKER, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.
229 N. W. 2d 197

Filed May 22, 1975. No. 39771.

1. **Estoppel.** In order for a party to be estopped by having taken inconsistent positions in a judicial proceeding, such change of position must result in prejudice to the adverse party.
2. **Interest: Eminent Domain: Pleadings.** The right to interest under the provisions of section 76-711, R. R. S. 1943, on an award in an eminent domain proceeding does not depend upon a prayer for such interest in some pleading, but exists by virtue of the provisions of the statute.
3. **Trial: Eminent Domain: Evidence.** In eminent domain proceedings where the sales price of other tracts is offered as evidence of market value of the tract taken, a wide discretion must be granted the trial judge in determining the admissibility of the evidence of the other sales. The evidence should not be admitted where there is a marked difference in the situation of the properties.
4. ———: ———: ———. The question of the admission of the sales price of other land and the sufficiency of the foundation for admission of such evidence is within the sound discretion of the trial court.
5. **Words and Phrases: Eminent Domain: Evidence.** Similarity of tracts does not mean identical, but having a resemblance.
6. **Trial: Eminent Domain: Evidence.** The determination of the similarity of tracts for purposes of deciding the admissibility of sales of such tracts in order to show market value of the tract taken or damages is to be left largely to the discretion of the trial court.
7. **Trial: Eminent Domain: Witnesses.** In order for the testimony of either an expert or lay witness to be admissible on

the question of market value of real estate, the witness must not only be familiar with the property in question, but also with the state of the market.

8. **Trial.** Upon appeal this court will not usually predicate prejudicial error on the exclusion of largely redundant testimony of a particular witness.
9. **Trial: Instructions.** It is not error to refuse a properly requested instruction where the subject matter is properly covered in instructions which are given.

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed.

Paul L. Douglas, Attorney General, Warren D. Lichty, Jr., and Dale L. Babcock, Jr., for appellant.

Smith, Smith & Boyd, for appellee.

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

CLINTON, J.

This is an eminent domain proceeding. The State of Nebraska, Department of Roads, condemner, appeals from a judgment on a jury verdict in the amount of $225,000 awarded Margaret M. Thacker, landowner and condemnee, in the District Court for Dakota County, Nebraska.

The condemner's numerous assignments of error may be condensed to the following: (1) The refusal of the District Court to grant the condemner's motion to dismiss the appeal of the owner from the award of the appraisers appointed by the county judge. (2) The allowance by the District Court to the owner for attorneys fees and expert witness fees is unreasonable and excessive, and no interest should have been allowed on the award because interest is not prayed for in the petition. (3) The admission of testimony concerning the sales of certain property as evidence of the value of the tract acquired and damaged and as foundation for the testimony of the owner's expert witnesses was error. (4) Refusal of the trial court to permit the appraisers ap-

pointed by the county judge to testify as to the value of the property taken and damaged. (5) Refusal of the trial court to receive into evidence exhibit 10, a graph compiled by the condemner's expert witness purporting to show the relationship of size of tract to per acre market value. (6) Refusal of the trial court to give the condemner's requested instruction No. 1.

We affirm. The facts and the evidence will be stated as necessary in connection with the discussion of each assignment.

The county court-appointed appraisers entered an award of $74,648. The owner appealed. The condemner then filed a motion to dismiss the appeal in which motion it alleged that, at the hearing before the board of appraisers, counsel for the owner induced the appraisers to return an award for less than the $84,669 which the condemner alleged it was willing to pay, and, that as a result, the award returned was $74,648. The motion further alleged that the owner's purpose was to insure that upon appeal to the District Court she would obtain an award more than 15 percent greater than the award made by the appraisers, thus qualifying for an allowance of attorneys and expert witness fees. Issue was joined on this motion by the owner's counter-motion to strike the condemner's motion to dismiss. The motion to strike was heard without evidence being received to establish any of the facts alleged in the motion to dismiss and the motion to strike was sustained.

The condemner contends that because of the alleged conduct of the owner's counsel the owner lost her right of appeal. The condemner frames its position in the form of a contention that the District Court had no jurisdiction to hear the appeal. Framed in that manner, of course, the contention is unsupportable. It is obvious that an appellate tribunal's jurisdiction to hear a case on the merits is not properly invoked if the appealing party fails to take necessary jurisdictional steps, but no such contention is made here. Insofar as there is any argu-

able basis at all for the condemner's position, it is founded on the doctrine that a party who has assumed a position in judicial proceedings is estopped to assume an inconsistent position to the prejudice of the adverse party. Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N. W. 2d 591.

Because the trial court acted on the motion to strike instead of directly on the motion to dismiss, it heard no evidence as to the truth of the factual allegations in the motion to dismiss. (The condemner did not itself produce witnesses and attempt to make proof of the facts alleged.) We assume the truth of the allegations. No doubt if a condemnee induced a low award by the appraisers and then, on that account, succeeded in obtaining a verdict 15 percent greater on his appeal and thus became prima facie entitled to an award of attorneys and expert witness fees to which he would not otherwise have become entitled, the condemner would, upon proper pleadings and proof, be entitled to use those facts to defeat such an award of fees. But that is not this case. In any event, the facts alleged relate only to fees and could not defeat the jurisdiction of the District Court or the condemnee's right to his day in court on the issue of the amount of damages.

It is judicially admitted that the parties were unable to agree on the damages. On appeal the owner obtained an award of $225,000. This is far more than 15 percent greater than the $84,669 which the condemner alleges it would have been willing to pay. The owner thus became entitled to an award of attorneys and expert witness fees. In short, her right to such an award was not the result of the alleged misconduct of the owner's attorneys. In order for the doctrine cited in the second preceding paragraph to be applied, prejudice must have been caused the adverse party. The condemner's position on the first assignment cannot be sustained.

After trial and judgment the owner filed an application for attorneys and expert witness fees under the

provisions of section 76-720, R. R. S. 1943. The court awarded attorneys fees of $8,280 and expert witness fees totaling $1,100. The condemner's position is that the amounts are unreasonable and included an award for the services of two attorneys when the services of one would have sufficed. It cites Anderson v. State, 184 Neb. 467, 168 N. W. 2d 522. Based upon an examination of the evidence we conclude that Anderson v. State is not applicable and the fees allowed are reasonable.

The condemner asserts that the court erred in awarding interest on the judgment. The interest was awarded in accordance with the provisions of section 76-711, R. R. S. 1943. The condemner claims this was erroneous because the petition does not pray for interest. It cites no relevant authority. The owner's right to interest rests upon the provisions of section 76-711, R. R. S. 1943, and not upon the prayer of the petition. The condemner's assignment in this respect is unfounded.

The condemner's claim that the court erred in admitting over objection testimony concerning sales of other tracts of land claimed to be comparable to the subject tract as evidence of the value of the subject tract is grounded on the argument that the tracts involved in the sales used for comparison were too small to be sufficiently similar to the subject tract to make the evidence admissible. The tract taken and damaged was located entirely within the city limits of South Sioux City, Nebraska. It contained 62.69 acres and had dimensions of 1,280 feet x 2,607 feet, excluding from these dimensions a 620-foot x 990-foot rectangular-shaped tract in the southwest corner which had earlier been disposed of by the owner. The west boundary of 1,619.52 feet of the wider part of the tract fronted on Dakota Avenue (Highway 77). The north boundary of 1,280 feet fronted on 39th Street. Both of these boundaries, previous to the acquisition, were afforded direct access to all parts of the streets on which they fronted. The topography of the subject tract was flat. It was unim-

proved. All utilities were available to it from one or the other of the two streets on which the property fronted. The tract was zoned industrial which permitted either industrial or commercial development. The immediately surrounding area was primarily commercially developed or agricultural.

The condemner acquired a wedge-shaped 24.08-acre tract running from east to west through the heart of the wider or northern part of the tract thus dividing the entire tract and leaving two irregular-shaped tracts of 12.1 and 26.51 acres on the north and south respectively. The condemner also acquired a narrow strip along the remainder of the boundary fronting on Dakota Avenue and along about half the frontage on 39th Street, and access on these parts was to be completely restricted and enclosed by a chain link fence. Access was thus completely lost on the entire frontage on Highway 77 and also on 39th Street except at one narrow point. The only access afforded to the severed south tract was from Dakota Avenue through a 40-foot access right-of-way provided by the condemner through the 620-foot x 990-foot tract earlier referred to. An earthen berm was to be erected on the acquired 24.08-acre tract which, at the eastern edge of the owner's property, would be 15.2 feet above ground level and, at the western edge, 24.6 feet above ground level.

As a part of the foundation for their testimony, each of the expert witnesses (three for the owner and one for the condemner) described the sales of what each considered sufficiently comparable property to afford a basis for arriving at the market value of the subject property. In each case, the witness, including the condemner's expert, laid a foundation which generally consisted of the following: (1) Date of sale, (2) location of property (all within South Sioux City), (3) size, (4) utilities available, (5) topography, (6) access, (7) use and shape, (8) zoning, (9) verified that the sale conformed to the

legally prescribed definition of market value sale, and (10) price.

The first expert for the owner described eight sales; the second, five sales; and the third, four sales. The tracts varied in size from 14 acres to .7875 acres. The condemner's expert, whose testimony was admitted without objection, described four sales. The size of the tracts involved in the sales which he used ranged from 24.7 acres to 3.512 acres. All four experts, including the condemner's, used the 14-acre tract as a comparable sale. All used some tracts which were comparable in size to those used by the other experts, but all a great deal smaller than the subject tract. Each expert then, in his own mind, made such adjustments (without specifically describing them) as were required by differences in the various sales to arrive at the market value of the subject property on the day of taking. The sales in question were not offered as independent evidence of value of the subject tract, but as foundation for the various expert opinions. However, the jury by instruction was permitted to consider the sales in connection with determining the value of the property taken and damaged. No objection is made to the instruction which permitted this.

In eminent domain proceedings, a wide discretion must be granted the trial judge in determining the admissibility of evidence of other sales. The evidence should not be admitted where there is a marked difference in the situation of the properties, or when the judge is not satisfied that the price paid was sufficiently voluntary to be a reasonable index of value. Swanson v. State, 178 Neb. 671, 134 N. W. 2d 810. The question of the admission of the sales price of other land and the sufficiency of the foundation for admission of such evidence is within the sound discretion of the trial court. State v. Mahloch, 174 Neb. 190, 116 N. W. 2d 305. The requirement of similarity of compared tracts does not mean that they must be identical, but, rather, that they bear a re-

semblance to each other. 1 Orgel, Valuation Under Eminent Domain (2d Ed.), § 138, p. 587. The determination of the similarity of tracts for purposes of deciding the admissibility of sales of such tracts in order to show market value of the tract taken or damaged is to be left largely to the discretion of the trial court. 1 Orgel, Valuation Under Eminent Domain (2d Ed.), § 138, footnote 7, p. 586; Wassenich v. Denver, 67 Colo. 456, 186 P. 533.

We have carefully examined the foundation testimony and conclude that the trial court did not abuse its discretion in admitting evidence of the particular sales.

The condemner called as witnesses two of the appraisers appointed by the county court and sought to elicit their testimony as to the value of the tract taken and damaged. The trial judge, outside the presence of the jury, heard the foundation testimony as to the qualifications of these witnesses. He then refused to let them testify. In this he did not err. The proffered foundation disclosed neither familiarity by the witnesses with market conditions and value of comparable properties, nor familiarity with the definition of market value. In order for the testimony of either an expert or lay witness to be admissible on the question of market value of real estate, the witness must not only be familiar with the property in question, but also with the state of the market. Dawson v. City of Lincoln, 176 Neb. 311, 125 N. W. 2d 908; Chudomelka v. Board of Equalization, 187 Neb. 542, 192 N. W. 2d 403. The condemner relies upon a statement made by this court in Schmailzl v. State, 176 Neb. 617, 126 N. W. 2d 821, to the effect that one who has a reasonable familiarity with the property is usually competent to testify. It takes this statement out of context. In that case the testimony of the owner of the property was involved. Of course, the owner may always testify as to its value. In addition, an examination of Wahlgren v. Loup River P. P. Dist., 139 Neb. 489, 297 N. W. 833, cited as authority in Schmailzl v. State,

supra, indicates that the lay witnesses in that case showed familiarity with the state of the market as well as familiarity with the tract.

The condemner offered in evidence a graph purporting to illustrate that the per acre value of tracts increase or decrease inversely to their size. The trial court upon objection excluded the graph. The condemner's expert was permitted to testify without objection as to his general conclusions on the relationship of size of tract to price as well as to give in detail all such information as it pertained to the sales of comparable tracts upon which his opinion of value of the condemned tract was founded. Many of these comparable sales were included in the graph. We find no prejudicial error in the exclusion of the graph. It was largely redundant of the oral testimony. If the court's ruling was error, it was harmless. We will not predicate prejudicial error on the exclusion of redundant testimony of a particular witness.

The condemner assigns as error the refusal of the court to give its requested instruction No. 1. The substance of the instruction was to set forth section 39-1329, R. R. S. 1943, and advise the jury that no damages could be assessed on account of the fact that the owner would have no access from her two remaining tracts to the portion of the interstate highway constructed on the acquired tract. The court in instructions Nos. 8 and 9 properly defined the elements and measure of damages. Those instructions impliedly exclude the irrelevant items addressed by the requested instruction. It is not error to refuse a properly requested instruction where the subject matter is properly covered in instructions which are given. Eden v. Klaas, 166 Neb. 354, 89 N. W. 2d 74.

AFFIRMED.

HARMONY LANES, A PARTNERSHIP, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

229 N. W. 2d 203

Filed May 22, 1975. No. 39772.

1. **Eminent Domain: Damages.** The measure of compensation for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking.
2. **Eminent Domain: Damages: Trial: Evidence.** The value of property includes its value for any reasonable use to which it may be put. If because of its artificial improvements or its intrinsic character it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown.
3. ———: ———: ———: ———. Anything connected with the land which would influence the market value thereof in the mind of a good faith intending purchaser is an element for consideration in determining damages in a condemnation case.
4. **Eminent Domain: Damages: Evidence.** The taking of property by condemnation subjects the State to liability for all damages sustained by reason of the taking. Those damages include all elements of inconvenience which affect the market value, the costs of restoration or adjustment to the changed conditions, and any material impairment or destruction of a right of access to a public highway.
5. **Eminent Domain: Damages: Trial: Witnesses: Jury.** In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury.
6. **Eminent Domain: Damages: Trial: Jury.** The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by the jury. Where the evidence is conflicting this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong.
7. **Eminent Domain: Attorneys at Law: Fees.** The amount allowed as attorney's fees in a condemnation case should be fixed as though the services were performed by one attorney unless the circumstances are such as to require the services of two or more attorneys.

Appeal from the District Court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed as modified.

Paul L. Douglas, Attorney General, Warren D. Lichty, Jr., and Dale L. Babcock, Jr., for appellant.

Smith, Smith & Boyd, for appellee.

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

McCOWN, J.

This is a condemnation case involving the taking and damaging of plaintiff's property for highway purposes. The date of taking and commencement of the action was October 25, 1973. The county court appointed appraisers who returned an award for plaintiff in the sum of $22,832. The plaintiff appealed to the District Court. In the District Court the jury returned its verdict for the plaintiff for $57,500. The State of Nebraska, Department of Roads, has appealed from the District Court judgment entered on that verdict.

The plaintiff, Harmony Lanes, is a partnership whose partners are Margaret M. Thacker, Victor I. Bianchini, and Nancy M. Bianchini. Plaintiff is the owner of a rectangular tract of land located on the east side of Dakota Avenue within the city limits of South Sioux City, in Dakota County, Nebraska. Dakota Avenue runs north and south and is also U. S. Highway No. 77. The property is zoned industrial. The tract dimensions are 330 feet north and south and 620 feet east and west. On the west, access to Dakota Avenue was unrestricted and consisted of a 65-foot driveway and a 35-foot driveway. There are no other streets on the other three sides of plaintiff's property. The tract contained 4.7 acres prior to the taking.

There was a blacktopped parking lot 133 feet by 250 feet on the westerly side of the tract which accommodated 96 cars. There was an additional parking lot to the north which could accommodate 64 cars. A metal building faced with brick was located on the southerly portion of the property immediately east of the west

parking lot. Its north-south dimensions were 100 feet and east-west dimensions were 154 feet. Plaintiff's building contained a 16-lane bowling alley in the east portion of the building, with a snack bar and lounge located at the west end. The entrance to the building was on the west side between the snack bar and the lounge. The air conditioning equipment and the septic tank for the building are located on the south side of the building.

Plaintiff's property is being condemned for the construction of a new cloverleaf interchange for the interstate highway. The property actually taken by the State consists of a strip of land across the entire west side of the plaintiff's property, varying in width from some 54.20 feet at the south to 81.25 feet to the north. A chain link fence will be erected along the boundary, cutting off all direct access to U. S. Highway No. 77 from plaintiff's property. In addition, the State is taking a 20-foot strip of land along the south boundary which will be used as the north half of a new access road to U. S. Highway No. 77, which will serve plaintiff and other property owners to the east and south. The total area of land actually taken by the State is .78 acres. The taking will reduce the capacity of plaintiff's west parking area from 96 to 10 cars, and leave an area between the building and the new right-of-way which can be used as a driveway. The north parking lot will not be affected. The 20-foot right-of-way strip on the south line of the property passes over the septic tank serving the building and comes within 10 feet of the south edge of the building and within 3½ feet of the air conditioning unit and equipment. A storage shed on the south side of the building will also have to be moved.

There is substantial dispute in the evidence of the expert witnesses as to the necessity or feasibility of moving the entrance of the bowling alley from the west side to the north side and as to the costs involved, as well as to the amount of damage to the remainder of the property

resulting from the taking. One of the plaintiff owners testified that in his opinion the total amount of damages resulting from the taking and damaging of plaintiff's property was $140,000. One of the plaintiff's two expert witnesses testified that the total amount of damages resulting from the taking and damaging was $90,000. The other put the amount at $96,348. One of the defendant's two expert witnesses placed the amount of total damages at $25,032 and the other at $26,478.03. Testimony of plaintiff's two expert witnesses valued the property actually taken at $13,962 and $7,800 respectively. The defendant's two expert witnesses placed the value of the property actually taken at $7,080 and $10,848.48. The combined differences between plaintiff's and defendant's expert witnesses as to the value of the land actually taken were relatively minor. Major differences came in connection with the opinions as to damage to the remainder of the property. Plaintiff's expert witnesses placed the remainder damages at $76,000 and $96,000, while the defendant's two expert witnesses placed the remainder damages at $15,000 and $18,000. Expert valuations of the property before the taking varied from $285,000 to $391,000. The lowest estimate by plaintiff's witnesses was $356,000, while the highest estimate by the defense witnesses was $339,000. Values after the taking ranged from $258,000 to $314,000, both of which were by the defendant's witnesses. Plaintiff's witnesses valued the property after the taking at $266,000 and $294,000 respectively.

The jury returned its verdict for the plaintiff in the amount of $57,500. The District Court entered judgment for that amount, plus interest of $1,920.90; expert witness' fees of $575 and $750; and attorney's fees of $8,640, plus costs. The State has appealed.

The State's assignments of error are directed primarily at the admission of certain testimony into evidence. The State also asserts that the verdict is excessive and that interest, attorney's fees, and witness' fees were im-

properly allowed. It also challenges the jurisdiction of the District Court on appeal. There is no complaint as to any of the instructions to the jury.

The measure of compensation for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. Berlowitz v. State, 180 Neb. 164, 141 N. W. 2d 764. In the present case the opinions of all four of the expert witnesses, plaintiff's and defendant's alike, were directly expressed in compliance with that rule.

The State's objections are generally directed at the expert witnesses' testimony about various facts or information which were a part of the foundation for the expert opinion as to damages. The State complains, for example, about the admission of testimony by plaintiff's experts with respect to certain comparable sales in the vicinity. The contention is founded on the argument that the testimony as to these sales was offered as independent proof on the issue of value of plaintiff's property. The State exposes the invalidity of the assertion by arguing that each of the sales were adjusted by the witnesses and because they were adjusted, therefore they were not comparable. None of the sales here were presented as independent proof of the value of plaintiff's property. In fact, several of the comparable sales to which the State objects were used as comparable sales by its own expert witnesses. The testimony was relevant and it was open to cross-examination. The State's contentions on this issue are wholly unfounded.

The State also contends that the plaintiff's expert witnesses improperly included the value of leased bowling equipment and fixtures in determining remainder damage. The testimony of plaintiff's witnesses establishes that their opinions of remainder damage did not include any item or element of damage to bowling equipment or fixtures. It is also obvious from the testi-

mony that both plaintiff's and defendant's witnesses were including the value of bowling fixtures and equipment in their opinions of values before and after taking but were not including any damage to that property in their opinions as to remainder damage. Both plaintiff's and defendant's expert witnesses agreed that the highest and best use of plaintiff's property was for a bowling alley.

The value of property includes its value for any reasonable use to which it may be put. If because of its artificial improvements or its intrinsic character it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown. Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N. W. 2d 865.

The State complains further that much of the testimony of one of the expert witnesses and the testimony of one of the owners was improperly admitted because it dealt with special or particular use value of plaintiff's property as a bowling alley rather than value in general terms of market value. In a situation where virtually all the witnesses conceded that the highest and best use of the property was as a bowling alley, it is difficult to understand the State's complaint that some testimony as to damage to plaintiff's property is improper because it reflects an opinion based on a peculiar value for special reasons. The values that were used by the expert witnesses in expressing opinions were market values. Anything connected with the land which would influence the market value thereof in the mind of a good faith intending purchaser is an element for consideration in determining damages, and that rule applies to all instances of uses which follow the property taken or damaged. Fulmer v. State, 178 Neb. 20, 131 N. W. 2d 657. Use of the property here as a bowling alley did not create or provide any peculiar value for special reasons but was merely one of the uses, perhaps the best use, to which the property was reasonably adaptable. The

taking of property by condemnation subjects the State to liability for all damages sustained by reason of the taking. Those damages include all elements of inconvenience which affect the market value, the costs of restoration or adjustment to the changed conditions, and any material impairment or destruction of a right of access to a public highway. See Balog v. State, 177 Neb. 826, 131 N. W. 2d 402.

In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury. Iske v. Omaha Public Power Dist., 185 Neb. 724, 178 N. W. 2d 633. The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by the jury. Where the evidence is conflicting this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. Iske v. Metropolitan Utilities Dist., 183 Neb. 34, 157 N. W. 2d 887.

The State also contends that because of certain alleged irregularities by plaintiff's counsel in connection with the appraisal award by the appraisers appointed in the county court, the nature of which is not disclosed by the record, the plaintiff lost any right of appeal to the District Court and the District Court had no jurisdiction. Those allegations have been disposed of in the case of Thacker v. State, *ante* p. 817, 229 N. W. 2d 197. The issues are identical and that case is controlling here.

Finally, the State contends that interest, expert witness' fees, and attorney's fees were improperly allowed. The allowance of interest is in direct compliance with section 76-711, R. R. S. 1943. The fees of the two expert witnesses who testified for the plaintiff here are not in serious dispute, and were properly allowed under section 76-720, R. R. S. 1943. The State, however, contends that the attorney's fees of $8,640 included services of more than one attorney, and at least some duplication.

The trial here took 3 days. An examination of the record and the affidavits as to services tends to establish some duplication and multiplicity of services and counsel. In Anderson v. State, 184 Neb. 467, 168 N. W. 2d 522, we said: "The statute contemplates but one fee and the amount allowed should be fixed as though the services were performed by one attorney unless the circumstances are such as to require the services of two or more attorneys." The record supports the conclusion that the award of attorney's fees here was based on an unnecessary multiplicity of counsel and some duplication and was therefore excessive. The combined allowance for attorney's fees in the District Court and in this court should be fixed at $6,000. The remaining assignments of error asserted by the State are without merit.

The judgment of the District Court is affirmed except as to attorney's fees. Plaintiff is allowed the total sum of $6,000 for the services of its attorneys in the District Court and in this court. Costs are taxed to the State.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. ARMICHAEL WAYNE, APPELLANT.
229 N. W. 2d 64

Filed May 22, 1975. No. 39778.

1. **Guilty Plea: Criminal Law.** Notwithstanding the acceptance of a plea of guilty the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea.
2. ———: ———. The acceptance of a plea of guilty is left largely to the discretion of the judge. The circumstances of the case will often dictate the kind and amount of inquiry which is necessary.
3. ———: ———. In accepting a guilty plea the criteria is whether or not the defendant understands the relevant factors involved in a guilty plea.
4. ———: ———. Before accepting a guilty plea a judge is

expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

SPENCER, J.

Defendant prosecutes an appeal from a guilty plea on which he was sentenced to a term of 1 to 3 years in the Nebraska Penal and Correctional Complex. Defendant's only assignment of error is that the court committed reversible error in not making an inquiry into the factual basis for the plea. We affirm.

Defendant, represented by counsel, entered a plea of guilty pursuant to a plea bargain. Defendant's counsel advised the court that the arraignment in District Court on a direct information was in the nature of a plea bargain since defendant had given the police a confession to a number of matters that could give rise to charges of larceny and burglary in 16 different cases. In response to the court's suggestion that the various charges be set out in the record, the defendant's counsel advised the court that the record contained a three-page confession. The defendant, in response to the court's question, said the confession told everything he did. The trial court examined the defendant at length but did not further discuss the confession. The procedure followed by the trial court was in strict accord with Part I of the American Bar Association Standards Relating to Pleas of Guilty, and amply demonstrates the voluntariness of the plea.

Defendant's counsel questions compliance with No. 1.6 of the Standards, which reads as follows: "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea." In the Commentary to this Standard, we find the following: "* * * no attempt is made here to state specifically a particular probability-of-guilt standard for this inquiry. The matter is left largely to the discretion of the judge. The circumstances of the case will often dictate the kind and amount of inquiry which is necessary." There can be no question in this case that the record was sufficient to satisfy the trial judge that the defendant had made an unequivocal confession of guilt.

Defendant's present complaint is frivolous. He was represented by competent counsel who in spite of a confession to a large number of crimes worked out a plea bargain to one of them, that of receiving or buying stolen property. Defendant on arraignment personally acknowledged that he was charged with the particular crime, and voluntarily pleaded thereto. He acknowledged he had discussed it with his lawyer. The trial judge examined the defendant and determined that he understood the nature of the charge, the possible penalty, and the effect of his plea. Defendant's plea was in full accord with State v. Turner (1971), 186 Neb. 424, 183 N. W. 2d 763, in which we said in accepting a guilty plea: "The criteria is whether or not the defendant understands the relevant factors involved in a guilty plea. Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea."

The judgment is affirmed.

AFFIRMED.

IGNATZ A. LAMMERS, APPELLEE, V. JEROME B. LAMMERS, APPELLANT.
229 N. W. 2d 555

Filed May 22, 1975. No. 39786.

1. **Contracts: Time: Laches.** Where the obligation is clear and its essential character has not been changed by lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, especially between the immediate parties to the litigation.
2. **Estoppel: Laches.** Where there has been no material change in the defendant's position, laches is not a defense.

Appeal from the District Court for Cedar County: GEORGE W. DITTRICK, Judge. Affirmed.

Jewell, Otte, Gatz & Collins, for appellant.

Robert G. Scoville of Ryan, Scoville & Uhlir and P. F. Verzani, for appellee.

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

BOSLAUGH, J.

The plaintiff, Ignatz A. Lammers, is the father of the defendant, Jerome B. Lammers. On March 1, 1951, the defendant and his brother, Reinold A. Lammers, entered into a contract with the plaintiff to purchase approximately 1,120 acres of land owned by the plaintiff. The contract price was $69,300 of which $1 was paid upon execution of the contract. The balance was to be paid in annual installments equivalent to the annual rental value of the land.

This action was filed March 24, 1966, to recover possession of the property, for a declaratory judgment that the contract had been canceled and rescinded, and for an accounting of the rents and profits from the land since 1954.

The case was tried in 1968. The trial court found the contract to purchase had been abandoned by the parties in 1954 and that the defendant had farmed the land

since that time as a family farm or as a tenant. The trial court further found the plaintiff was entitled to an accounting of rents and profits since 1962 and that the defendant was indebted to the plaintiff in the sum of $22,929.04. The defendant has appealed. There is no cross-appeal.

The defendant's theory of the case was that the contract to purchase had never been rescinded or canceled; that the plaintiff and his wife had entered into an agreement with the defendant in which the defendant was to provide a home for them and the amounts expended by the defendant pursuant to that agreement were accepted by the plaintiff as payment in full of all interest due under the land contract; and that the defendant was ready to perform the contract to purchase by payment of the principal amount due under the contract.

The evidence does not sustain the defendant's theory of the case. The only testimony concerning the alleged agreement of the defendant to provide a home for the plaintiff and his wife came from the defendant. The defendant's testimony in this regard was not corroborated by the other facts and circumstances in the record. The plaintiff testified there was no such agreement.

The plaintiff further testified that in 1954 the defendant told the plaintiff he and Reinold would have to give up the agreement. The defendant stayed on the farm and kept on farming but did not account for the rents and profits.

The defendant's brother, Reinold, left the farm in 1957. At that time he assigned his interest in the personal property to the defendant.

In 1965, the defendant told Cyril Becker, a brother-in-law, that the defendant was farming the property as a family farm. The same statement was made to Florene Burbach, another brother-in-law.

In 1965, the plaintiff distributed the property among his children by conveying remainder interests in specific tracts to each child, reserving a life estate in himself.

In this distribution the defendant received the remainder interest in an 80-acre tract subject to a charge in favor of another child. At about this time the defendant executed a 1-year written farm lease covering a tract that had been deeded to two of the girls. The lease provided the defendant would pay rent to the plaintiff and promptly "yield up possession" of the premises at the expiration of the term.

In 1966, Reinold executed a quit-claim deed of the land to the plaintiff. The defendant did not obtain an assignment of Reinold's interest in the contract to purchase until 1967. The evidence sustains the finding that the contract to purchase was canceled and rescinded in 1954 and the plaintiff was entitled to possession of the property.

With respect to the accounting, the plaintiff conceded the statute of limitations barred any recovery prior to 1962. The defendant contends the plaintiff is barred from any recovery by laches. Where the obligation is clear and its essential character has not been changed by lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, especially between the immediate parties to the litigation. Uptegrove v. Elsasser, 161 Neb. 527, 74 N. W. 2d 61. Where there has been no material change in the defendant's position, laches is not a defense.

The trial court found the rental value of the land from 1962 to 1969 was $7,000 per year. This finding has adequate support in the record. The defendant was given credit for payments to or on behalf of the plaintiff in the amount of $9,998.04 plus the amounts collected by a receiver and a note held by the receiver. We find no basis in the record upon which to disturb this finding.

The judgment of the District Court is affirmed.

AFFIRMED.

ELEANOR BECKER, ADMINISTRATRIX OF THE ESTATE OF MARY LAMMERS, DECEASED, APPELLEE, V. JEROME B. LAMMERS, APPELLANT.

229 N. W. 2d 557

Filed May 22, 1975. No. 39785.

Bills and Notes: Limitations of Actions. When the acceleration provision of an installment note is optional with the holder of the note, the statute of limitations commences to run upon each installment as it becomes due in the absence of an effective declaration that the entire amount is due.

Appeal from the District Court for Cedar County: GEORGE W. DITTRICK, Judge. Affirmed.

David A. Domina of Jewell, Otte, Gatz & Collins, for appellant.

Robert G. Scoville of Ryan, Scoville & Uhlir and P. F. Verzani, for appellee.

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

BOSLAUGH, J.

This was an action filed November 8, 1966, by the administratrix of the estate of Mary Lammers, deceased, upon a promissory note signed by the defendant and Reinold A. Lammers, his brother. The note was dated March 1, 1950, and was in the amount of $16,262. The note was payable in annual installments of $500 commencing March 1, 1951, and contained an acceleration clause, at the option of the owner, in the event of default in any payment.

Payments of $500 on March 1, 1951, and March 1, 1952, were endorsed on the back of the note. The petition alleged no other payments had been made and declared the entire balance due except as to payments due in 1961 and prior years.

The answer admitted the execution and delivery of the note but alleged payment and that the action was barred by the statute of limitations.

The trial court found that all payments due before November 8, 1961, were barred by the statute of limitations, but the plaintiff was entitled to recover $15,564.40 plus interest from May 8, 1969. The defendant has appealed.

The note was given as a part of a transaction in which the defendant and his brother contracted to purchase approximately 1,120 acres of land owned by their father together with farm machinery, grain and a half-interest in livestock owned by their mother. The note represented the consideration for the sale of farm machinery, grain and interest in livestock except for a downpayment of $100.

This case involved some of the same issues and was consolidated for trial with Lammers v. Lammers, *ante* p. 836, 229 N. W. 2d 555.

The defendant's claim of payment was based upon the contention that he had agreed to provide a home for his parents and his performance of that agreement had satisfied the obligation of the note in full. That contention and his claim of laches are discussed and decided adversely to the defendant in Lammers v. Lammers, *supra*. As to these issues the decision in that case is controlling here.

The remaining contention is that the entire amount due on the note is barred by the statute of limitations because the payee could have elected to declare the entire amount due upon the first default by the makers. The argument is by analogy from the rule applicable to demand notes. However, a different rule is applicable to installment notes containing an optional acceleration clause.

When the acceleration provision of an installment note is optional with the holder of the note, the statute of limitations commences to run upon each installment as it becomes due in the absence of an effective declaration that the entire amount is due. See, Nares v. Bell,

66 Neb. 606, 92 N. W. 571; 12 Am. Jur. 2d, Bills and Notes, § 1047, p. 60; Annotation, 161 A. L. R. 1211.

In this case the option to declare the entire amount due was not exercised until the petition was filed. The judgment of the District Court was correct and it is affirmed.

AFFIRMED.

CHARLES ROBERT SCHETZER, APPELLANT, V. JOHN L. SULLIVAN, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.
229 N. W. 2d 550

Filed May 22, 1975. No. 39789.

1. **Appeal and Error. Consideration of a cause on appeal is limited to errors assigned and discussed.**
2. **Appeal and Error: Records: Evidence. Purported evidence which does not appear in the record cannot be considered by this court on appeal.**

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

Charles Robert Schetzer, pro se.

Paul L. Douglas, Attorney General, and Steven C. Smith, for appellee.

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

SPENCER, J.

Charles Robert Schetzer, appellant, appeals from a judgment dismissing his petition filed pursuant to section 60-503, R. R. S. 1943, contesting an order of suspension of his driver's license. We affirm.

Appellant was involved in a property damage accident on March 12, 1974, in Omaha, Nebraska. He executed a U-turn-type maneuver in which he drove his vehicle in

a southbound direction in a traffic lane designated for northbound traffic only. At the same time, another vehicle driven by one Zager pulled out of a south driveway to proceed northbound. The vehicles collided. Appellant was ticketed and convicted in the municipal court for driving left of the center marker. Appellant was uninsured. Upon receipt of the accident reports the Department of Motor Vehicles determined there was a reasonable possibility of a judgment being rendered against appellant as the result of this accident, and accordingly issued the order of suspension being contested.

Appellant, who appears pro se, sets out four assignments of error, as follows: "1. The court erred in not sustaining appelants (sic) motion that the facts were insufficient to require this action.

"2. The court erred in admitting improper evidence over proper and timely objection of appelant (sic).

"3. The evidence is insufficient to require this action.

"4. Law is unconstitutional in that it requires double bonding."

Section 60-507, R. R. S. 1943, provides in relevant part: "(1) Within ninety days after the receipt by the Department of Roads of a report of a motor vehicle accident within this state which has resulted in * * * damage to the property of any one person, including such operator, to an apparent extent in excess of two hundred fifty dollars, the Department of Motor Vehicles shall suspend (a) the license of each operator of a motor vehicle in any manner involved in such accident * * * unless such operator shall deposit security in a sum which shall be sufficient, in the judgment of the Department of Motor Vehicles, to satisfy any judgment or judgments for damages resulting from such accident which may be recovered against such operator, and unless such operator shall give proof of financial responsibility; * * *.

"(2) The order of suspension provided for in subsection (1) of this section shall not be entered by the Department of Motor Vehicles if the department deter-

mines that in its judgment there is no reasonable possibility of a judgment being rendered against such operator.

"(3) In determining whether there is a reasonable possibility of judgment being rendered against such operator, the department shall consider all reports and information filed in connection with the accident.

"(4) The order of suspension provided for in subsection (1) of this section shall advise the operator that he has a right to appeal the order of suspension in accordance with the provisions set forth in section 60-503."

Assignment of error No. 2 presents no issue since appellant made no objection whatsoever to any evidence offered at the trial. Further, the assignment is nowhere discussed in appellant's brief. Consideration of a cause on appeal is limited to errors assigned and discussed. McClellen v. Dobberstein (1973), 189 Neb. 669, 204 N. W. 2d 559.

Appellant's assignment of error No. 4 does not present any question for the action of this court. There is absolutely nothing in the entire record to substantiate any allegation concerning double bonding. Appellant attaches a photocopy of what purports to be a personal bond in an appeal by appellant from a municipal court judgment obtained by Olon E. Zager. This attachment is not properly before the court. It was not received nor offered during the proceedings below. Apparently it is a copy of a document which originated subsequent to the disposition of appellant's appeal to the District Court. Purported evidence which does not appear in the record cannot be considered by this court on appeal. State v. Griger (1973), 190 Neb. 405, 208 N. W. 2d 672.

Appellant's assignments of error Nos. 1 and 3 contest the sufficiency of the evidence to sustain the judgment of the trial court. This action is contesting an order of suspension under section 60-507, R. R. S. 1943. The only issue below was whether there was a reasonable possibility of a judgment being rendered against the appellant

as an operator of a motor vehicle involved in the accident on March 12, 1974. The trial court found there was such reasonable possibility, and we agree. The evidence is undisputed appellant was operating his motor vehicle the wrong way in northbound traffic when the collision occurred.

The judgment is affirmed.

AFFIRMED.

BETTY E. BADBERG, APPELLANT, V. MELVIN C. BADBERG, APPELLEE.

229 N. W. 2d 552

Filed May 22, 1975. No. 39792.

1. **Divorce: Alimony.** The fixing of alimony rests in each case within the sound discretion of the trial court.
2. ———: ———. Making temporary allowances during the pendency of an appeal applicable on the alimony awarded to the petitioner on the decree being appealed is approved when the trial judge has adequately adjusted the rights of the parties.
3. **Attorneys at Law: Fees: Costs.** The award of attorneys' fees and the taxing of costs is discretionary with the District Court.

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

Perry, Perry, Witthoff & Guthery, for appellant.

David M. Geier of Bauer, Galter & Geier, for appellee.

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

SPENCER, J.

This is a divorce action. All questions raised deal with the propriety of the division of property, the amount of the alimony award, and attorneys' fees. We affirm.

Betty E. Badberg, petitioner and appellant, and Melvin C. Badberg, respondent and appellee, were married December 22, 1946. At the time of the hearing Betty was

53 years of age and Melvin was 50. During the course of their marriage they adopted two children. Diane Badberg, who was 12 years old at the time of the divorce, was the only child living with petitioner and affected by the decree. The major asset of the parties was the family home which was purchased in April 1973, and is subject to a mortgage of $6,500. Petitioner's appraiser set $35,000 as its fair market value.

The custody of the minor child of the parties was awarded to the petitioner, subject to respondent's right of reasonable visitation. Child support was awarded to petitioner in the sum of $150 per month, continuing until the child reaches the age of majority, dies, or becomes emancipated. Respondent was ordered to pay petitioner alimony in the sum of $150 per month, commencing on the 1st day of September 1974, and continuing for a period of 60 months, or a total of $9,000. The real estate was awarded to the petitioner, subject to the mortgage. In equalizing the property distribution, judgment was entered against petitioner in favor of respondent in the sum of $14,000. This is approximately one-half of the equity of $28,500. This judgment is not to be enforceable until 6 months after the sale of the real estate, or 6 months after the date the minor child reaches her majority, whichever date occurs first. Said judgment is not to bear interest until the date provided for enforcement.

Petitioner was further awarded the household furnishings, appliances, and fixtures located in the residence, except for some specific items awarded to respondent. Petitioner received property valued at approximately $17,000 above indebtedness. Respondent received property valued at approximately $18,000, counting the $14,000 judgment and the present value of his pension fund. No purpose will be served by further detailing the distribution of the personal property. Suffice it to note that all things considered the distribution was approximately equal.

In the matter of the distribution of the property, the petitioner takes exception to the awarding of a judgment against her in favor of the respondent in the amount of $14,000. It is apparent that the trial court was attempting to divide the equity in the property approximately equal and at the same time to give petitioner the option of living in the property until the minor child reached her majority. This appears to us to be a very equitable solution of a difficult matter.

Petitioner contends the alimony allowance is grossly inadequate because the trial court did not consider respondent's retirement plan benefits as an asset of the parties. We do not agree. It is evident the trial court considered the pension since the interest in the plan was specifically awarded to the respondent. Respondent's annual contributions are now $60, or 3½ percent of earnings over his Social Security base, whichever is greater. At the time of the trial, the only benefit available to him from this source was the amount of his contributions which totalled $1,671, indicating that respondent's contributions to the pension plan have been nominal. Respondent testified that, as he will have 30 years of service with Goodyear in 5 years, he would be able to retire at the age of 55 on a pension of $500 per month. The work sheet included as an exhibit would indicate that this amount would be reduced 4 percent for each month between his 55th and 62nd birthday. At age 62 his monthly retirement would be $504.50 plus his Social Security. Whatever bearing the plan would have on an allowance of alimony in the future could be no different essentially from the expected value of respondent's continuing employment with Goodyear.

Respondent's take-home pay, after withholding, pension plan, and medical insurance deductions, was $790 per month. By the decree, he is required to pay child support of $150 and alimony of $150, leaving him $490 for his personal living expenses. At the time of the trial petitioner was earning $325 net a month. This with

child support and alimony would give her $625 per month. The alimony award was given for 5 years, or the approximate minority of the minor child. The fixing of alimony rests in each case within the sound discretion of the trial court. The record of the trial is not complicated and the facts are not in dispute. The decree entered by the trial court on the allowances and alimony was within its discretion and should not be disturbed.

Petitioner's aunt advanced $7,000 to the parties in either 1967 or 1968. Two or three years later the parties attempted to deliver a note to her to cover this amount but she refused to accept it. This money was applied to the payment on the home purchased by the parties. The aunt stated that she would ask for the $7,000 back if she ever needed the money, but she had not asked for any of it by the time of the trial. Both parties consider this a moral obligation which should be paid if demand is ever made. The court assigned the indebtedness equally to the two parties. Petitioner objects to this division, but actually any payment made will reduce the equity in the home proportionately.

Petitioner questions the provision making temporary allowances during the pendency of this appeal applicable on the alimony awarded to petitioner in the decree being appealed. We approve this procedure, and consider it eminently fair when the trial judge has adequately adjusted the rights of the parties.

Petitioner next complains that the trial court abused its discretion in not awarding attorneys' fees in the District Court. Respondent paid a temporary attorneys' fee of $100 pursuant to an order on a temporary allowance. At the time the action was started petitioner withdrew $250 from the joint checking account of the parties to apply to court costs and attorneys' fees. Undoubtedly the trial court took these circumstances into consideration in determining not to require respondent to pay further attorneys' fees and court costs. The

award of attorneys' fees and the taxing of costs is discretionary with the District Court. Sullivan v. Sullivan (1975), 192 Neb. 841, 224 N. W. 2d 542. The trial herein was a simple one. The two parties were the only witnesses sworn. The record, excluding the index and certificates, covers 62 pages. While we would have made an additional allowance, we cannot say that the trial court abused his discretion.

For the reasons given, the judgment of the District Court is affirmed. Plaintiff is allowed an additional $500 for the services of her attorney in both courts, and the costs in this court are taxed to the respondent.

AFFIRMED.

OMAHA PAPER STOCK COMPANY, INC., A NEBRASKA CORPORATION, APPELLANT, V. MARTIN K. EBY CONSTRUCTION CO., INC., A CORPORATION, APPELLEE.

230 N. W. 2d 87

Filed May 22, 1975. No. 39813.

Limitations of Actions: Time. An action for an injury to the rights of the plaintiff accrues under section 25-207, R. R. S. 1943, when the damage occurs and not when plaintiff discovers the cause of the damage.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Frederick S. Cassman of Abrahams, Kaslow & Cassman, for appellant.

Thomas Walsh of Walsh, Walentine & Miles, for appellee.

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

SPENCER, J.

Plaintiff appeals from an order of dismissal entered when it elected to stand on its amended petition to

which the trial court had sustained defendant's demurrer. The sole issue presented is when did plaintiff's cause of action accrue and the statute of limitations commence to run? We affirm.

On October 1, 1968, fire substantially destroyed plaintiff's warehouse, when no water flowed into its sprinkler system due to an underground break at some unknown point along the waterline. In October 1971, plaintiff discovered that its waterline had ruptured due to the settling of a 10-foot interceptor sewer laid by the defendant in 1960. Plaintiff predicates this action on the alleged negligent construction of that sewer in 1960. Plaintiff contends the sewer was constructed immediately over its waterline without adequate clearance or support and that its waterline ruptured due to the settling of this interceptor sewer.

Section 25-207, R. R. S. 1943, is the controlling statute herein. It provides as follows: "The following actions can only be brought within four years: (1) An action for trespass upon real property; (2) an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; (3) an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; and (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud, except as provided in sections 76-288 to 76-298."

The period of limitations for plaintiff's tort action is 4 years. For the purposes of this appeal we accept the premise on which this case was presented by the parties. Did the statute commence to run on October 1, 1968, when plaintiff was actually damaged, or October 1971, when plaintiff learned what caused the break in its waterline?

Plaintiff analogizes its situation to our flood and overflow cases where we have held that the right to damages for an obstruction of a stream by an insufficient culvert

or drain does not accrue when the structure is built, but when the overflow actually results. See Schmutte v. State (1946), 147 Neb. 193, 22 N. W. 2d 691. Actually there is no analogy. In those cases we hold the statute begins to run when the injury actually occurs. Plaintiff here is contending for a discovery of cause rule which is an entirely different matter from the occurrence of the damage or injury.

It is to be noted that in subsection (4) of section 25-207, R. R. S. 1943, the cause of action in a case involving fraud does not accrue until the discovery of the fraud. Subsection (3) is not so limited. Plaintiff is seeking to have us read into subsection (3) the point for which it is contending, the cause of action shall not be deemed to have accrued until the discovery of the existence of the wrongful act. We decline to do so.

Plaintiff knew by October 1, 1968, that a break had occurred in its waterline. It would seem reasonable to believe when plaintiff discovered that "no water flowed from the 8-inch water line to the automatic sprinkler systems" some attempt would have been made promptly to trace the cause. Plaintiff slept on whatever rights it may have had for 3 years. When the waterline was excavated for rebuilding purposes in October 1971, plaintiff discovered what it now claims was the cause of the break. This was well within the statutory period assumed by the defendant and the court to be applicable. Still, plaintiff waited until March 7, 1973, or approximately 17 months thereafter, to file its petition herein.

In Patterson v. Renstrom (1972), 188 Neb. 78, 195 N. W. 2d 193, we were urged to extend the discovery rule followed in malpractice and fraud cases to an action for damages as the result of publication of alleged slanderous, libelous, and defamatory letters. We declined to do so.

Plaintiff alleges that "the cause of the damage to the 8-inch water line did not manifest itself or become apparent until October of 1971" and contends this should

toll the statute. Plaintiff knew October 1, 1968, that some of its fire damage was attributable to the fact that no water flowed from its waterline into its sprinkler system. Even in malpractice and fraud cases where a discovery rule is applied, it is not the actual discovery of the reason for the injury which is the criteria. In those cases we have consistently held that discovery means discovery of facts constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. Patterson v. Renstrom (1972), 188 Neb. 78, 195 N. W. 2d 193.

It is the statute that makes the discovery rule applicable in fraud cases. It is true, this court has made it applicable in cases involving medical malpractice. However, this was done because of strong public policy considerations which set those cases apart from other torts. This is sufficiently noted in Spath v. Morrow (1962), 174 Neb. 38, 115 N. W. 2d 581. Those same public policy considerations are not present here. To apply the discovery rule to a situation such as this would effectively defeat the purpose which is responsible for limitation of actions. An action for an injury to the rights of the plaintiff accrues under section 25-207, R. R. S. 1943, when the damage occurs and not when plaintiff discovers the cause of the damage.

The defendant's demurrer to plaintiff's amended petition was properly sustained. The trial court was correct in entering an order of dismissal when plaintiff elected to stand on its amended petition. The judgment is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BENJAMIN DAVID ENS, APPELLANT.
229 N. W. 2d 208

Filed May 22, 1975. No. 39838.

Sentences: Probation and Parole: Criminal Law. In imposing sentence and denying probation in a criminal case, the judgment of the District Court will not be disturbed on appeal unless the record shows an abuse of discretion.

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

T. Clement Gaughan and Richard L. Goos, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

SPENCER, J.

Defendant appeals from a conviction on a plea of nolo contendere to an amended information of assault with intent to rape. Defendant was sentenced to 2 years in the Nebraska Penal and Correctional Complex. He here contends the sentence is excessive and the trial court erred in not finding him a proper subject for probation. We affirm.

Defendant was originally charged with the felony offense of incest. On September 20, 1974, pursuant to a plea bargain, he was arraigned on an amended information charging assault with intent to commit rape. His plea of nolo contendere was accepted by the court. The penalty for this offense is imprisonment in the Nebraska Penal and Correctional Complex for not more than 15 nor less than 2 years. Defendant was given the minimum sentence of 2 years.

Did the trial court err in not placing defendant on probation? Defendant is 38 years of age, a high school

graduate, twice divorced, and the father of four daughters. He was originally charged with incest with his oldest daughter who was 15. As a result of a plea bargain, he was permitted to plead to this lesser offense on which he received the minimum penalty. In imposing sentence and denying probation in a criminal case, the judgment of the District Court will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Heckathorn (1973), 190 Neb. 418, 208 N. W. 2d 689. Our review of the record and the presentence report sustains the conclusion that the trial court did not abuse its discretion.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WAYNE RADTKE, APPELLANT.
229 N. W. 2d 209

Filed May 22, 1975. No. 39844.

Appeal from the District Court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

William G. Line of Kerrigan, Line, Martin & Hanson, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

BOSLAUGH, J.

The defendant was originally charged with felonious assault and robbery. Upon arraignment he pleaded not guilty by reason of mental derangement.

A mental examination was made which disclosed no evidence of an emotional or mental disorder. The de-

fendant then pleaded guilty to the assault count and the robbery count was dismissed.

The county attorney recommended the defendant be granted probation. This recommendation was made as a part of the plea bargain and the defendant understood the recommendation was not binding on the court. The trial court sentenced the defendant to imprisonment for 2 years. The defendant has appealed and contends he should have been placed on probation.

The defendant is a construction worker, 40 years of age. He is married and has four children. He has no criminal record other than traffic offenses, and appears to have been a satisfactory employee.

On the day the assault occurred the defendant was not working because of inclement weather. He spent much of the day drinking. Late in the afternoon he drove to a park on the edge of Fremont, Nebraska, with Harold McKee, another man, and two women who had been in a bar with him. After arriving at the park, the defendant struck McKee about the head and face with a claw hammer and more than $100 was taken from his billfold. The defendant, the other man, and the women then left the park. Statements in the police report indicate the defendant may have intended to kill McKee and thought he was dead when they left the park.

The incident was reported to the police by the women. McKee was found badly injured but still alive. The defendant claims he has no recollection of the assault.

The sentence imposed was the minimum provided by statute. § 28-409, R. R. S. 1943. Probation might have been appropriate except for the seriousness of the offense and the violence with which it was committed. Under the circumstances of this case, the sentence imposed was not excessive.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ELMER RUBEN GOCHENOUR, APPELLANT.
230 N. W. 2d 90

Filed May 22, 1975. No. 39848.

1. **Sentences: Criminal Law. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively.**
2. **———: ———. A sentence imposed within statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record.**

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

T. Clement Gaughan and Dennis G. Carlson, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

BRODKEY, J.

Defendant was charged with two counts of forgery. Pursuant to plea bargaining between his attorney and the county attorney's office, he entered a plea of nolo contendere to count I, and the second charge was dismissed. The District Court sentenced the defendant to a term of imprisonment from 3 to 5 years in the Nebraska Penal and Correctional Complex and ordered him to pay a fine of $5 and the costs of the action, the "term to be consecutive to the present term or terms now being served." At the time, the defendant was serving a term of 18 months imposed by the federal District Court for the criminal offense of escaping custody.

In this appeal he alleges: (1) The court erred in failing to run the sentence concurrent with the term previously imposed by the federal court, and (2) the sentence was excessive. We affirm.

The first assignment of error has been considered and decided in the recent case of State v. O'Kelly, *ante* p. 390, 227 N. W. 2d 415 (1975). We quote from the opinion in that case: "In defendant's last assignment of error, he argues that his sentences should run concurrently with a sentence imposed upon him in Iowa. In State v. Rodman (1974), 192 Neb. 403, 222 N. W. 2d 109, we said: 'It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively.' In State v. Cannady (1974), 192 Neb. 404, 222 N. W. 2d 110, the defendant contended that the District Court for Lancaster County, Nebraska, should make a sentence concurrent to one defendant was required to serve in Ohio. We there said: '* * * if this court were to make the Nebraska sentence concurrent to the Ohio sentence, it would in effect amount to no sentence at all and defendant would go unpunished for the crime he committed in this state. It is frivolous to suggest that the refusal of the trial court to adopt such position was an abuse of discretion.' That opinion is controlling on this point."

The defendant's claim that the sentence imposed upon him was excessive is likewise without merit. At the time of sentencing the defendant, the court made the following comments: "All right, the record shows that you have a record that can only be called terrible. You are one of the few persons I think can really be said that it seems when you are not institutionalized, you are committing crimes. The only time you are not committing crimes is when you are in prison. It's true that you apparently have an alcoholism problem, but some of these crimes you were involved in were pretty cunningly conducted. It took a lot of planning and conniving to commit them. It could be this alcoholism is just something very convenient to talk about when you are being sentenced and facing the judge." We have before us the presentence investigation report compiled by an adult probation officer, and suffice it to say that report com-

pletely substantiates the comments of the trial judge. In addition to a number of very serious felonies, it also discloses a clear pattern of bad check writing. Under the provisions of section 28-601, R. S. Supp., 1974, the penalty for forgery is imprisonment in the Nebraska Penal Complex for a space of time not exceeding 20 years nor less than 1 year, and the payment of a fine not exceeding $500. A sentence imposed within statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Zeigler, 191 Neb. 322, 215 N. W. 2d 80 (1974). Defendant's sentence in this case is well within the statutory limits and no abuse of discretion appears in the record.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH JOSEPH PALU, APPELLANT.
229 N. W. 2d 66

Filed May 22, 1975. No. 39853.

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

T. Clement Gaughan and Richard L. Goos, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

MCCOWN, J.

Pursuant to a plea bargain the defendant pleaded guilty to one count of burglary and the second burglary count was dismissed. The District Court imposed a sentence of 2 to 4 years imprisonment and the defendant

has appealed. The sole ground for appeal is that the sentence was excessive.

The two counts of burglary with which the defendant was originally charged involved burglaries of the same oil company, one on June 18 and one on July 21, 1974. Property taken in other burglaries was found in the residence defendant occupied with another individual but defendant denied any knowledge of other burglaries.

The defendant was 20 years old at the time of the burglaries in the summer of 1974. He had a prior petit larceny conviction. He was at one time a runaway from Boys Town and had a limited record of appearances in juvenile court.

The penalty for burglary is not more than 10 years nor less than 1 year imprisonment in the Nebraska Penal and Correctional Complex; or a fine not exceeding $500; or imprisonment in the county jail not exceeding 6 months.

While the sentence may be somewhat harsh in the case of a first felony offender, we cannot say that it constitutes an abuse of discretion under the factual circumstances here. Unless an abuse of discretion appears a sentence within statutory limits will not be disturbed on appeal. State v. Sheets, 191 Neb. 153, 214 N. W. 2d 379.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH D. CHRISTIAN, APPELLANT.
229 N. W. 2d 67

Filed May 22, 1975. No. 39928.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed as modified.

Albert T. Reddish, for appellant.

Paul L. Douglas Attorney General, and Terry R. Schaaf, for appellee.

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

NEWTON, J.

The defendant entered a plea of guilty to burglary of a filling station. He received a sentence of 1 to 3 years to the Department of Correctional Services. The essence of his assignments of error is that the sentence was excessive. The judgment of the District Court is modified and affirmed.

The defendant was 18 years of age at the time of the offense. While released, pending a presentence investigation, he issued several no-fund checks. His only prior offense was the violation of traffic regulations. His mother and father were divorced and both had remarried. His home life was unsatisfactory and he apparently was treated with undue harshness. His record is such as to indicate that he at least verges on incorrigibility.

It is evident that this young man needs to be impressed with the knowledge that he can not continue his irresponsible conduct. On the other hand it does not appear that he is beyond redemption. If at all possible, rehabilitation is in the best interests of both the defendant and society. With this in view, we are inclined to reduce the sentence imposed to one of 6 months in the county jail.

The judgment of the District Court is modified by a reduction of the sentence imposed to a sentence of 6 months in the county jail.

AFFIRMED AS MODIFIED.

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Alimony.

1. Among matters to be considered in making an al-

lowance of alimony are the circumstances of the parties, the duration of the marriage, the contributions to the marriage by each party, and the ability of the supported party to engage in gainful employment. Tuttle v. Tuttle ---------- 397

2. Under section 42-365, R. R. S. 1943, 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. Walker v. Walker ---------- 540
Gregg v. Gregg ---------- 811

3. Awards of property jointly to divorced parties requiring divided management and financial control are not generally commended. Walker v. Walker - 540

4. 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. Cumming v. Cumming ---------- 601

5. 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. Cumming v. Cumming -------- 601

6. Ordinarily the fixing of child support and alimony rests in the sound discretion of the court, and in the absence of abuse of discretion, will not be disturbed on appeal. Wheeler v. Wheeler ---------- 615

7. The earning capacity of the husband is an element to be considered in the allowance of alimony. Wheeler v. Wheeler ---------- 615

8. The provision for reasonable security for payment of alimony provided for in section 42-365, R. R. S. 1943, should not be invoked in the original decree except when compelling circumstances require it. Wheeler v. Wheeler ---------- 615

9. In determining an award of alimony, the trial court must consider the circumstances of the parties, the duration of the marriage, and the ability of the supported party to engage in gainful employment. Yelkin v. Yelkin ---------- 789

10. The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are al-

ways to be determined by the facts in each case and courts consider all pertinent facts in reaching an award that is just and equitable. Gregg v. Gregg ---------- 811

11. The fixing of alimony rests in each case within the sound discretion of the trial court. Badberg v. Badberg ---------- 844

12. Making temporary allowances during the pendency of an appeal applicable on the alimony awarded to the petitioner on the decree being appealed is approved when the trial judge has adequately adjusted the rights of the parties. Badberg v. Badberg ---------- 844

Animals.

1. Ordinarily the existence of vicious or dangerous propensities in a domestic animal and knowledge of such propensities are indispensable to liability on the part of the owner. Fritz v. Marten ------- 83

2. The Legislature, by enacting section 54-601, R. R. S. 1943, removed the common law restriction of proving scienter or knowledge of the dangerous propensities of dogs, but only as it applied to the actions of dogs specified in the statute. Donner v. Plymate 647

3. Obviously the Legislature was fully aware of the need for protection from the intentional, deliberate, and purposeful acts of dogs and as a result restricted section 54-601, R. R. S. 1943, to those acts manifesting such qualities. Donner v. Plymate -------- 647

4. When the words killing, wounding, worrying, or chasing as used in section 54-601, R. R. S. 1943, are read together, they exclude playful and mischievous acts of dogs. Donner v. Plymate ---------- 647

Appeal and Error.

1. A petition may be attacked at any stage of the proceedings on the ground it fails to state a cause of action, but where the attack is delayed until appeal the pleading will be liberally construed. Johnson v. Hays ---------- 54

2. The procedure and manner of appealing from an action of a county board of equalization is that formerly prescribed for an appeal of a judgment of a justice of the peace court to the District Court, but the time provisions therein referred to are in-

applicable for the perfecting of such an appeal. Knoefler Honey Farms v. County of Sherman ---- 95
3. In order to perfect an appeal to the District Court from a decision of a county board of equalization, pursuant to section 77-1510, R. R. S. 1943, all activities necessary to perfect such appeal, including the filing of notice of appeal, are required to be carried out within 45 days of the adjournment of the board. Knoefler Honey Farms v. County of Sherman ---------- 95
4. The District Court acquires jurisdiction by appeal from a decision of a county board of equalization, where the taxpayer gives notice of appeal, furnishes an appeal bond, and files in the office of the clerk of the District Court a transcript of the proceedings and order of the county board of equalization within the time allowed by law. Knoefler Honey Farms v. County of Sherman ---------- 95
5. The statutory procedure for appealing from an award of the appraisers in an eminent domain proceeding was not modified by the enactment of L. B. 1032, Laws 1972. Estate of Tetherow v. State ---------- 150
6. In an appeal from the award of the appraisers, the party first appealing has the burden of filing the petition in the District Court. Estate of Tetherow v. State ---------- 150
7. The filing and serving of notice of appeal as required by section 76-715, R. R. S. 1943, is jurisdictional. Estate of Tetherow v. State ---------- 150
8. The failure of the appealing party to plead within the time required may, unless good cause is shown, be grounds in the exercise of sound discretion by the District Court for dismissal of the appeal. Estate of Tetherow v. State ---------- 150
9. In an appeal to the District Court from a judgment of the small claims court under section 24-527, R. S. Supp., 1974, a party has the right to provide his own counsel and appear by such counsel in the District Court. Simon v. Lieberman ---------- 321
10. For a question of constitutionality to be considered by this court it must be previously raised in the trial court. State v. Moreno ---------- 351
11. Errors assigned but not argued will not be considered by this court. State v. Micek ---------- 379
12. Assignments of error on grounds available to the

defendant in the District Court must first have been presented to the District Court. State v. Taylor -- 388
13. Unless an error can be considered prejudicial to the rights of a defendant, it may not be considered as ground for reversal. State v. O'Kelly ---------- 390
14. The action of a party to an action for the dissolution of marriage in accepting the benefits of a decree in respect to his or her own interests should not be permitted to affect adversely the interests of the children of the parties, and will not preclude consideration of an appeal to the extent such interests are involved. Reynek v. Reynek ---------- 404
15. This court will not take judicial notice of the rules of practice of the District Court. Fanning v. Richards ---------- 431
16. It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Silvacarvalho 447
17. An action for specific performance is triable de novo on appeal to this court. Dowd Grain Co., Inc. v. Pflug ---------- 483
18. It is not the province of this court to resolve conflicts in the evidence, to determine plausibility or reasonableness of explanations, or to weigh the evidence. State v. Kelly ---------- 494
19. 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. Henrickson v. Dooley ---------- 509
20. It is not within the province of this court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court will review the judgment rendered, will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed on appeal unless clearly wrong. Buttner v. Omaha P. P. Dist. ---------- 515
21. The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong. Buttner v. Omaha P. P. Dist. ---------- 515
22. In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed

out to the trial court in a motion for a new trial and a ruling obtained thereon. State v. Cordell -- 562

23. This court will consider the fact that the trial court saw and heard the witnesses, and observed their demeanor, and will give great weight to the trial court's judgment as to credibility. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---------- 586

24. To justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake. Dort v. Swift & Co. ---------- 606

25. An order of a county superintendent changing school district boundaries under the provisions of section 79-402, R. R. S. 1943, may be collaterally attacked if the superintendent is without jurisdiction to act. School Dist. of Gering v. Stannard ---------- 624

26. Any decision of the Nebraska Liquor Control Commission granting or refusing to grant a license or permit for the sale of alcoholic liquors may be reversed, vacated, or modified by the District Court on appeal. Hadlock v. Nebraska Liquor Control Commission ---------- 721

27. Upon appeal in actions in equity, when the testimony of witnesses orally examined before the court upon the vital issues is conflicting, this court will, while trying the case de novo, 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. Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc. ---------- 781

28. Consideration of a cause on appeal is limited to errors assigned and discussed. Schetzer v. Sullivan 841

29. Purported evidence which does not appear in the record cannot be considered by this court on appeal. Schetzer v. Sullivan ---------- 841

Arrest.

1. Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. State v. Dussault ---------- 122

2. Where the police were advised by an informant

that a certain individual, identified by name and address, was departing by a specified airline flight for a California destination and was in possession of a large sum of money for the purpose of purchasing a specified quantity and type of drugs and would be returning on one or the other of two specified days on the same airline with the drugs in his luggage; and the police pursuant to this tip verify by their own personal observation and that of other law enforcement officers the departure, return, and identity of the individual and observe him pick up his luggage, probable cause for arrest and search without warrant may be said to exist. State v. Dussault 122

3. The applicable standard for an arrest without warrant is that there must exist reasonable ground to believe both that a felony has been committed and that the person arrested is guilty of such offense. This standard, under our statutory and case law, is the same standard as that of the Fourth Amendment to the Constitution of the United States protecting persons against unreasonable seizures. State v. Russ ---------- 308

4. When authorized to make an arrest for a felony without a warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance. The constitutional exercise of such authority is subject to the condition that the officer has probable cause to believe the person sought is within the building. No search warrant is required in this circumstance. State v. Russ ---------- 308

5. An illegal search and seizure or arrest issue cannot be considered in a post conviction review where the circumstances of the search and seizure or arrest were fully known to the defendant at the time of the trial resulting in his conviction. State v. Russ 308

6. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the

status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. State v. Micek -- 379

7. The applicable standard for an arrest without warrant is that there must exist reasonable ground to believe both that a felony has been committed and that the person arrested is guilty of such offense. State v. Atwater ---------- 669
8. There is no formula for the determination of reasonableness for an arrest without a warrant. Each case is to be decided on its own facts and circumstances. The ultimate test is whether the action of the officers was reasonable. State v. Atwater ---------- 669
9. The information supplied to a judicial officer issuing a search warrant on a sworn complaint may be supplemented by additional information which the arresting officers themselves have or have acquired before the arrest and which is corroborative of the complicity of the arrestee in the crime. State v. Graves ---------- 797

Assessments.

The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. Matzke v. City of Seward ---------- 211

Assignments.

A provision in a contract for the sale of land prohibiting an assignment of the contract without the consent of the other party is usually considered to be a provision to safeguard performance of the contract. Where the contract has been performed, or performance has been tendered, the provision is usually considered unenforceable. Riffey v. Schulke --------- 317

Assumption of Risk.

1. It is essential to the application of the doctrine of assumption of risk that the plaintiff have knowledge of the unreasonable character of the risk. Jensen v. Hawkins Constr. Co. ---------- 220
2. Assumption of risk is available as a defense when

one voluntarily exposes himself to the injury, even though it plays no part in causing the injury. Circo v. Sisson ---------- 704
3. The defense of contributory negligence and assumption of risk are not inconsistent defenses, although the evidence as to one may tend to prove the other. Circo v. Sisson ---------- 704

Attorneys at Law.
1. The allowance of a reasonable attorney's fee for necessary services performed by an attorney will not be reversed on appeal in the absence of a showing of an abuse of discretion by the trial court in making the allowance. Y Motel, Inc. v. State ---- 526
2. Where an action is brought pursuant to section 23-930, R. R. S. 1943, the trial court is without authority to award the plaintiff an attorney's fee or to charge an award of attorney's fees as costs against the defendant. Willms v. Nebraska City Airport Authority ---------- 567
3. Misconduct of an attorney acting in an official capacity has been held to constitute ground for his suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729
4. Respondent was guilty of extreme negligence in his failure to familiarize himself with section 77-1918, R. R. S. 1943. The fact that he was extremely busy does not absolve him of this responsibility. State ex rel. Nebraska State Bar Assn. v. Holscher ----- 729
5. The gravamen of Disciplinary Rule 7-102(A) (3) and (5) is the intentional concealment, failure to disclose, or knowingly making a false statement. State ex rel. Nebraska State Bar Assn. v. Holscher 729
6. Disciplinary Rule 8-101(A) (2) prohibits a lawyer who holds public office from using that office to influence or attempt to influence a tribunal to act in favor of himself or a client. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729
7. A county board is a tribunal embraced within the ambit of Disciplinary Rule 8-101. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729
8. The amount allowed as attorney's fees in a condemnation case should be fixed as though the services were performed by one attorney unless the circumstances are such as to require the services

of two or more attorneys. Harmony Lanes v. State 826
9. The award of attorneys' fees and the taxing of costs is discretionary with the District Court. Badberg v. Badberg ---------- 844

Bail.

1. If a surety on a bail bond fails to deliver his principal into the custody of a proper officer of the law or to procure his attendance in court as the bond requires, the liability of the makers of the bond for the penalty thereof becomes absolute and the bond should be forfeited. State v. Kennedy ---------- 472
2. A bail bond is a contract between the surety and the State that if the latter will release the principal from custody the surety will undertake that the principal will appear personally at any specified time and place to answer the charge against him; and upon the failure of the principal to so appear the makers of the bond become absolute debtors of the State in the amount of the penalty of the bond. State v. Kennedy ---------- 472
3. When a surety makes a bail bond it assumes the risk involved if its faith in the principal is misplaced. State v. Kennedy ---------- 472
4. In a forfeiture action there is no duty on the part of the State to prove damages. State v. Kennedy - 472
5. Section 29-1107, R. R. S. 1943, gives the District Court authority to remit a part or all the penalty of a bail bond in its sound discretion, to be exercised as to what is right and equitable under the circumstances of the individual case. State v. Kennedy ---------- 472

Banks and Banking.

1. Under section 3-802, U.C.C., unless otherwise agreed, where a personal check is taken for an underlying obligation, the obligation is suspended pro tanto until the presentment of the check. If the check is dishonored an action may be maintained on either the check or the obligation. Westland Homes Corp. v. Hall ---------- 237
2. Where a federal savings and loan association installs a computer terminal in a retail store as authorized by the Federal Home Loan Bank Board for the purpose of facilitating the electronic transfer of funds

between the association and its depositors, the owner or operator of the store, by manning the computer terminal and assisting in such electronic transfer of funds under the facts here, is not engaging in either a banking or savings and loan business. State ex rel. Meyer v. American Community Stores Corp. ---------- 634

Bills and Notes.

When the acceleration provision of an installment note is optional with the holder of the note, the statute of limitations commences to run upon each installment as it becomes due in the absence of an effective declaration that the entire amount is due. Becker v. Lammers ---------- 839

Bonds.

1. No action may be maintained on a guardian's bond until the amount due thereon has been ascertained and judgment therefor entered. Sherwood v. Merchants Mut. Bonding Co. ---------- 262
2. If a surety on a bail bond fails to deliver his principal into the custody of a proper officer of the law or to procure his attendance in court as the bond requires, the liability of the makers of the bond for the penalty thereof becomes absolute and the bond should be forfeited. State v. Kennedy ---------- 472
3. A bail bond is a contract between the surety and the State that if the latter will release the principal from custody the surety will undertake that the principal will appear personally at any specified time and place to answer the charge against him; and upon the failure of the principal to so appear the makers of the bond become absolute debtors of the State in the amount of the penalty of the bond. State v. Kennedy ---------- 472
4. When a surety makes a bail bond it assumes the risk involved if its faith in the principal is misplaced. State v. Kennedy ---------- 472

Brokers.

1. Section 36-107, R. R. S. 1943, requires that a sale of real estate made through a broker be in writing between the broker and the landowner. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ------ 586

2. When an owner lists his property with a business broker for sale, it is generally understood that the broker's duties are merely to find a purchaser. Preisendorf v. Jenkins ---------- 611
3. A listing by the owner does not constitute an offer to any third party, but is merely an employment contract between owner and broker. Preisendorf v. Jenkins ---------- 611

Budgets.

1. Full compliance with the requirements of the Nebraska Budget Act, sections 23-921 to 23-933, R. R. S. 1943, is mandatory and jurisdictional, and a budget of an airport authority adopted without full compliance with those requirements is void, and may be set aside in an action brought under section 23-930, R. R. S. 1943. Willms v. Nebraska City Airport Authority ---------- 567
2. Where an action is brought pursuant to section 23-930, R. R. S. 1943, the trial court is without authority to award the plaintiff an attorney's fee or to charge an award of attorney's fees as costs against the defendant. Willms v. Nebraska City Airport Authority ---------- 567

Burglary.

1. Unlimited consent to enter a building is generally a defense to burglary, but a consent limited as to place, time, or purpose is not a defense if the entry occurred outside the limitation. State v. Pappan -- 80
2. It is not the law of Nebraska that failure to consummate the crime of burglary is an essential element of attempted burglary. State v. Gallegos ---- 651

Carriers.

1. "Car service" connotes the use to which the vehicles of transportation are put; not the transportation service by means of them. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ------ 59
2. Where a subject is national in its character and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one to another, Congress alone can provide the needed regulations. In such a case the federal power is

exclusive, and the states may not act even though Congress has not exerted its legislative authority, the silence of Congress being equivalent to a declaration that the particular commerce shall be free from regulation. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59

3. Common carriers of passengers for hire are required to exercise the utmost skill, diligence, and foresight for the protection of their passengers, consistent with the business in which they are engaged. They are liable for the slightest negligence but they are not held to the strict liability of insurers. Ware v. Yellow Cab, Inc. ---------- 159

4. The mere fact that a collison has occurred does not create a presumption that the common carrier was guilty of negligence. Ware v. Yellow Cab, Inc. --- 159

Commerce.

1. The commerce clause of the Constitution of the United States delegates to Congress the power to regulate interstate commerce. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. -- 59

2. The power to regulate interstate commerce is plenary in nature and has been held to embrace matters which are intrastate in nature but which affect interstate commerce. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59

3. The extent of federal preemption is determined by an inquiry into the congressional intent underlying the federal law. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59

4. The fact that the Interstate Commerce Commission has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the act delegating the power. The question is whether the federal act was intended to occupy the field. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59

5. Congress intended in the enactment of Title 49 U. S. C., section 1(15), that the exclusive power is vested in the Interstate Commerce Commission to regulate the distribution of railroad cars and to suspend administrative order-making due process pursuant to a declaration of emergency because of equipment shortage, priorities in use on a national level, or

congestion. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59

6. Implicit in the grant to the Interstate Commerce Commission of emergency powers is the implied power to determine that a particular subject or a particular geographical area remain unregulated. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59

7. The term "car service" includes the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59

8. Congress delegated, under the supervision of the Interstate Commerce Commission, the power and the duty of every carrier by railroad to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59

9. "Car service" connotes the use to which the vehicles of transportation are put; not the transportation service by means of them. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. -- 59

10. Where a subject is national in its character and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one to another, Congress alone can provide the needed regulations. In such a case the federal power is exclusive, and the states may not act even though Congress has not exerted its legislative authority, the silence of Congress being equivalent to a declaration that the particular commerce shall be free from regulation. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59

11. The exercise of jurisdiction by the Federal Communications Commission over the terms and conditions governing the interconnection of customer-provided telephone equipment to the nationwide telephone network has established the primacy of federal authority and preempts conflicting or inconsistent state regulation. Sherdon v. Dann ---------- 768

12. The action of the Federal Communications Commission does not foreclose any state from taking action of its own in the telephone interconnect area so long as such action does not derogate the interstate rulings. Sherdon v. Dann ---------- 768
13. Federal action in the telephone interconnect area does not foreclose any state from the full exercise of its investigatory powers with respect to the effects of interconnection as related to the quality of telephone service or the regulation by the state of intrastate rate structures and revenue requirements for services subject to its jurisdiction. Sherdon v. Dann ---------- 768

Common Law.

At common law a landlord has no duty to provide fire protection devices or services for his tenant. Such a duty may be assumed by contract or imposed by statute. The Geer Co. v. Hall County Airport Authority ---------- 17

Constitutional Law.

1. In the absence of a valid authorizing statute, such as section 39-669.08 et seq., R. R. S. 1943, the results of a test of blood for alcoholic content are inadmissible where the blood sample is taken involuntarily and the constitutional requirements of the Fourth Amendment to the United States Constitution have not been satisfied. State v. Howard ---- 45
2. The commerce clause of the Constitution of the United States delegates to Congress the power to regulate interstate commerce. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. -- 59
3. Congress intended in the enactment of Title 49 U. S. C., section 1(15), that the exclusive power is vested in the Interstate Commerce Commission to regulate the distribution of railroad cars and to suspend administrative order-making due process pursuant to a declaration of emergency because of equipment shortage, priorities in use on a national level, or congestion. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59
4. The Fourteenth Amendment to the Constitution of the United States does not compel state courts or legislatures to adopt any particular rule for estab-

lishing the conclusiveness of judgments in class suits. Gant v. City of Lincoln ---------- 108

5. A court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it. Gant v. City of Lincoln ---------- 108

6. Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. State v. Dussault ---------- 122

7. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Dussault ---------- 122

8. The test, under the Fourteenth Amendment to the Constitution of the United States, when a state statute operates to single out a class of people for special treatment, is whether the suspect classification bears some rational relationship to the legitimate purposes of the legislation. Botsch v. Reisdorff ---------- 165

9. In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution of the United States simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Botsch v. Reisdorff ---------- 165

10. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. Botsch v. Reisdorff ---------- 165

11. A minimum requirement to merit First Amendment protection is that the work in question has serious literary, artistic, political, or scientific value. State v. American Theater Corp. ---------- 289

12. The "knowingly" language of the statute, and the construction given by the District Court in this case,

satisfies the constitutional requirements of scienter. State v. American Theater Corp. ---------- 289

13. The general rule is that the Legislature may not delegate legislative powers to an administrative agency. State v. Cutright ---------- 303

14. To declare what shall constitute a crime and how it shall be punished is a power vested solely and exclusively in the Legislature and may not be delegated to an administrative agency. State v. Cutright 303

15. The exercise of a legislatively delegated authority to make rules and regulations to carry out an express legislative purpose, or for the complete operation or enforcement of a law with clearly designated limitations and standards, is not an exercise of legislative power. State v. Cutright ---------- 303

16. There is no unconstitutional delegation of legislative authority where the Legislature by statute defines a crime and provides a penalty therefor, but delegates to administrative or executive authority the implementation of the details thereof. State v. Cutright ---------- 303

17. In both civil and criminal cases the right to a hearing includes the right to appear by counsel, and the arbitrary refusal of such right constitutes a deprivation of due process. Simon v. Lieberman --------- 321

18. The Legislature can create a small claims court where informal hearings may be held without the assistance of counsel, so long as the right to appear by counsel is guaranteed in a real sense somewhere in the proceedings. Simon v. Lieberman ---------- 321

19. For a question of constitutionality to be considered by this court it must be previously raised in the trial court. State v. Moreno ---------- 351

20. No procedural principle is more familiar than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. State v. Moreno ---------- 351

21. The guest statute does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States nor any provision of the Constitution of the State of Nebraska. Lubash v. Langemeier ---------- 371
Circo v. Sisson ---------- 704

22. Section 28-477, R. S. Supp., 1974, is not unconstitutional on the ground that it is vague and indefinite. State v. Cialkowski ---------- 372

23. When the Legislature has adopted a revision of the statutes, reference to or consideration of the original title will not be made in a determination of constitutionality. Lost Creek Drainage Dist. v. Kring ---------- 450

24. The Legislature has the plenary power to fix school district boundaries by direct legislative action which, if otherwise valid, is unaffected by constitutional guaranties of procedural due process. Where, however, the Legislature has authorized school district boundary changes by private persons acting within guidelines and procedures established by the Legislature, procedural due process is required. School Dist. of Gering v. Stannard ---------- 624

25. Legal school voters of school districts involved in district boundary changes under section 79-402, R. R. S. 1943, are entitled to judicial review of the action of the county superintendent ordering such changes, including, when appropriate, the right of collateral attack; and such rights may not be barred by a statute of limitations enacted subsequent to the commencement of suit to challenge or review the same. School Dist. of Gering v. Stannard ---- 624

26. The power of the Legislature to create a body with appropriate powers to deal with the labor relations of governmental entities and departments does not depend upon the grant of power given by Article XV, section 9, of the Nebraska Constitution, but exists by virtue of the general grant of legislative power under Article III, section 1. Orleans Education Assn. v. School Dist. of Orleans ---------- 676

27. The Legislature has plenary legislative authority except as limited by the state and federal Constitutions. Orleans Education Assn. v. School Dist. of Orleans ---------- 676

28. Where the Legislature delegates to an administrative body authority to settle labor relation disputes, the delegation is valid if the statute making the delegation establishes a sufficient basic standard — a definite and certain policy and rule of action for the guidance of the agency created to administer

the law. The standards set forth in section 48-818, R. R. S. 1943, meet the above criterium. Orleans Education Assn. v. School Dist. of Orleans ------ 676

29. The jurisdiction of the Court of Industrial Relations is limited to what are clearly legislative concerns and the quasi-judicial powers which it exercises are merely incidental thereto. Section 48-818, R. R. S. 1943, does not delegate judicial powers to an administrative body in violation of Article II, section 1, or Article V, section 1, of the Nebraska Constitution. Orleans Education Assn. v. School Dist. of Orleans ---------- 676

30. The authority given to the Court of Industrial Relations to establish rates of pay and conditions of employment in accordance with the standards prescribed by section 48-818, R. R. S. 1943, does not constitute the delegation of legislative authority to act in violation of Article III, section 1, or Article VIII, section 6, of the Nebraska Constitution. Orleans Education Assn. v. School Dist. of Orleans 676

31. The act creating the Court of Industrial Relations is not amendatory of section 79-810, R. R. S. 1943, granting budget-making authority to school districts and hence does not violate Article III, section 14, of the Nebraska Constitution. Orleans Education Assn. v. School Dist. of Orleans ---------- 676

Continuances.

1. 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. Korte v. Betzer ---------- 15

2. A motion for continuance or for postponement of trial is addressed to the sound discretion of the trial court and an order denying it will not be disturbed on appeal unless there is a clear abuse of discretion. State v. Newton ---------- 129

3. An affidavit in support of a motion to continue a trial indefinitely until a witness can be found is insufficient where there is no information as to the witness' whereabouts nor any showing that either the witness' personal attendance or testimony will probably be obtained. State v. Newton ---------- 129

Contracts.

1. At common law a landlord has no duty to provide fire protection devices or services for his tenant. Such a duty may be assumed by contract or imposed by statute. The Geer Co. v. Hall County Airport Authority ---------- 17
2. There is inherent justice in the requirement that one who undertakes to perform a duty gratuitously should not be under the same obligation as one who enters upon the same undertaking for compensation. Botsch v. Reisdorff ---------- 165
3. A distinction between the duty imposed in the case of gratuitous performance of services and the performance of them for hire is to be found running through many fields of law. Botsch v. Reisdorff -- 165
4. Under section 52-102, R. R. S. 1943, the risk of all payments made to the original contractor is upon the owner until the expiration of the time for filing any subcontractor's lien. Westland Homes Corp. v. Hall ---------- 237
5. A contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered, and such procedure would not offend against justice and equity. Riffey v. Schulke ---------- 317
6. Applications for strict foreclosure of land contracts are addressed to the sound legal discretion of the court, and will be granted where it would be inequitable and unjust to refuse them. Riffey v. Schulke ---------- 317
7. Strict foreclosure will be decreed only under peculiar and special circumstances where the purchaser does not have a substantial equity in the property. Riffey v. Schulke ---------- 317
8. Where strict foreclosure is granted, the defaulting party is entitled to a reasonable time to avoid its consequences by performing the contract. Riffey v. Schulke ---------- 317
9. A provision in a contract for the sale of land prohibiting an assignment of the contract without the consent of the other party is usually considered to be a provision to safeguard performance of the contract. Where the contract has been performed, or

performance has been tendered, the provision is usually considered unenforceable. Riffey v. Schulke 317

10. Execution of a covenant not to levy in favor of an uninsured motorist bars recovery under uninsured motorist coverage where the policy provides the insured will hold all rights of recovery in trust for the benefit of the insurer and do nothing after loss to prejudice such rights. Hastings v. Fireman's Fund American Ins. Co. ---------- 417

11. In the ordinary contract for the sale of real estate, time is not of the essence unless so provided in the instrument itself or is clearly manifested by the agreement construed in the light of the surrounding circumstances. Where time is not of the essence, performance must be within a reasonable time. Dowd Grain Co., Inc. v. Pflug ---------- 483

12. Specific performance should, in general be granted as a matter of course, of a written contract cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship and when the ends of justice will be served thereby. Dowd Grain Co., Inc. v. Pflug ---------- 483

13. In a contract for the sale of land, specific performance may properly be decreed in spite of a minor breach by the plaintiff involving no substantial failure of the exchange for the performance to be compelled. Dowd Grain Co., Inc. v. Pflug ---------- 483

14. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of their contract, and should be given great, if not controlling influence, and the courts should ordinarily enforce such construction. Reed v. Nice-Pak Products, Inc. ---------- 505
Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---------- 586

15. Generally an agent acting for a disclosed principal is not liable for the contracts of the principal. Reed v. Nice-Pak Products, Inc. ---------- 505

16. 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. Omaha P. P. Dist. v. Natkin & Co. ---------- 518

17. When there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it. Omaha P. P. Dist. v. Natkin & Co. ---------- 518
18. The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract. Omaha P. P. Dist. v. Natkin & Co. -- 518
19. Construction "in a good and workmanlike manner" is determined according to good usage and accepted practice by a competent workman in the community. Newson Constr. Co. v. Calvery Assembly of God Church ---------- 556
20. Where a contract is plain and unambiguous, it will be enforced according to its terms. Newson Constr. Co. v. Calvary Assembly of God Church ---------- 556
21. Where a contract, after preliminary negotiations and oral conversations, is reduced to writing that is clear and unambiguous, there is a conclusive presumption that the parties have reduced their entire engagement to writing, and that any parol agreement is merged in the written contract, and that testimony of prior or contemporaneous conversations to alter, contradict, or explain such writing is incompetent to vary the terms of the written instrument. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---------- 586
22. In determining whether a sale is by the acre or in gross, the intention of the parties is controlling, as in other contracts, and must be given effect. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---- 586
23. If there is ambiguity in the contract as to whether a sale is strictly in gross or one by the acre, extrinsic evidence, such as the circumstances which surround the parties, and their situations, may be admissible as an aid in interpreting the contract to ascertain the intention of the parties. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---------- 586
24. A contract of sale by the tract or in gross is one wherein boundaries are specified but quantity is not specified or, if specified, the existence of exact quantities specified is not material; each party takes the risk of the actual quantity varying to some extent from what he expected it to be. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ------ 586

25. A contract may be originally one by the acre and subsequently so modified as to be turned into a sale in gross. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---------- 586
26. Section 36-107, R. R. S. 1943, requires that a sale of real estate made through a broker be in writing between the broker and the landowner. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---------- 586
27. When an owner lists his property with a business broker for sale, it is generally understood that the broker's duties are merely to find a purchaser. Preisendorf v. Jenkins ---------- 611
28. A listing by the owner does not constitute an offer to any third party, but is merely an employment contract between owner and broker. Preisendorf v. Jenkins ---------- 611
29. Before there can be specific performance of an oral contract, the contract itself must be proved. Preisendorf v. Jenkins ---------- 611
30. The parties to a contract may avoid a provision requiring prior written authorization for additional work where their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment of the provision, or the party claiming the benefit of the provision is estopped to rely on it. Griffin v. Geneva Industries, Inc. ---------- 694
31. Antenuptial agreements should be construed according to the intentions of the parties and the conditions and circumstances attending their execution. Anderl v. Willsey ---------- 698
32. A liberal construction of an antenuptial agreement will be indulged in order to carry out the intention of the parties. Anderl v. Willsey ---------- 698
33. A contract for sale of real estate may not be strictly foreclosed where it is clear that the value of the property greatly exceeds the amount due. Yelkin v. Yelkin ---------- 789
34. Where the obligation is clear and its essential character has not been changed by lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, especially between the immediate parties to the litigation. Lammers v. Lammers 836

Contributing to Delinquency.

Section 28-477, R. S. Supp., 1974, is not unconstitutional

on the ground that it is vague and indefinite. State v. Cialkowski ---------- 372

Contribution.

1. To the extent that Tober v. Hampton, 178 Neb. 858, 136 N. W. 2d 194, and Farmer's Elevator Mut. Ins. Co. v. American Mut. Liability Ins. Co., 185 Neb. 4, 173 N. W. 2d 378, announced the rule that there may be no contribution between negligent joint tort-feasors, those cases are overruled. Royal Ind. Co. v. Aetna Cas. & Sur. Co. ---------- 752
2. A right to equitable contribution exists among judgment debtors jointly liable in tort for damages negligently caused, which right becomes enforceable on behalf of any party when he discharges more than his proportionate share of the judgment. Royal Ind. Co. v. Aetna Cas. & Sur. Co. ---------- 752
3. Even in the absence of a contractual policy provision so providing, where an insurer of a joint judgment debtor jointly liable in tort for damage negligently caused discharges more than its insured's proportionate share of the common liability, such insurer is subrogated to the right of its insured to recover contribution from the other judgment debtors. Royal Ind. Co. v. Aetna Cas. & Sur. Co. ---------- 752

Controlled Substances.

1. Where the police were advised by an informant that a certain individual, identified by name and address, was departing by a specified airline flight for a California destination and was in possession of a large sum of money for the purpose of purchasing a specified quantity and type of drugs and would be returning on one or the other of two specified days on the same airline with the drugs in his luggage; and the police pursuant to this tip verify by their own personal observation and that of other law enforcement officers the departure, return, and identity of the individual and observe him pick up his luggage, probable cause for arrest and search without warrant may be said to exist. State v. Dussault -- 122
2. For an affidavit based upon a tip from an informant to be sufficient, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were

located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible. State v. Glouser ---------- 190
State v. Graves ---------- 797
3. The term "cannabis sativa L" as used in section 28-4,115 (14), R. S. Supp., 1974, includes all species of the genus cannabis. State v. Claire ---------- 341

Costs.

1. The fact that one of the parties to an action for the dissolution of marriage has committed adultery will not as a matter of law prevent an award of attorney's fees or affect the payment of costs under sections 42-351 and 42-367, R. R. S. 1943. Lockard v. Lockard ---------- 400
2. The award of attorneys' fees and the taxing of costs is discretionary with the District Court. Badberg v. Badberg ---------- 844

Counties.

1. L.B. 549, Laws 1973, page 1309 (now section 5-108, R. S. Supp., 1974), does not permanently change the method of electing governing boards by districts but provides for at large elections for counties with district elections until the county is properly redistricted. State ex rel. Hansen v. Seiler ---------- 9
2. The procedure and manner of appealing from an action of a county board of equalization is that formerly prescribed for an appeal of a judgment of a justice of the peace court to the District Court, but the time provisions therein referred to are inapplicable for the perfecting of such an appeal. Knoefler Honey Farms v. County of Sherman ---------- 95
3. In order to perfect an appeal to the District Court from a decision of a county board of equalization, pursuant to section 77-1510, R. R. S. 1943, all activities necessary to perfect such appeal, including the filing of notice of appeal, are required to be carried out within 45 days of the adjournment of the board. Knoefler Honey Farms v. County of Sherman ---------- 95
4. The District Court acquires jurisdiction by appeal from a decision of a county board of equalization, where the taxpayer gives notice of appeal, furnishes

an appeal bond, and files in the office of the clerk of the District Court a transcript of the proceedings and order of the county board of equalization within the time allowed by law. Knoefler Honey Farms v. County of Sherman ---------- 95

County Boards.

A county board is a tribunal embraced within the ambit of Disciplinary Rule 8-101. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729

Court of Industrial Relations.

1. That provision of section 48-817, R. R. S. 1943, prohibiting a retroactive order is interpreted to mean that the orders of the Court of Industrial Relations cannot apply to a period prior to that embraced within the dispute submitted to it. Crete Education Assn. v. School Dist. of Crete ---------- 245
2. In selecting school districts for the purpose of comparison pursuant to section 48-818, R. R. S. 1943, the ultimate question is whether, as a matter of fact, the school districts selected for comparison are sufficiently similar to the subject district to fulfill the requirements of section 48-818, R. R. S. 1943, and the mere fact that one set of school districts was deemed adequate in one case does not mean that a different set of school districts would necessarily be inadequate in a different case. Crete Education Assn. v. School Dist. of Crete ---------- 245
3. The Court of Industrial Relations, in establishing wage rates is compelled by section 48-818, R. R. S. 1943, to consider the entire situation regarding the fringe benefits made available by the subject employer and those made available by comparable employers. Crete Education Assn. v. School Dist. of Crete ---------- 245
4. The jurisdiction of the Court of Industrial Relations is limited to what are clearly legislative concerns and the quasi-judicial powers which it exercises are merely incidental thereto. Section 48-818, R. R. S. 1943, does not delegate judicial powers to an administrative body in violation of Article II, section 1, or Article V, section 1, of the Nebraska Constitution. Orleans Education Assn. v. School Dist. of Orleans 676
5. The authority given to the Court of Industrial Rela-

tions to establish rates of pay and conditions of employment in accordance with the standards prescribed by section 48-818, R. R. S. 1943, does not constitute the delegation of legislative authority to act in violation of Article III, section 1, or Article VIII, section 6, of the Nebraska Constitution. Orleans Education Assn. v. School Dist. of Orleans 676

6. The act creating the Court of Industrial Relations is not amendatory of section 79-810, R. R. S. 1943, granting budget-making authority to school districts and hence does not violate Article III, section 14, of the Nebraska Constitution. Orleans Education Assn. v. School Dist. of Orleans ---------- 676

Courts.

1. The county court and the District Court have concurrent jurisdiction in supervision over the administration of testamentary trusts. Johnson v. Hays 54
2. There is no requirement that the arraignment and the sentencing hearing be conducted by the same District Judge. State v. Hilderbrand ---------- 233
3. The Legislature can create a small claims court where informal hearings may be held without the assistance of counsel, so long as the right to appear by counsel is guaranteed in a real sense somewhere in the proceedings. Simon v. Lieberman ---------- 321
4. In an appeal to the District Court from a judgment of the small claims court under section 24-527, R. S. Supp., 1974, a party has the right to provide his own counsel and appear by such counsel in the District Court. Simon v. Lieberman ---------- 321
5. An action by the District Court in denying probation and imposing a sentence to confinement will not be disturbed on appeal unless an abuse of discretion can be found in the record. State v. Roberts 363

Criminal Law.

1. A defendant's character witness may, on cross-examination, be asked if he has heard that the defendant has been previously convicted or arrested for other crimes, provided such misconduct occurred prior to, and not after, the commission of the crime charged. State v. Casados ---------- 28
2. The scope of the cross-examination of a character witness, in the absence of an abuse of discretion, is discretionary with the trial court. State v. Casados 28

3. The cross-examination of a character witness as to other misconduct on the part of a defendant is admissible, not to establish the truth of the facts, but to test the credibility of the witness and ascertain the weight to be given to his testimony, and must be made in good faith. State v. Casados ---------- 28
4. In the prosecution of a violation under section 28-1011.22 (7) (b), R. S. Supp., 1972, intent is a material element of the offense charged. State v. Casados 28
5. A finding that a defendant has violated his probation must be established by clear and convincing evidence. State v. Howard ---------- 45
6. In the absence of a valid authorizing statute, such as section 39-669.08 et seq., R. R. S. 1943, the results of a test of blood for alcoholic content are inadmissible where the blood sample is taken involuntarily and the constitutional requirements of the Fourth Amendment to the United States Constitution have not been satisfied. State v. Howard ---------- 45
7. The provisions of the implied consent statutes are applicable only to prosecutions for offenses arising out of acts alleged to have been committed while the person was driving or was in the actual physical control of a motor vehicle while under the influence of alcoholic liquor. State v. Howard ---------- 45
8. In the absence of some statute making provision for the effect to be given a test of body fluid for alcoholic content, expert testimony is necessary to make the results admissible. State v. Howard ---------- 45
9. Unlimited consent to enter a building is generally a defense to burglary, but a consent limited as to place, time, or purpose is not a defense if the entry occurred outside the limitation. State v. Pappan -- 80
10. In a prosecution for rape, after the prosecutrix has testified to the commission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made. State v. Castor ---------- 86
11. The testimony concerning such complaint should, on direct examination, be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was

a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae. State v. Castor ---------- 86

12. A witness may be interrogated as to his previous convictions for a felony, but no other proof of such conviction is competent except the record thereof. State v. Kallos ---------- 113

13. Where a witness on cross-examination admits previous conviction of a felony, it is error to allow further inquiry of the witness on the subject other than as to the number of his prior felony convictions. State v. Kallos ---------- 113

14. A motion for continuance or for postponement of trial is addressed to the sound discretion of the trial court and an order denying it will not be disturbed on appeal unless there is a clear abuse of discretion. State v. Newton ---------- 129

15. 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. Glouser ---------- 186
State v. Atwater ---------- 669

16. There is no requirement that the arraignment and the sentencing hearing be conducted by the same District Judge. State v. Hilderbrand ---------- 233

17. Unless it is impractical to do so, the court shall not impose sentence upon an offender convicted of a felony without first ordering a presentence investigation of the offender and giving due consideration to the report of the investigation. State v. Hilderbrand ---------- 233

18. The constitutional provisions against double jeopardy protect against both multiple prosecutions and multiple punishments for the same offense. State v. Gaston ---------- 259

19. Where a sentence not authorized by law has been imposed, an appellate court may remand the cause with directions to impose a lawful sentence even though a part of the invalid sentence has been served. State v. Gaston ---------- 259

20. If the sentence first imposed was invalid, the sentence imposed after remand does not violate the con-

stitutional prohibition against double jeopardy. State v. Gaston ---------- 259

21. The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses arising out of the same transaction or the same chain of events is whether the offense charged in one count involves any different elements than an offense charged in another count. State v. Saxon 278

22. Constitutional provisions against double jeopardy are not violated by the imposition of consecutive sentences, one for robbery in violation of section 28-414, R. R. S. 1943, and one for the use of a firearm in the commission of a felony in violation of section 28-1011.21, R. S. Supp., 1974, even though both of the offenses charged arise out of the same transaction or the same chain of events. State v. Saxon ---------- 278

23. An erroneous instruction in a criminal case is not ground for reversal unless prejudicial to the defendant. State v. Garza ---------- 283

24. The applicable standard for an arrest without warrant is that there must exist reasonable ground to believe both that a felony has been committed and that the person arrested is guilty of such offense. This standard, under our statutory and case law, is the same standard as that of the Fourth Amendment to the Constitution of the United States protecting persons against unreasonable seizures. State v. Russ ---------- 308

25. When authorized to make an arrest for a felony without a warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance. The constitutional exercise of such authority is subject to the condition that the officer has probable cause to believe the person sought is within the building. No search warrant is required in this circumstance. State v. Russ ---------- 308

26. A woman who is chaste is one who has never had sexual intercourse with a male person. An act of sexual intercourse without her consent and against her will if she is capable of consent does not destroy her chastity. State v. Richards ---------- 345

27. While substantial, the prosecutor's duty of candor

i.e., to disclose material evidence favorable to accused, is not all-encompassing; it neither requires full disclosure nor permits a combing of the prosecutor's files in search of evidence possibly useful to the accused. State v. Richards ---------- 345

28. A prosecutor's failure to disclose a report does not violate due process when there is no significant chance that the report, which could have been used solely for impeachment purposes, would induce a reasonable doubt in the jurors' minds or is inherently unfair. State v. Richards ---------- 345

29. A defendant who has ready access to a report mentioned in the court files cannot logically claim it was suppressed. State v. Richards ---------- 345

30. In a criminal case this court will not interfere on appeal with a verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Richards ---------- 345

31. In a criminal case where the sufficiency of the evidence is challenged on appeal, the Supreme Court will not interfere with a verdict of guilty or a finding of guilty by the court where a jury is waived, or not required, unless the evidence is so lacking in probative force that this court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Digilio ---------- 348

32. An action by the District Court in denying probation and imposing a sentence to confinement will not be disturbed on appeal unless an abuse of discretion can be found in the record. State v. Roberts 363

33. If a sentence imposed is within the statutory limits it will not be disturbed by this court on appeal in the absence of an abuse of judicial discretion. The trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment, and includes the sentencing judge's observation as to demeanor, attitude, and all the facts and circumstances surrounding the life of the defendant. State v. Wade ---------- 365

34. The ruling of the trial court upon a severance of criminal prosecutions properly joined in a single indictment, information, or complaint will not be dis-

turbed on appeal, in the absence of an abuse of discretion. State v. Micek ---------- 379

35. The existence of probable cause must be determined by a practical and not any technical standard. State v. Micek ---------- 379

36. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. State v. Micek ---------- 379

37. At the hearing of any person charged with being an habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment. State v. Micek ---------- 379

38. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. State v. Micek -- 379

39. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively. State v. O'Kelly -------- 390
State v. Gochenour ---------- 855

40. It is frivolous to suggest that the refusal of a District Court to make a Nebraska sentence concurrent with a sentence in another jurisdiction is an abuse of discretion. State v. O'Kelly ---------- 390

41. Under section 29-1305, R. R. S. 1943, where an offense is committed on a county line, the trial of such offense may be had in either county divided by such line. State v. Lindsey ---------- 442

42. 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. Lindsey ---------- 442

43. A sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Anderson - 465
State v. Gochenour ---------- 855

44. A court's final judgment of guilt must be based on a valid jury verdict. State v. Anderson ---------- 467

45. A jury's action cannot become a verdict until it is finally rendered in open court and received and accepted by the trial judge. State v. Anderson -- 467

46. The decision in this case is controlled by our opinion and holding in State v. Lewis, 192 Neb. 518, 222 N. W. 2d 815, filed October 31, 1974. State v. Shropshire ---------- 470

47. Whether or not a jury should be sequestered during the trial of a criminal case is left to the sound discretion of the court. State v. Bautista ---------- 476

48. The time required for premeditation and deliberation may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. State v. Bautista ---- 476

49. The conviction herein is reversed for the failure of the trial court to grant a mistrial for the inexcusable conduct of the prosecution in presenting before the jury possible inferences of previous crimes on the part of the defendant. State v. Atwater -- 563

50. Defendants must be given fair trials, and it is the responsibility of the prosecution to see that each defendant receives one. State v. Atwater -------- 563

51. In Nebraska there are no common law crimes and we only resort to common law definitions where general terms are used to designate crimes. State v. Gallegos ---------- 651

52. It is not the law of Nebraska that failure to consummate the crime of burglary is an essential element of attempted burglary. State v. Gallegos -- 651

53. Where the statutory definition of the crime is the

attempt to do a certain act or acts, it is immaterial whether or not the objective of the attempt is successful, and the actual commission of a crime represents the execution of an attempt to commit it. State v. Gallegos ---------- 651

54. A written waiver of jury trial signed by the defendant is sufficient to constitute a valid waiver of a criminal defendant's right to a jury trial. State v. Svitak ---------- 660

55. 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. Svitak ---- 660

56. Unless an abuse of discretion appears, a sentence within statutory limits will not be disturbed on appeal. State v. Svitak ---------- 660

57. A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. State v. Atwater - 669

58. When subsequent to a defendant's conviction a statutory change is made in the law governing parole and the defendant thereafter violates his parole, the amendatory law is applicable and is not ex post facto in its application. Berry v. Wolff -- 717

59. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. State v. Graves ---------- 797

60. It is not proper to give an instruction on a lesser offense unless such an instruction is applicable and authorized by the evidence. State v. Maxwell ---- 807

61. In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses. State v. Maxwell ---------- 807

62. It is only when there is a total want of proof to support a material allegation of the information, or where the testimony in a criminal case is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that a court will be justified in directing a verdict of not guilty. State v. Maxwell 807

63. Notwithstanding the acceptance of a plea of guilty the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea. State v. Wayne ---------- 833

64. The acceptance of a plea of guilty is left largely to the discretion of the judge. The circumstances of the case will often dictate the kind and amount of inquiry which is necessary. State v. Wayne ---- 833
65. In accepting a guilty plea the criteria is whether or not the defendant understands the relevant factors involved in a guilty plea. State v. Wayne --- 833
66. Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea. State v. Wayne ---------- 833
67. In imposing sentence and denying probation in a criminal case, the judgment of the District Court will not be disturbed on appeal unless the record shows an abuse of direction. State v. Ens -------- 852

Damages.

1. Evidence as to damages must be such that a jury could determine the amount with reasonable certainty and the determination may not be based on pure speculation and conjecture. Sherman v. Travelers Ind. Co. ---------- 104
2. A verdict for damages will not be set aside unless it is so clearly exorbitant as to indicate prejudice or disregard of evidence or controlling rules of law. Bakhit v. Thomsen ---------- 133
3. In cases where reasonable value of loss of use of personal property is a measure of damages, rental value is not necessarily the "measure" of damages, but proof of what the item whose use has been lost would have rented for is admitted as evidence of the value of loss of use. American Tel. & Tel. Corp. v. Thompson ---------- 327
4. The question of determining the amount of damages is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damages proved. American Tel. & Tel. Corp. v. Thompson -------- 327
5. One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. Paasch v. Brown ---------- 368

6. Liability exists only where the severe emotional distress is inflicted intentionally or recklessly and only where the conduct is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. Paasch v. Brown ---------- 368
7. In a forfeiture action there is no duty on the part of the State to prove damages. State v. Kennedy -- 472
8. Section 29-1107, R. R. S. 1943, gives the District Court authority to remit a part or all the penalty of a bail bond in its sound discretion, to be exercised as to what is right and equitable under the circumstances of the individual case. State v. Kennedy -- 472
9. Where recovery is not a mere matter of computation and depends upon the intangible and quite subjective elements of pain and suffering, and emotional distress, it will not be interfered with unless it is so excessive as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury. Crouter v. Rogers ---------- 497
10. Ordinarily the entire property involved in an eminent domain proceeding is to be valued and damages to it assessed as a whole. Y Motel, Inc. v. State ---- 526
11. Where, in eminent domain proceedings, the property is clearly divisible from the standpoint of use and adaptability, presenting different factors and elements of damage, it definitely is not error to permit such division. In determining whether the property is to be considered as a whole or as units, usually unity of use is given greater emphasis, and has been called the controlling and determining factor. Y Motel, Inc. v. State ---------- 526
12. In the valuation of a motel property gross room rental may be a substantial factor in making a comparison of comparable properties. Y Motel, Inc. v. State ---------- 526
13. The evidence on gross room rental was admissible herein because: (1) It was one of the items by which the jury could gauge comparability of the sales relied upon for comparison; (2) it was an item to which prospective buyers gave substantial consideration; and (3) the property was adapted to only one use. Y Motel, Inc. v. State ---------- 526
14. In an eminent domain proceeding, anticipated profits from the continued carrying on of a business in an established location cannot be considered in esti-

mating the damages, and the profits of a business cannot be shown for the purpose of proving the value of the property. Y Motel, Inc. v. State ---- 526

15. Evidence of the use of federal funds in a state road project is not admissible in an eminent domain proceeding. Y Motel, Inc. v. State ---------- 526

16. The fact that an expert witness uses sales of properties in other states as a basis of comparison in determining value rather than comparable sales in the vicinity of the property condemned goes to the foundation for, and the weight to be given to, the expert's testimony. Y Motel, Inc. v. State ------ 526

17. The admissibility of expert testimony is ordinarily within the discretion of the trial court and its ruling will be upheld on appeal unless an abuse of discretion is shown. Y Motel, Inc. v. State ---------- 526

18. The measure of compensation for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. Harmony Lanes v. State ---------- 826

19. The value of property includes its value for any reasonable use to which it may be put. If because of its artificial improvements or its intrinsic character it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown. Harmony Lanes v. State --------- 826

20. Anything connected with the land which would influence the market value thereof in the mind of a good faith intending purchaser is an element for consideration in determining damages in a condemnation case. Harmony Lanes v. State ---------- 826

21. The taking of property by condemnation subjects the State to liability for all damages sustained by reason of the taking. Those damages include all elements of inconvenience which affect the market value, the costs of restoration or adjustment to the changed conditions, and any material impairment or destruction of a right of access to a public highway. Harmony Lanes v. State ---------- 826

22. In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury. Harmony Lanes v. State ---------- 826

23. The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by the jury. Where the evidence is conflicting this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. Harmony Lanes v. State ---------- 826

Deeds.

1. In determining whether a sale is by the acre or in gross, the intention of the parties is controlling, as in other contracts, and must be given effect. Donahoo v. Home of the Good Shepherd of Omaha, Inc. 586
2. If there is ambiguity in the contract as to whether a sale is strictly in gross or one by the acre, extrinsic evidence, such as the circumstances which surround the parties, and their situations, may be admissible as an aid in interpreting the contract to ascertain the intention of the parties. Donahoo v. Home of the Good Shepherd of Omaha, Inc. -- 586

Descent and Distribution.

1. Section 30-228.03, R. R. S. 1943, directs that where a devisee, being a child or other relation of the testator, dies before the testator, such issue if any surviving the testator take the estate devised to the ancestor unless a different disposition shall be made or directed by the will. Avery v. Evans --------- 437
2. Where a testator makes a devise to four of his children by name and further provides: "Should any of my said children die before my decease I hereby give, will, devise and bequeath the share of said deceased child to the survivor or survivors of my said children, share and share alike," and where, at the time of the execution of the will, all the named children were parents of children then living, and also at that time the testator had another grandchild then living, the child of a daughter of the testator who had died years before the will was executed and for whom he made no provision in the will, it can be said with certainty that the testator has made a disposition so that the issue of one of the named children who predeceased the testator do not take the share of the parent under the terms of section 30-228.03, R. R. S. 1943. Avery v. Evans -- 437

Destructive Devices.

In the prosecution of a violation under section 28-1011.22 (7) (b), R. S. Supp., 1972, intent is a material element of the offense charged. State v. Casados 28

Disciplinary Proceedings.

1. Misconduct of an attorney acting in an official capacity has been held to constitute ground for his suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729
2. Respondent was guilty of extreme negligence in his failure to familiarize himself with section 77-1918, R. R. S. 1943. The fact that he was extremely busy does not absolve him of this responsibility. State ex rel. Nebraska State Bar Assn. v. Holscher 729
3. The gravamen of Disciplinary Rule 7-102(A) (3) and (5) is the intentional concealment, failure to disclose, or knowingly making a false statement. State ex rel. Nebraska State Bar Assn. v. Holscher 729
4. Disciplinary Rule 8-101(A) (2) prohibits a lawyer who holds public office from using that office to influence or attempt to influence a tribunal to act in favor of himself or a client. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729
5. A county board is a tribunal embraced within the ambit of Disciplinary Rule 8-101. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729

Divorce.

1. A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed. Bartlett v. Bartlett -------- 76
2. An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must ordinarily be founded upon new facts and circumstances which have arisen since the entry of the decree. Bartlett v. Bartlett ------ 76
3. 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. Bartlett v. Bartlett ---------- 76
4. In a proceeding involving the custody of minor children, the court may place custody in the court in order to facilitate judicial supervision and summary

power to act swiftly in the best interests of the children. Bartlett v. Bartlett ---------- 76

5. A change of circumstances, which will permit a modification of a divorce decree relating to child custody, includes those not known to the court and the opposing party at the time of the entry of the decree and which could not have been discovered by the exercise of reasonable diligence at the time of the entry of the original decree. Bartlett v. Bartlett 76
Youngberg v. Youngberg ---------- 394

6. The discovery of material facts which existed but were unknown to the court and the opposing party and could not have been ascertained with reasonable diligence, which, if known to the court, might have warranted the entry of a different decree, are changed circumstances which the court will consider in an application for a change of child custody. Bartlett v. Bartlett ---------- 76

7. When custody of minor children is placed in the court, the court, at a subsequent hearing, may consider predivorce activities of the parties unknown to the court at the time the decree was entered. Bartlett v. Bartlett ---------- 76

8. 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. Bartlett v. Bartlett ---------- 76

9. A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children. Youngberg v. Youngberg 394

10. Whether or not a mother's meretricious relationship requires a change in child custody depends upon the circumstances in each case. Youngberg v. Youngberg ---------- 394

11. Among matters to be considered in making an allowance of alimony are the circumstances of the parties, the duration of the marriage, the contributions to the marriage by each party, and the ability of the supported party to engage in gainful employment. Tuttle v. Tuttle ---------- 397

12. In determining who shall receive custody of the

minor children of the parties to an action for the dissolution of marriage the controlling consideration is the best interests and welfare of the children. Lockard v. Lockard ---------- 400
Reynek v. Reynek ---------- 404

13. The fact that one of the parties to an action for the dissolution of marriage has committed adultery, although a relevant consideration, will not necessarily be determinative of who shall be awarded custody of the minor children of those parties. Lockard v. Lockard ---------- 400

14. The fact that one of the parties to an action for the dissolution of marriage has committed adultery will not as a matter of law prevent an award of attorney's fees or affect the payment of costs under sections 42-351 and 42-367, R. R. S. 1943. Lockard v. Lockard ---------- 400

15. The action of a party to an action for the dissolution of marriage in accepting the benefits of a decree in respect to his or her own interests should not be permitted to affect adversely the interests of the children of the parties, and will not preclude consideration of an appeal to the extent such interests are involved. Reynek v. Reynek ---------- 404

16. Under section 42-365, R. R. S. 1943, 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. Walker v. Walker ---------- 540
Gregg v. Gregg ---------- 811

17. Awards of property jointly to divorced parties requiring divided management and financial control are not generally commended. Walker v. Walker -- 540

18. 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. Cumming v. Cumming ---------- 601

19. 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. Cumming v. Cumming ---------- 601

20. Ordinarily the fixing of child support and alimony rests in the sound discretion of the court, and in

the absence of abuse of discretion, will not be disturbed on appeal. Wheeler v. Wheeler ---------- 615

21. The earning capacity of the husband is an element to be considered in the allowance of alimony. Wheeler v. Wheeler ---------- 615

22. The provision for reasonable security for payment of alimony provided for in section 42-365, R. R. S. 1943, should not be invoked in the original decree except when compelling circumstances require it. Wheeler v. Wheeler ---------- 615

23. Third persons may be joined in an action for dissolution of a marriage where it is necessary to determine interests in property to be awarded the parties to the marriage, or their interests may be adversely affected. Yelkin v. Yelkin ---------- 789

24. In determining an award of alimony, the trial court must consider the circumstances of the parties, the duration of the marriage, and the ability of the supported party to engage in gainful employment. Yelkin v. Yelkin ---------- 789

25. In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. Gregg v. Gregg ---------- 811

26. The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are always to be determined by the facts in each case and courts consider all pertinent facts in reaching an award that is just and equitable. Gregg v. Gregg ---------- 811

27. The fixing of alimony rests in each case within the sound discretion of the trial court. Badberg v. Badberg ---------- 844

28. Making temporary allowances during the pendency of an appeal applicable on the alimony awarded to the petitioner on the decree being appealed is approved when the trial judge has adequately adjusted the rights of the parties. Badberg v. Badberg ---- 844

Double Jeopardy.

1. The constitutional provisions against double jeopardy protect against both multiple prosecutions and

multiple punishments for the same offense. State v. Gaston ---------- 259

2. If the sentence first imposed was invalid, the sentence imposed after remand does not violate the constitutional prohibition against double jeopardy. State v. Gaston ---------- 259

3. Constitutional provisions against double jeopardy are not violated by the imposition of consecutive sentences, one for robbery in violation of section 28-414, R. R. S. 1943, and one for the use of a firearm in the commission of a felony in violation of section 28-1011.21, R. S. Supp., 1974, even though both of the offenses charged arise out of the same transaction or the same chain of events. State v. Saxon ---------- 278

Due Process.

1. In both civil and criminal cases the right to a hearing includes the right to appear by counsel, and the arbitrary refusal of such right constitutes a deprivation of due process. Simon v. Lieberman ---------- 321

2. The Legislature can create a small claims court where informal hearings may be held without the assistance of counsel, so long as the right to appear by counsel is guaranteed in a real sense somewhere in the proceedings. Simon v. Lieberman ---------- 321

3. An uninvolved hearing officer, who has had no direct connection with the case, should determine whether probable cause exists for revocation of probation in order to meet due process requirements. State v. Moreno ---------- 351

4. No procedural principle is more familiar than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. State v. Moreno ---------- 351

Elections.

L.B. 549, Laws 1973, page 1309 (now section 5-108, R. S. Supp., 1974), does not permanently change the method of electing governing boards by districts but provides for at large elections for counties with district elections until the county is properly redistricted. State ex rel. Hansen v. Seiler ---------- 9

Eminent Domain.

1. The statutory procedure for appealing from an award of the appraisers in an eminent domain proceeding was not modified by the enactment of L. B. 1032, Laws 1972. Estate of Tetherow v. State -- 150
2. In an appeal from the award of the appraisers, the party first appealing has the burden of filing the petition in the District Court. Estate of Tetherow v. State ---------- 150
3. The filing and serving of notice of appeal as required by section 76-715, R. R. S. 1943, is jurisdictional. Estate of Tetherow v. State ---------- 150
4. The failure of the party first appealing to timely file a petition in the District Court does not affect or defeat jurisdiction. Estate of Tetherow v. State 150
5. The failure of the appealing party to plead within the time required may, unless good cause is shown, be grounds in the exercise of sound discretion by the District Court for dismissal of the appeal. Estate of Tetherow v. State ---------- 150
6. Ordinarily the entire property involved in an eminent domain proceeding is to be valued and damages to it assessed as a whole. Y Motel, Inc. v. State -- 526
7. Where, in eminent domain proceedings, the property is clearly divisible from the standpoint of use and adaptability, presenting different factors and elements of damage, it definitely is not error to permit such division. In determining whether the property is to be considered as a whole or as units, usually unity of use is given greater emphasis, and has been called the controlling and determining factor. Y Motel, Inc. v. State ---------- 526
8. In the valuation of a motel property gross room rental may be a substantial factor in making a comparison of comparable properties. Y Motel, Inc. v. State ---------- 526
9. The evidence on gross room rental was admissible herein because: (1) It was one of the items by which the jury could gauge comparability of the sales relied upon for comparison; (2) it was an item to which prospective buyers gave substantial consideration; and (3) the property was adapted to only one use. Y Motel, Inc. v. State ---------- 526
10. In an eminent domain proceeding, anticipated profits from the continued carrying on of a business in

an established location cannot be considered in estimating the damages, and the profits of a business cannot be shown for the purpose of proving the value of the property. Y Motel, Inc. v. State ---- 526

11. Evidence of the use of federal funds in a state road project is not admissible in an eminent domain proceeding. Y Motel, Inc. v. State ---------- 526

12. The fact that an expert witness uses sales of properties in other states as a basis of comparison in determining value rather than comparable sales in the vicinity of the property condemned goes to the foundation for, and the weight to be given to, the expert's testimony. Y Motel, Inc. v. State -------- 526

13. The admissibility of expert testimony is ordinarily within the discretion of the trial court and its ruling will be upheld on appeal unless an abuse of discretion is shown. Y Motel, Inc. v. State ---------- 526

14. The right to interest under the provisions of section 76-711, R. R. S. 1943, on an award in an eminent domain proceeding does not depend upon a prayer for such interest in some pleading, but exists by virtue of the provisions of the statute. Thacker v. State ---------- 817

15. In eminent domain proceedings where the sales price of other tracts is offered as evidence of market value of the tract taken, a wide discretion must be granted the trial judge in determining the admissibility of the evidence of the other sales. The evidence should not be admitted where there is a marked difference in the situation of the properties. Thacker v. State 817

16. The question of the admission of the sales price of other land and the sufficiency of the foundation for admission of such evidence is within the sound discretion of the trial court. Thacker v. State ------ 817

17. Similarity of tracts does not mean identical, but having a resemblance. Thacker v. State ---------- 817

18. The determination of the similarity of tracts for purposes of deciding the admissibility of sales of such tracts in order to show market value of the tract taken or damages is to be left largely to the discretion of the trial court. Thacker v. State ---- 817

19. In order for the testimony of either an expert or lay witness to be admissible on the question of market value of real estate, the witness must not

only be familiar with the property in question, but also with the state of the market. Thacker v. State 817

20. The measure of compensation for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. Harmony Lanes v. State ---------- 826

21. The value of property includes its value for any reasonable use to which it may be put. If because of its artificial improvements or its intrinsic character it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown. Harmony Lanes v. State ---- 826

22. Anything connected with the land which would influence the market value thereof in the mind of a good faith intending purchaser is an element for consideration in determining damages in a condemnation case. Harmony Lanes v. State ---------- 826

23. The taking of property by condemnation subjects the State to liability for all damages sustained by reason of the taking. Those damages include all elements of inconvenience which affect the market value, the costs of restoration or adjustment to the changed conditions, and any material impairment or destruction of a right of access to a public highway. Harmony Lanes v. State ---------- 826

24. In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury. Harmony Lanes v. State ---------- 826

25. The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by the jury. Where the evidence is conflicting this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. Harmony Lanes v. State ---------- 826

26. The amount allowed as attorney's fees in a condemnation case should be fixed as though the services were performed by one attorney unless the circumstances are such as to require the services of two or more attorneys. Harmony Lanes v. State ------ 826

Employer and Employee.

There is no private cause of action implied for violation

of the Fair Labor Standards Act and Regulations by employment of a child under 16 years of age to operate a farm tractor of over 20 PTO horsepower. Kube v. Kube ---------- 559

Equity.

1. 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. Henrickson v. Dooley ---------- 509
2. In an appeal in an equity case, proper consideration will be given to the fact that the trial court inspected the premises and that its examination constituted evidence; the findings therefrom will be affirmed if supported by competent evidence in the record. Newson Constr. Co. v. Calvary Assembly of God Church ---------- 556
3. A court of equity has a reasonable discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right. Cumming v. Cumming ---------- 601

Escape.

1. "Break such custody" in section 28-736, R. R. S. 1943, does not mean force is required. It is unlawfully leaving a place of confinement which constitutes the breaking of custody and escape. State v. Glenn ---------- 230
2. An escapee breaks custody whenever he escapes by subterfuge, force, by walking away, or failing to return from a temporary leave. State v. Glenn 230

Estates.

1. Under our law, the testator's testamentary desires have little or no importance in relation to the best interests of the surviving spouse in electing to take under or against the will. Clarkson v. First Nat. Bank of Omaha ---------- 201
2. A testator is presumed to know that his widow may lawfully exercise her right under the statute to take against the will, and that such right is paramount to his will. Clarkson v. First Nat. Bank of Omaha 201
3. The statute requires the court to make the election

which it deems is in the best interests of the incompetent spouse. This must be made without reference to whether she may be provided for otherwise. Clarkson v. First Nat. Bank of Omaha ---- 201

4. A court, in making a choice for an incompetent whether to elect to take under or against the will, must consider only the best interests of the incompetent. Clarkson v. First Nat. Bank of Omaha 201

Estoppel.

1. The selection of a site for a new school building in a Class III school district is an administrative determination to be made by the board of education of the district. Christian v. Geis ---------- 146
2. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation. Exceptions are made only where right and justice so demand. Christian v. Geis ---------- 146
3. Estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice. Christian v. Geis ---------- 146
4. An essential element of estoppel is a representation relied upon by the party claiming the benefit of the estoppel, which induced him to act, or refrain from acting, to his prejudice. Sherwood v. Merchants Mut. Bonding Co. ---------- 262
5. When a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration. Orleans Education Assn. v. School Dist. of Orleans ---------- 676
6. The parties to a contract may avoid a provision requiring prior written authorization for additional work where their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment of the provision, or the party claiming the benefit of the provision is estopped to rely on it. Griffin v. Geneva Industries, Inc. ---------- 694
7. In order for a party to be estopped by having taken

inconsistent positions in a judicial proceeding, such change of position must result in prejudice to the adverse party. Thacker v. State ---------- 817
8. Where there has been no material change in the defendant's position, laches is not a defense. Lammers v. Lammers ---------- 836

Evidence.

1. A finding that a defendant has violated his probation must be established by clear and convincing evidence. State v. Howard ---------- 45
2. In the absence of a valid authorizing statute, such as section 39-669.08 et seq., R. R. S. 1943, the results of a test of blood for alcoholic content are inadmissible where the blood sample is taken involuntarily and the constitutional requirements of the Fourth Amendment to the United States Constitution have not been satisfied. State v. Howard - 45
3. In the absence of some statute making provision for the effect to be given a test of body fluid for alcoholic content, expert testimony is necessary to make the results admissible. State v. Howard ---- 45
4. A change of circumstances, which will permit a modification of a divorce decree relating to child custody, includes those not known to the court and the opposing party at the time of the entry of the decree and which could not have been discovered by the exercise of reasonable diligence at the time of the entry of the original decree. Bartlett v. Bartlett -- 76
Youngberg v. Youngberg ---------- 394
5. The discovery of material facts which existed but were unknown to the court and the opposing party and could not have been ascertained with reasonable diligence, which, if known to the court, might have warranted the entry of a different decree, are changed circumstances which the court will consider in an application for a change of child custody. Bartlett v. Bartlett ---------- 76
6. When custody of minor children is placed in the court, the court, at a subsequent hearing, may consider predivorce activities of the parties unknown to the court at the time the decree was entered. Bartlett v. Bartlett ---------- 76
7. In order for the plaintiff to recover upon the ground of negligence, the evidence must show with reason-

able certainty the negligent act complained of. Fritz v. Marten ---------- 83

8. Where several inferences may be drawn from the facts proved, which inferences are opposed to each other, but are equally consistent with the facts proved, the plaintiff may not sustain his position by a reliance alone on the inference which would entitle him to recover. Fritz v. Marten ---------- 83

9. In a prosecution for rape, after the prosecutrix has testified to the commission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made. State v. Castor -------- 86
State v. Escamilla ---------- 503

10. The testimony concerning such complaint should, on direct examination, be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae. State v. Castor ---------- 86
State v. Escamilla ---------- 503

11. The admission of incompetent evidence is not prejudicial where the same facts are established by the testimony of the defendant. State v. Castor ----- 86

12. 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 are not proof. There must be something more which would lead a reasoning mind to one conclusion rather than another. Sherman v. Travelers Ind. Co. ---------- 104

13. Evidence as to damages must be such that a jury could determine the amount with reasonable certainty and the determination may not be based on pure speculation and conjecture. Sherman v. Travelers Ind. Co. ---------- 104

14. Upon a hearing on a motion to suppress where the sufficiency of the affidavit is challenged, its contents supporting probable cause may be supplemented by

additional information proved to have been known to the officers at the time the affidavit was made and the warrant issued. State v. Dussault 122

15. Where the police were advised by an informant that a certain individual, identified by name and address, was departing by a specified airline flight for a California destination and was in possession of a large sum of money for the purpose of purchasing a specified quantity and type of drugs and would be returning on one or the other of two specified days on the same airline with the drugs in his luggage; and the police pursuant to this tip verify by their own personal observation and that of other law enforcement officers the departure, return, and identity of the individual and observe him pick up his luggage, probable cause for arrest and search without warrant may be said to exist. State v. Dussault .. 122

16. The reading by an official court reporter of testimony of a witness examined on trial after the jury has retired for deliberation, when a disagreement arises within the jury as to certain testimony, is proper so long as such action is taken in the presence of or after notice to the parties or their counsel. Bakhit v. Thomsen 133

17. To maintain an action for malicious prosecution the plaintiff must prove malice and want of probable cause. Cimino v. Rosen 162

18. The newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in the result. State v. Glouser 190

19. Newly discovered evidence must be competent, material, and credible and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial. It must appear that the unsuccessful party had no knowledge of the newly discovered evidence at the previous trial and could not have discovered it by the exercise of reasonable diligence. State v. Glouser 190

20. In cases where reasonable value of loss of use of personal property is a measure of damages, rental value is not necessarily the "measure" of damages, but proof of what the item whose use has been lost would have rented for is admitted as evidence of

the value of loss of use. American Tel. & Tel. Corp. v. Thompson ---------- 327

21. The question of determining the amount of damages is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damages proved. American Tel. & Tel. Corp. v. Thompson ---------- 327

22. One of the exceptions to the requirement of expert testimony is the situation where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laymen. Halligan v. Cotton - 331

23. Where, in the course of surgery, it was necessary to ligate bleeding blood vessels on the dome of the bladder and about 10 days later a perforation of the bladder resulted, expert opinion testimony is required before the trier of fact is permitted to infer that the hole was the result of a lack of or the failure to exercise the required degree of skill or care. Halligan v. Cotton ---------- 331

24. Ordinarily if a witness is examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party conducting the examination. State v. Claire ---------- 341

25. Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded. State v. Claire ---------- 341

26. While substantial, the prosecutor's duty of candor i.e., to disclose material evidence favorable to accused, is not all-encompassing; it neither requires full disclosure nor permits a combing of the prosecutor's files in search of evidence possibly useful to the accused. State v. Richards ---------- 345

27. A prosecutor's failure to disclose a report does not violate due process when there is no significant chance that the report, which could have been used solely for impeachment purposes, would induce a reasonable doubt in the jurors' minds or is inherently unfair. State v. Richards ---------- 345

28. A defendant who has ready access to a report mentioned in the court files cannot logically claim it was suppressed. State v. Richards ---------- 345

29. In a criminal case this court will not interfere on

appeal with a verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Richards ---------- 345

30. In a criminal case where the sufficiency of the evidence is challenged on appeal, the Supreme Court will not interfere with a verdict of guilty or a finding of guilty by the court where a jury is waived, or not required, unless the evidence is so lacking in probative force that this court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Digilio 348

31. At the hearing of any person charged with being an habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment. State v. Micek ---------- 379

32. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. State v. Micek ---- 379

33. A judicial record of this state, or of any federal court of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he has one. State v. Micek ---------- 379

34. A judicial record of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of a judge, chief justice, or presiding magistrate, that the attestation is in due form of law. State v. Micek ---------- 379

35. Whether or not a mother's meretricious relationship requires a change in child custody depends upon the circumstances in each case. Youngberg v. Youngberg ---------- 394

36. The verdict of a jury must be sustained if there is

substantial evidence, taking the view most favorable to the State, to support it. State v. Fowler ------ 420

37. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown its determination will not be disturbed. State v. Fowler ---------- 420

38. This court will require a stronger showing of abuse of discretion where the motion to vacate is allowed than in cases where a trial on the merits is denied. Fanning v. Richards ---------- 431

39. This court will not take judicial notice of the rules of practice of the District Court. Fanning v. Richards ---------- 431

40. Ordinarily when an objection to proper evidence is not timely made, such objection is waived. Mecham v. McLeay ---------- 457

41. In determining the sufficiency of the evidence to support the submission of an issue to the jury, the asserting party is entitled to have all the conflicts in the evidence and all reasonable inferences therefrom resolved in his favor. Mecham v. McLeay -- 457

42. In order for a verdict to be set aside because of prejudicial effect of newspaper accounts on jurors, there must be evidence presented that the jurors read newspaper accounts and that the accounts were unfair or prejudicial to the defendant. State v. Bautista ---------- 476

43. When the findings of fact by the trial court in a workmen's compensation case are supported by reasonable, competent testimony, the cause will be not considered de novo on appeal. Jensen v. Western Printing Co. ---------- 481

44. When there is substantial evidence sustaining the jury's finding, it will not be set aside. State v. Kelly ---------- 494

45. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of their contract, and should be given great, if not controlling influence, and the courts should ordinarily enforce such construction. Reed v. Nice-Pak Products, Inc. ---------- 505

46. In an appeal in an equity case, proper consideration will be given to the fact that the trial court in-

spected the premises and that its examination constituted evidence; the findings therefrom will be affirmed if supported by competent evidence in the record. Newson Constr. Co. v. Calvary Assembly of God Church ---------- 556

47. Where a contract, after preliminary negotiations and oral conversations, is reduced to writing that is clear and unambiguous, there is a conclusive presumption that the parties have reduced their entire engagement to writing, and that any parol agreement is merged in the written contract, and that testimony of prior or contemporaneous conversations to alter, contradict, or explain such writing is incompetent to vary the terms of the written instrument. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---------- 586

48. If there is ambiguity in the contract as to whether a sale is strictly in gross or one by the acre, extrinsic evidence, such as the circumstances which surround the parties, and their situations, may be admissible as an aid in interpreting the contract to ascertain the intention of the parties. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ------ 586

49. A motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant 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. Starlin v. Burlington Northern, Inc. ---------- 619

50. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. Starlin v. Burlington Northern, Inc. ---------- 619

51. When testimony is offered in the trial court and proper objection is not made nor preserved in motion for new trial, such objection will not be heard on appeal. Anderl v. Willsey ---------- 698

52. Upon appeal in actions in equity, when the testimony of witnesses orally examined before the court upon the vital issues is conflicting, this court will, while

trying the case de novo, 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. Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc. ---------- 781

53. Formal unequivocal judicial admissions which waive any evidence by the adverse party on the admitted matter are conclusive on the pleader. Ordinary evidentiary admissions in pleadings may be overcome by evidence explaining an apparent inconsistency, such as showing the pleader's ignorance of the contents of the pleadings, his misunderstanding of the facts, or mistake on his part. Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc. ---------- 781

54. The information supplied to a judicial officer issuing a search warrant on a sworn complaint may be supplemented by additional information which the arresting officers themselves have or have acquired before the arrest and which is corroborative of the complicity of the arrestee in the crime. State v. Graves ---------- 797

55. In eminent domain proceedings where the sales price of other tracts is offered as evidence of market value of the tract taken, a wide discretion must be granted the trial judge in determining the admissibility of the evidence of the other sales. The evidence should not be admitted where there is a marked difference in the situation of the properties. Thacker v. State 817

56. The question of the admission of the sales price of other land and the sufficiency of the foundation for admission of such evidence is within the sound discretion of the trial court. Thacker v. State ------ 817

57. Similarity of tracts does not mean identical, but having a resemblance. Thacker v. State ---------- 817

58. The determination of the similarity of tracts for purposes of deciding the admissibility of sales of such tracts in order to show market value of the tract taken or damages is to be left largely to the discretion of the trial court. Thacker v. State ---- 817

59. The value of property includes its value for any reasonable use to which it may be put. If because of its artificial improvements or its intrinsic character it is peculiarly adapted to some particular use, all

the circumstances which make up this adaptability may be shown. Harmony Lanes v. State 826

60. Anything connected with the land which would influence the market value thereof in the mind of a good faith intending purchaser is an element for consideration in determining damages in a condemnation case. Harmony Lanes v. State 826

61. The taking of property by condemnation subjects the State to liability for all damages sustained by reason of the taking. Those damages include all elements of inconvenience which affect the market value, the costs of restoration or adjustment to the changed conditions, and any material impairment or destruction of a right of access to a public highway. Harmony Lanes v. State 826

62. Purported evidence which does not appear in the record cannot be considered by this court on appeal. Schetzer v. Sullivan 841

Extradition.

1. In habeas corpus proceedings to release a prisoner detained under a warrant of extradition, the fact that a criminal complaint was filed against him in the demanding state is prima facie evidence that he was there charged with a crime, and if he contends otherwise, the burden is on him to establish the fact. Kujala v. Headley 1

2. To be a fugitive from justice, it is not necessary that one shall have left the demanding state for the purpose of avoiding prosecution, but only that, having committed an act charged to be criminal under the laws of that state, he has left that jurisdiction and is found in another state. Kujala v. Headley 1

3. The issuance of a warrant of extradition creates a presumption that the prisoner detained under it is a fugitive from justice. Kujala v. Headley 1

4. In an extradition proceeding, it is within the power of the Governor of the asylum state to inquire into the motives or purposes of the prosecution, but his inquiry is final and not subject to review by the courts. Kujala v. Headley 1

False Imprisonment.

False imprisonment consists of the unlawful restraint

against his will of an individual's personal liberty. Cimino v. Rosen ---------- 162

False Pretenses.

1. Mere negligence on the part of the claimant is not enough to sustain a conviction under section 23-135.01, R. R. S. 1943. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729
2. The gravamen of Disciplinary Rule 7-102(A) (3) and (5) is the intentional concealment, failure to disclose, or knowingly making a false statement. State ex rel. Nebraska State Bar Assn. v. Holscher 729

Fees.

1. The allowance of a reasonable attorney's fee for necessary services performed by an attorney will not be reversed on appeal in the absence of a showing of an abuse of discretion by the trial court in making the allowance. Y Motel, Inc. v. State --- 526
2. Where an action is brought pursuant to section 23-930, R. R. S. 1943, the trial court is without authority to award the plaintiff an attorney's fee or to charge an award of attorney's fees as costs against the defendant. Willms v. Nebraska City Airport Authority ---------- 567
3. The payment of fees alone is not enough to create an agency relationship. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---------- 586
4. Laws 1971, L.B. 743, which amended section 77-1918, R. R. S. 1943, was to be effective so far as compensation was provided for county attorneys as soon as it could become operative under the Constitution of the State of Nebraska. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729
5. The fee provided for county attorneys in section 77-1918, R. R. S. 1943, is not payable until the tax foreclosure decree is entered and the property sold pursuant to such decree. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729
6. The amount allowed as attorney's fees in a condemnation case should be fixed as though the services were performed by one attorney unless the circumstances are such as to require the services of two or more attorneys. Harmony Lanes v. State ---- 826
7. The award of attorneys' fees and the taxing of

costs is discretionary with the District Court. Badberg v. Badberg ---------- 844

Foreclosure.

1. A contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered, and such procedure would not offend against justice and equity. Riffey v. Schulke ---------- 317
2. Applications for strict foreclosure of land contracts are addressed to the sound legal discretion of the court, and will be granted where it would be inequitable and unjust to refuse them. Riffey v. Schulke ---------- 317
3. Strict foreclosure will be decreed only under peculiar and special circumstances where the purchaser does not have a substantial equity in the property. Riffey v. Schulke ---------- 317
4. Where strict foreclosure is granted, the defaulting party is entitled to a reasonable time to avoid its consequences by performing the contract. Riffey v. Schulke ---------- 317
5. A contract for sale of real estate may not be strictly foreclosed where it is clear that the value of the property greatly exceeds the amount due. Yelkin v. Yelkin ---------- 789

Gratuitous Benefactors.

1. There is inherent justice in the requirement that one who undertakes to perform a duty gratuitously should not be under the same obligation as one who enters upon the same undertaking for compensation. Botsch v. Reisdorff ---------- 165
2. A distinction between the duty imposed in the case of gratuitous performance of services and the performance of them for hire is to be found running through many fields of law. Botsch v. Reisdorff - 165

Guardian and Ward.

No action may be maintained on a guardian's bond until the amount due thereon has been ascertained and judgment therefor entered. Sherwood v. Merchants Mut. Bonding Co. ---------- 262

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. Freeman ---------- 227
2. A motion to withdraw a plea of guilty should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds are established by clear and convincing evidence. State v. Freeman ---------- 227
3. The decision in this case is controlled by our opinion and holding in State v. Lewis, 192 Neb. 518, 222 N. W. 2d 815, filed October 31, 1974. State v. Shropshire ---------- 470
4. 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. Svitak ---------- 660
5. A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. State v. Atwater 669
6. Notwithstanding the acceptance of a plea of guilty the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea. State v. Wayne ---------- 833
7. The acceptance of a plea of guilty is left largely to the discretion of the judge. The circumstances of the case will often dictate the kind and amount of inquiry which is necessary. State v. Wayne ---- 833
8. In accepting a guilty plea the criteria is whether or not the defendant understands the relevant factors involved in a guilty plea. State v. Wayne ---- 833
9. Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea. State v. Wayne ---------- 833

Habeas Corpus.

1. In habeas corpus proceedings to release a prisoner detained under a warrant of extradition, the fact

that a criminal complaint was filed against him in the demanding state is prima facie evidence that he was there charged with a crime, and if he contends otherwise, the burden is on him to establish the fact. Kujala v. Headley ---------- 1

2. In an extradition proceeding, it is within the power of the Governor of the asylum state to inquire into the motives or purposes of the prosecution, but his inquiry is final and not subject to review by the courts. Kujala v. Headley ---------- 1

3. In a habeas corpus proceeding to determine the custody of a child, the primary consideration is the welfare of the child. Bigley v. Tibbs ---------- 4

4. To the extent that Raymond v. Cotner, 175 Neb. 158, 120 N. W. 2d 892, does not hold that the first and primary consideration in any case involving the custody of a child is the best interests of the child, it is overruled. Bigley v. Tibbs ---------- 4

5. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent. Bigley v. Tibbs ---- 4

Habitual Criminals.

1. At the hearing of any person charged with being an habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment. State v. Micek ---------- 379

2. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. State v. Micek -- 379

3. The exact time of the commission of an alleged prior felony is not of the essence of a charge under the Habitual Criminal Act and the failure of the information to accurately state the time of a prior

felony does not render the information insufficient. State v. Silvacarvalho ---------- 447

Hearings.

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. Freeman ---------- 227
2. A motion to withdraw a plea of guilty should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds are established by clear and convincing evidence. State v. Freeman ---------- 227
3. An uninvolved hearing officer, who has had no direct connection with the case, should determine whether probable cause exists for revocation of probation in order to meet due process requirements. State v. Moreno ---------- 351

Homicide.

The time required for premeditation and deliberation may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. State v. Bautista ---- 476

Husband and Wife

1. Antenuptial agreements should be construed according to the intentions of the parties and the conditions and circumstances attending their execution. Anderl v. Willsey ---------- 698
2. A liberal construction of an antenuptial agreement will be indulged in order to carry out the intention of the parties. Anderl v. Willsey ---------- 698

Implied Consent Law.

The provisions of the implied consent statutes are applicable only to prosecutions for offenses arising out of acts alleged to have been committed while the person was driving or was in the actual physical control of a motor vehicle while under the influence of alcoholic liquor. State v. Howard ---------- 45

Incompetent Persons.

1. The statute requires the court to make the election which it deems is in the best interests of the incompetent spouse. This must be made without reference to whether she may be provided for otherwise. Clarkson v. First Nat. Bank of Omaha ---------- 201
2. A court, in making a choice for an incompetent whether to elect to take under or against the will, must consider only the best interests of the incompetent. Clarkson v. First Nat. Bank of Omaha -- 201

Indemnity.

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. Omaha P. P. Dist. v. Natkin & Co. ---------- 518

Indictments and Informations.

1. The ruling of the trial court upon a severance of criminal prosecutions properly joined in a single indictment, information, or complaint will not be disturbed on appeal, in the absence of an abuse of discretion. State v. Micek ---------- 379
2. The exact time of the commission of an alleged prior felony is not of the essence of a charge under the Habitual Criminal Act and the failure of the information to accurately state the time of a prior felony does not render the information insufficient. State v. Silvacarvalho ---------- 447

Infants.

1. In a habeas corpus proceeding to determine the custody of a child, the primary consideration is the welfare of the child. Bigley v. Tibbs ---------- 4
2. To the extent that Raymond v. Cotner, 175 Neb. 158, 120 N. W. 2d 892, does not hold that the first and primary consideration in any case involving the custody of a child is the best interests of the child, it is overruled. Bigley v. Tibbs ---------- 4
3. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the

superior rights, as between the parties, of a fit, proper, and suitable parent. Bigley v. Tibbs ---- 4

4. Whether negligence may be attributed to a minor 11 years of age is usually a question of fact for the jury. Gadeken v. Langhorst ---------- 299

5. A minor 11 years of age is required to exercise that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. Gadeken v. Langhorst ---------- 299

6. Until the driver of an automobile has notice of the presence or the likelihood of the presence of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume others will do likewise; and until he has such notice, the rule is the same as respects adults and children. Korbelik v. Johnson ---------- 356

7. Where a driver observes near his line of travel a child in the apparent control of an adult and the child quickly and unexpectedly moves into the street, it will normally be for the jury to determine under all the circumstances of the case whether the driver's duty of care was violated. Korbelik v. Johnson --- 356

8. The instruction that "a person may assume that every other person will use reasonable care and will obey the law until the contrary reasonably appears" should not be given where the only inference that could be adduced from the evidence is that the driver ought to have seen or anticipated the presence, in the street or near his line of travel, of a child not under the apparent control of an adult. Korbelik v. Johnson ---------- 356

9. Section 28-477, R. S. Supp., 1974, is not unconstitutional on the ground that it is vague and indefinite. State v. Cialkowski ---------- 372

10. There is no private cause of action implied for violation of the Fair Labor Standards Act and Regulations by employment of a child under 16 years of age to operate a farm tractor of over 20 PTO horsepower. Kube v. Kube ---------- 559

11. Section 13-102, R. R. S. 1943, when construed together with section 42-364, R. R. S. 1943, gives statutory authority for the court to modify the amount of child support in a paternity action decree because of a change in circumstances of the parties

or in the best interests of the children. Riederer v. Siciunas ---------- 580

12. A person on the premises of another, without the permission of the owner, who is of sufficient age, mentality, experience, and ability to observe, realize, and avoid a particular danger or peril is an adult trespasser and cannot recover under the special rule pertaining to children. Haden v. Hockenberger & Chambers Co. ---------- 713

13. The attractive nuisance doctrine does not apply to machinery in a static condition unless there is evidence that the machinery is enticing and inherently dangerous to indiscriminating children of tender years. Haden v. Hockenberger & Chambers Co. -- 713

Instructions.

1. It is not error to refuse an instruction on an issue which is not supported by the evidence. State v. Temple ---------- 89

2. Related instructions must be read and construed together and if when so read and construed they correctly state the law, there is no error. State v. Temple ---------- 89

3. An instruction which submits an issue not supported by the evidence to the jury is erroneous. State v. Garza ---------- 283

4. An erroneous instruction in a criminal case is not ground for reversal unless prejudicial to the defendant. State v. Garza ---------- 283

5. Error cannot be predicated on an instruction given at the request of the complaining party. State v. American Theater Corp. ---------- 289

6. If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case unless proper instruction has been requested by the party complaining. State v. Claire ---------- 341

7. The instruction that "a person may assume that every other person will use reasonable care and will obey the law until the contrary reasonably appears" should not be given where the only inference that could be adduced from the evidence is that the driver ought to have seen or anticipated the

presence, in the street or near his line of travel, of a child not under the apparent control of an adult. Korbelik v. Johnson ---------- 356
8. When the jury is admonished to disregard objectionable questions and answers, a mistrial ordinarily will not be granted. State v. O'Kelly ---------- 390
9. Instructions to the jury must be considered as a whole, and when thus considered, if the law is correctly stated and the case fairly submitted, and the jury could not have been misled, a claim of prejudicial error in the instructions is not available. Duling v. Berryman ---------- 409
10. NJI No. 4.02 does not overlap NJI No. 4.03. Coleman v. Diamond Engineering Co. ---------- 487
11. Section 25-1111, R. R. S. 1943, requires that requested instructions must be submitted in writing. State v. Maxwell ---------- 807
12. It is not proper to give an instruction on a lesser offense unless such an instruction is applicable and authorized by the evidence. State v. Maxwell 807
13. In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses. State v. Maxwell ---------- 807
14. It is not error to refuse a properly requested instruction where the subject matter is properly covered in instructions which are given. Thacker v. State ---------- 817

Insurance.

1. Execution of a covenant not to levy in favor of an uninsured motorist bars recovery under uninsured motorist coverage where the policy provides the insured will hold all rights of recovery in trust for the benefit of the insurer and do nothing after loss to prejudice such rights. Hastings v. Fireman's Fund American Ins. Co. ---------- 417
2. A beneficiary under a life insurance policy is not ordinarily a representative of a deceased person within the meaning of the dead man's statute. Anderl v. Willsey ---------- 698
3. Even in the absence of a contractual policy provision so providing, where an insurer of a joint judgment debtor jointly liable in tort for damage negligently caused discharges more than its insured's proportionate share of the common liability, such insurer

is subrogated to the right of its insured to recover contribution from the other judgment debtors. Royal Ind. Co. v. Aetna Cas. & Sur. Co. ---------- 752

Intent.

1. In the prosecution of a violation under section 28-1011.22 (7) (b), R. S. Supp., 1972, intent is a material element of the offense charged. State v. Casados ---------- 28
2. The legislative intent is the cardinal rule in the construction of statutes. All statutes relating to the same subject are considered as parts of a homogeneous system and later statutes are considered as supplementary to preceding enactments. Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together. Matzke v. City of Seward - 211
3. A seller of magazines is ordinarily presumed to know what he is offering for sale, although it is not universally so. The operator of a book store, for instance, would not be presumed to know of every isolated obscene statement in the hundreds of books which he has for sale. But in a situation, as here, where the magazines are enclosed in plastic and the covers, front and back, are occupied with pictures of nude individuals in various poses, it can hardly be said that the jury could not infer knowledge of their contents by the defendant and an intent to sell obscene materials. State v. American Theater Corp. ---------- 289

Interest.

1. The provisions of section 45-103, R. R. S. 1943, as to interest on decrees and judgments for the payment of money refer to judgments or decrees for money which is immediately due and collectible where its nonpayment is a breach of duty on the part of the judgment debtor. Cumming v. Cumming 601
2. A court of equity has a reasonable discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right. Cumming v. Cumming ----- 601
3. The right to interest under the provisions of section 76-711, R. R. S. 1943, on an award in an eminent domain proceeding does not depend upon a prayer

for such interest in some pleading, but exists by virtue of the provisions of the statute. Thacker v. State ---------- 817

Intoxicating Liquors.

1. In the absence of a valid authorizing statute, such as section 39-669.08 et seq., R. R. S. 1943, the results of a test of blood for alcoholic content are inadmissible where the blood sample is taken involuntarily and the constitutional requirements of the Fourth Amendment to the United States Constitution have not been satisfied. State v. Howard -- 45
2. The provisions of the implied consent statutes are applicable only to prosecutions for offenses arising out of acts alleged to have been committed while the person was driving or was in the actual physical control of a motor vehicle while under the influence of alcoholic liquor. State v. Howard ---------- 45
3. In the absence of some statute making provision for the effect to be given a test of body fluid for alcoholic content, expert testimony is necessary to make the results admissible. State v. Howard -- 45
4. Under the statutes and rules applicable to the City of Kearney, a resolution recommending either issuance or refusal of a retail liquor license by the Nebraska Liquor Control Commission requires for adoption a majority vote of all elected members of the city council. Hadlock v. Nebraska Liquor Control Commission ---------- 721
5. Where the Nebraska Liquor Control Commission, within statutory time limitations, receives written allegations or evidence of facts which, if true, could constitute valid grounds for denial of a pending application for a retail liquor license, the commission has authority to require and hold a hearing on such application. Hadlock v. Nebraska Liquor Control Commission ---------- 721
6. The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. Hadlock v. Nebraska Liquor Control Commission ---------- 721
7. After an administrative hearing, the Nebraska Liquor Control Commission must base its findings and orders on a factual foundation in the record

of the proceedings, and the record must show some valid basis on which a finding and order may be premised. Hadlock v. Nebraska Liquor Control Commission ---------- 721

8. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. Hadlock v. Nebraska Liquor Control Commission ---------- 721

9. In an administrative hearing on an application for a retail liquor license not required by subsection (1) of section 53-133, R. R. S. 1943, where the evidence fails to establish any valid grounds for denial of the application, the provisions of section 53-132(1), R. R. S. 1943, require the Nebraska Liquor Control Commission to cause a license to be issued in the manner provided by law as a matter of course. Hadlock v. Nebraska Liquor Control Commission -- 721

10. Any decision of the Nebraska Liquor Control Commission granting or refusing to grant a license or permit for the sale of alcoholic liquors may be reversed, vacated, or modified by the District Court on appeal. Hadlock v. Nebraska Liquor Control Commission ---------- 721

11. A city may proscribe sexually oriented performances, not otherwise obscene or illegal, in establishments which it licenses to sell liquor by the drink. Midtown Palace, Inc. v. City of Omaha ---------- 785

12. A city ordinance which prohibits nudity in a liquor establishment is not rendered void by a statute which reserves solely unto the state the power to control obscenity. Midtown Palace, Inc. v. City of Omaha ---------- 785

Judges.

There is no requirement that the arraignment and the sentencing hearing be conducted by the same District Judge. State v. Hilderbrand ---------- 233

Judgments.

1. In determining whether a class action is properly brought, considerable discretion is vested in the trial court. In the absence of appeal, that decision is final and even though it may have been erroneous, it is not void. Gant v. City of Lincoln ------ 108

2. A judgment which is not void may only be set aside after the term at which it was entered as authorized in section 25-2001, R. R. S. 1943. Gant v. City of Lincoln ---------- 108
3. The judgment in a class or representative suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. Gant v. City of Lincoln ---------- 108
4. The Fourteenth Amendment to the Constitution of the United States does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits. Gant v. City of Lincoln ---------- 108
5. A court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it. Gant v. City of Lincoln ---------- 108
6. A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children. Youngberg v. Youngberg ---------- 394
7. A District Court has inherent power to vacate or modify its own judgment at any time during the term at which it is rendered. Such action rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be interfered with. Fanning v. Richards ---------- 431
8. This court will require a stronger showing of abuse of discretion where the motion to vacate is allowed than in cases where a trial on the merits is denied. Fanning v. Richards ---------- 431
9. A court's final judgment of guilt must be based on a valid jury verdict. State v. Anderson ---------- 467
10. The judgment of the District Court in the former action is final as to every issue there decided and every other issue which could have been decided in the case. This rule of res judicata is grounded on public policy and necessity to end litigation and the

hardship imposed on a person by being vexed twice for the same cause. Caradori v. Hamilton ------ 500

11. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. Caradori v. Hamilton ---------- 500
Riederer v. Siciunas ---------- 580

12. Where a second action is on the same cause of action and between the same parties as a first action, the judgment in the former action ordinarily is conclusive in the second action as to every question which was or might have been presented and determined in the former. Omaha P. P. Dist. v. Natkin & Co. ---------- 518

13. The provisions of section 45-103, R. R. S. 1943, as to interest on decrees and judgments for the payment of money refer to judgments or decrees for money which is immediately due and collectible where its nonpayment is a breach of duty on the part of the judgment debtor. Cumming v. Cumming 601

14. A court of equity has a reasonable discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right. Cumming v. Cumming ---- 601

15. When a judge of the Workmen's Compensation Court enters a judgment which he is authorized by law to make, such judgment is conclusive on all parties at interest. Marlow v. Maple Manor Apartments ---------- 655

Jurisdiction.

The county court and the District Court have concurrent jurisdiction in supervision over the administration of testamentary trusts. Johnson v. Hays _ 54

Jury.

1. The reading by an official court reporter of testimony of a witness examined on trial after the jury has retired for deliberation, when a disagreement arises within the jury as to certain testimony, is proper so long as such action is taken in the presence of or after notice to the parties or their counsel. Bakhit v. Thomsen ---------- 133

2. Although the taking of notes by jurors of the testimony of witnesses has been frowned upon and may under certain circumstances constitute prejudicial er-

or, such practice is not absolutely prohibited in this state. Bakhit v. Thomsen ---------- 133
3. The prejudicial effect of juror note-taking depends on the eventual use of such notes. Bakhit v. Thomsen ---------- 133
4. Whether or not a jury should be sequestered during the trial of a criminal case is left to the sound discretion of the court. State v. Bautista ------- 476
5. In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury. Harmony Lanes v. State ---------- 826
6. The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by the jury. Where the evidence is conflicting this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. Harmony Lanes v. State -------- 826

Labor and Labor Relations.

1. The power of the Legislature to create a body with appropriate powers to deal with the labor relations of governmental entities and departments does not depend upon the grant of power given by Article XV, section 9, of the Nebraska Constitution, but exists by virtue of the general grant of legislative power under Article III, section 1. Orleans Education Assn. v. School Dist. of Orleans ---------- 676
2. Where the Legislature delegates to an administrative body authority to settle labor relation disputes, the delegation is valid if the statute making the delegation establishes a sufficient basic standard — a definite and certain policy and rule of action for the guidance of the agency created to administer the law. The standards set forth in section 48-818, R. R. S. 1943, meet the above criterium. Orleans Education Assn. v. School Dist. of Orleans ------- 676

Laches.

1. Where the obligation is clear and its essential character has not been changed by lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, especially between the immediate parties to the litigation. Lammers v. Lammers ---------- 836

2. Where there has been no material change in the defendant's position, laches is not a defense. Lammers v. Lammers ---------- 836

Landlord and Tenant.

At common law a landlord has no duty to provide fire protection devices or services for his tenant. Such a duty may be assumed by contract or imposed by statute. The Geer Co. v. Hall County Airport Authority ---------- 17

Legislature.

1. The power of the Legislature to create a body with appropriate powers to deal with the labor relations of governmental entities and departments does not depend upon the grant of power given by Article XV, section 9, of the Nebraska Constitution, but exists by virtue of the general grant of legislative power under Article III, section 1. Orleans Education Assn. v. School Dist. of Orleans ---------- 676
2. The Legislature has plenary legislative authority except as limited by the state and federal Constitutions. Orleans Education Assn. v. School Dist. of Orleans ---------- 676

Licensees.

1. A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if (1) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger; (2) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved; and (3) the licensees do not know or have reason to know of the condition and the risk involved. Jensen v. Hawkins Constr. Co. -- 220
2. A duty of a possessor of land to warn a licensee may arise even though a defect or condition is in fact open and obvious where the circumstances are such that there is reason to believe the risk of harm involved would not be anticipated or appreciated. Jensen v. Hawkins Constr. Co. ---------- 220
3. 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. Jensen v. Hawkins Constr. Co. ----- 220

Licenses.

1. Under the statutes and rules applicable to the City of Kearney, a resolution recommending either issuance or refusal of a retail liquor license by the Nebraska Liquor Control Commission requires for adoption a majority vote of all elected members of the city council. Hadlock v. Nebraska Liquor Control Commission ---------- 721
2. Where the Nebraska Liquor Control Commission, within statutory time limitations, receives written allegations or evidence of facts which, if true, could constitute valid grounds for denial of a pending application for a retail liquor license, the commission has authority to require and hold a hearing on such application. Hadlock v. Nebraska Liquor Control Commission ---------- 721
3. The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. Hadlock v. Nebraska Liquor Control Commission ---------- 721
4. In an administrative hearing on an application for a retail liquor license not required by subsection (1) of section 53-133, R. R. S. 1943, where the evidence fails to establish any valid grounds for denial of the application, the provisions of section 53-132(1), R. R. S. 1943, require the Nebraska Liquor Control Commission to cause a license to be issued in the manner provided by law as a matter of course. Hadlock v. Nebraska Liquor Control Commission ---------- 721
5. Any decision of the Nebraska Liquor Control Commission granting or refusing to grant a license or permit for the sale of alcoholic liquors may be reversed, vacated, or modified by the District Court on appeal. Hadlock v. Nebraska Liquor Control Commission ---------- 721

Liens.

1. The determination of priority as between a lien held by the United States and nonfederal liens is governed by federal, not state, law. Westland Homes Corp. v. Hall ---------- 237
2. Under section 3-802, U.C.C., unless otherwise agreed, where a personal check is taken for an underlying obligation, the obligation is suspended pro tanto until the presentment of the check. If the check is dishonored an action may be maintained on either the check or the obligation. Westland Homes Corp. v. Hall ---------- 237

Limitations of Actions.

1. The limitation contained in section 25-210, R. R. S. 1943, does not commence to run until the guardian has obtained approval of his final account and been discharged by order of the probate court. Sherwood v. Merchants Mut. Bonding Co. ---------- 262
2. Legal school voters of school districts involved in district boundary changes under section 79-402, R. R. S. 1943, are entitled to judicial review of the action of the county superintendent ordering such changes, including, when appropriate, the right of collateral attack; and such rights may not be barred by a statute of limitations enacted subsequent to the commencement of suit to challenge or review the same. School Dist. of Gering v. Stannard ---- 624
3. When the acceleration provision of an installment note is optional with the holder of the note, the statute of limitations commences to run upon each installment as it becomes due in the absence of an effective declaration that the entire amount is due. Becker v. Lammers ---------- 839
4. An action for an injury to the rights of the plaintiff accrues under section 25-207, R. R. S. 1943, when the damage occurs and not when plaintiff discovers the cause of the damage. Omaha Paper Stock Co., Inc. v. Martin K. Eby Constr. Co., Inc. ---------- 848

Malicious Prosecution.

1. Where the process on which an arrest is made is regular and legal in form and issued by a court of competent authority, but is sued out maliciously and

without probable cause, the remedy is an action for malicious prosecution. Cimino v. Rosen ---------- 162

2. 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. Cimino v. Rosen ---------- 162
3. To maintain an action for malicious prosecution the plaintiff must prove malice and want of probable cause. Cimino v. Rosen ---------- 162
4. In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant. Cimino v. Rosen ---------- 162
5. The test as to whether or not there was probable cause is to be determined in the light of facts and circumstances as they existed and were known at the time the prosecution was commenced and not from the viewpoint of subsequently appearing facts. Cimino v. Rosen ---------- 162

Malpractice,

1. In performing professional services a doctor who is a specialist must use the skill and knowledge ordinarily possessed and used under like circumstances by members of his specialty in good standing in his or similar localities. In the application of this knowledge and skill the doctor must also use reasonable care. Halligan v. Cotton ---------- 331
2. Whether a specific manner of treatment or exercise of skill by a physician or surgeon demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter that must usually be proved by expert testimony. Halligan v. Cotton -- 331
3. Where, in the course of surgery, it was necessary to ligate bleeding blood vessels on the dome of the bladder and about 10 days later a perforation of the bladder resulted, expert opinion testimony is required before the trier of fact is permitted to

infer that the hole was the result of a lack of or the failure to exercise the required degree of skill or care. Halligan v. Cotton ---------- 331

4. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a doctor in a particular community, the test is that which physicians or surgeons in the same neighborhood and in similar communities engaged in the same or similar lines of work would ordinarily exercise for the benefit of their patients. Mecham v. McLeay 457

Mandamus.

To warrant the issuance of a writ of mandamus, the duty must be imposed upon the officer by law, the duty must exist at the time the writ is applied for, and the duty to act must be clear. Connot v. Monroe ---------- 453

Mechanics' Liens.

1. A recorded federal mortgage takes priority over an inchoate mechanic's lien subsequently filed. Westland Homes Corp. v. Hall ---------- 237
2. Under section 52-102, R. R. S. 1943, the risk of all payments made to the original contractor is upon the owner until the expiration of the time for filing any subcontractor's lien. Westland Homes Corp. v. Hall ---------- 237
3. A mechanic's lien action is tried de novo in the Supreme Court. Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc. ---------- 781

Minors.

1. An owner of a motor vehicle who knowingly entrusts it to an under-age unlicensed minor in violation of statute is guilty of negligence. Gertsch v. Gerber 181
2. The act of knowingly entrusting a motor vehicle to an under-age unlicensed minor is negligence. It becomes a proximate cause of the injury when it combines with negligent acts of the driver to cause the damage. Gertsch v. Gerber ---------- 181

Misdemeanors.

One may be guilty of aiding and abetting the commission of a misdemeanor. State v. Norman ---------- 719

Mortgages.

1. A recorded federal mortgage takes priority over an inchoate mechanic's lien subsequently filed. Westland Homes Corp. v. Hall ---------- 237
2. Under section 3-802, U.C.C., unless otherwise agreed, where a personal check is taken for an underlying obligation, the obligation is suspended pro tanto until the presentment of the check. If the check is dishonored an action may be maintained on either the check or the obligation. Westland Homes Corp. v. Hall ---------- 237

Motels.

1. In the valuation of a motel property gross room rental may be a substantial factor in making a comparison of comparable properties. Y Motel, Inc. v. State ---------- 526
2. The evidence on gross room rental was admissible herein because: (1) It was one of the items by which the jury could gauge comparability of the sales relied upon for comparison; (2) it was an item to which prospective buyers gave substantial consideration; and (3) the property was adapted to only one use. Y Motel, Inc. v. State ---------- 526

Motions, Rules, and Orders.

A motion to withdraw a plea of guilty should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds are established by clear and convincing evidence. State v. Freeman ---------- 227

Motor Vehicles.

1. Generally it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights. Wrasse v. Gustavson ---------- 41
2. An exception to the general rule occurs when the object struck is such that it blends into the surrounding area and cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision, or reasonable minds might differ as to whether the motorist was exercising due care under the circumstances. Wrasse v. Gustavson -------- 41

3. The provisions of the implied consent statutes are applicable only to prosecutions for offenses arising out of acts alleged to have been committed while the person was driving or was in the actual physical control of a motor vehicle while under the influence of alcoholic liquor. State v. Howard ---------- 45

4. Before a verdict can be directed against a motorist for failing to see an approaching automobile at a nonprotected intersection, the position of the approaching automobile must be indisputably located in a favored position. Stapleton v. Norvell ------- 71

5. If a driver fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross an intersection is for the jury. Stapleton v. Norvell 71

6. Under our guest statute, section 39-6,191, R. R. S. 1943, the owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver because of the gross negligence of the owner or operator in the operation of such motor vehicle. Botsch v. Reisdorff ---------- 165

7. "Gross negligence" within the meaning of the motor vehicle guest statute is great and excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty. Botsch v. Reisdorff ---------- 165

8. It is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Botsch v. Reisdorff ---------- 165

9. A driver of a motor vehicle should have his automobile under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof are exercising due care. Botsch v. Reisdorff ---------- 165

10. In the determination of whether all the evidence in a specific case is sufficient to submit the issue of gross negligence to the jury we have consistently held that the presence of imminence of danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the

consequences, are factors to be given material, if not controlling, consideration. Botsch v. Reisdorff 165

11. Section 39-6,191, R. R. S. 1943, the Nebraska guest statute, applies to the owner or operator of a motor vehicle and relieves both of them from liability for damages to a guest passenger unless such damage is caused by the driver being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. Gertsch v. Gerber ---------- 181

12. An owner of a motor vehicle who knowingly entrusts it to an under-age unlicensed minor in violation of statute is guilty of negligence. Gertsch v. Gerber ---------- 181

13. The act of knowingly entrusting a motor vehicle to an under-age unlicensed minor is negligence. It becomes a proximate cause of the injury when it combines with negligent acts of the driver to cause the damage. Gertsch v. Gerber ---------- 181

14. Until the driver of an automobile has notice of the presence or the likelihood of the presence of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume others will do likewise; and until he has such notice, the rule is the same as respects adults and children. Korbelik v. Johnson ---------- 356

15. Where a driver observes near his line of travel a child in the apparent control of an adult and the child quickly and unexpectedly moves into the street, it will normally be for the jury to determine under all the circumstances of the case whether the driver's duty of care was violated. Korbelik v. Johnson ---- 356

16. The instruction that "a person may assume that every other person will use reasonable care and will obey the law until the contrary reasonably appears" should not be given where the only inference that could be adduced from the evidence is that the driver ought to have seen or anticipated the presence, in the street or near his line of travel, of a child not under the apparent control of an adult. Korbelik v. Johnson ---------- 356

17. The guest statute does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States nor any provision

of the Constitution of the State of Nebraska. Lubash v. Langemeier ---------- 371
Circo v. Sisson ---------- 704

18. Generally it is negligence for a motorist to drive an automobile on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within his range of vision. Duling v. Berryman ---------- 409

19. Execution of a covenant not to levy in favor of an uninsured motorist bars recovery under uninsured motorist coverage where the policy provides the insured will hold all rights of recovery in trust for the benefit of the insurer and do nothing after loss to prejudice such rights. Hastings v. Fireman's Fund American Ins. Co. ---------- 417

20. Strict compliance with the provisions of the nonresident motorists statute relating to use of the postal service to notify a defendant that he has been sued is mandatory and jurisdictional. Wilson v. Smith ---------- 433

21. The existence or presence of elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of motor vehicles the duty to exercise a degree of care commensurate with such surrounding circumstances. Dort v. Swift & Co. ---------- 606

22. If the operator of a motor vehicle is familiar with a railroad crossing and the surroundings, it is his duty to look and listen at a time and place where looking and listening will be effective even though vision of the tracks is restricted, a failure to do so is less than the exercise of due or ordinary care and no recovery can be had for damages resulting from collision with a train. Starlin v. Burlington Northern, Inc. ---------- 619

23. It is the duty of the driver of the automobile to have his car under such control that, when it comes to a place where it is possible to see and to hear an approaching train, he can stop to avoid a collision. Starlin v. Burlington Northern, Inc. ---------- 619

24. A guest is not required to use the same degree of care as the driver of the automobile. If a guest perceives danger, or should have perceived it under the circumstances shown by the evidence, a duty to

warn the driver arises. Ordinarily, however, a guest need not watch the road or advise the driver in the management of the automobile. Circo v. Sisson -- 704

25. It is not contributory negligence for a guest to sleep while riding in an automobile when he has no knowledge of negligent driving on the part of his host, or of impending danger on the highway. Circo v. Sisson ---------- 704

Municipal Corporations.

1. The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. Matzke v. City of Seward ---------- 211
2. A water extension district described in section 19-2402, R. R. S. 1943, is an area of land or contiguous tracts of land located apart and outside any area served and benefited by an existing municipal water service system, wherein water extension mains are to be constructed and municipal water service extended. Matzke v. City of Seward 211
3. Under the statutes and rules applicable to the City of Kearney, a resolution recommending either issuance or refusal of a retail liquor license by the Nebraska Liquor Control Commission requires for adoption a majority vote of all elected members of the city council. Hadlock v. Nebraska Liquor Control Commission ---------- 721
4. A city may proscribe sexually oriented performances, not otherwise obscene or illegal, in establishments which it licenses to sell liquor by the drink. Midtown Palace, Inc. v. City of Omaha -- 785
5. A city ordinance which prohibits nudity in a liquor establishment is not rendered void by a statute which reserves solely unto the state the power to control obscenity. Midtown Palace, Inc. v. City of Omaha ---------- 785

Negligence.

1. Negligence presupposes the existence of a duty to perform some act, or act in a particular manner, and if there exists no such duty imposed by law

or otherwise no liability can be predicated upon failure to perform the act. The Geer Co. v. Hall County Airport Authority ---------- 17

2. Generally it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights. Wrasse v. Gustavson ---------- 41

3. An exception to the general rule occurs when the object struck is such that it blends into the surrounding area and cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision, or reasonable minds might differ as to whether the motorist was exercising due care under the circumstances. Wrasse v. Gustavson -------- 41

4. Before a verdict can be directed against a motorist for failing to see an approaching automobile at a nonprotected intersection, the position of the approaching automobile must be indisputably located in a favored position. Stapleton v. Norvell ------ 71

5. If a driver fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross an intersection is for the jury. Stapleton v. Norvell ---------- 71

6. Negligence consisting in whole or in part of the violation of statutes or ordinances, like other negligence, is without legal consequence unless it is a contributing cause of the injury for which recovery is sought. Stapleton v. Norvell ---------- 71

7. Ordinarily the existence of vicious or dangerous propensities in a domestic animal and knowledge of such propensities are indispensable to liability on the part of the owner. Fritz v. Marten --------- 83

8. In order for the plaintiff to recover upon the ground of negligence, the evidence must show with reasonable certainty the negligent act complained of. Fritz v. Marten ---------- 83

9. Common carriers of passengers for hire are required to exercise the utmost skill, diligence, and foresight for the protection of their passengers, consistent with the business in which they are engaged. They are liable for the slightest negligence

but they are not held to the strict liability of insurers. Ware v. Yellow Cab, Inc. ---------- 159

10. The mere fact that a collision has occurred does not create a presumption that the common carrier was guilty of negligence. Ware v. Yellow Cab, Inc. 159

11. Where a presumption of negligence does not arise as a matter of law, the plaintiff must make proof of the negligent acts of the defendant on which he bases the cause of action. Ware v. Yellow Cab, Inc. ---------- 159

12. Under our guest statute, section 39-6,191, R. R. S. 1943, the owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver because of the gross negligence of the owner or operator in the operation of such motor vehicle. Botsch v. Reisdorff -- 165

13. "Gross negligence" within the meaning of the motor vehicle guest statute is great and excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty. Botsch v. Reisdorff ---------- 165

14. Where several acts of negligence are supported by the evidence, no one act is to be segregated and weighed separately to determine whether or not it constituted gross negligence, instead the several acts are to be considered as a whole. Botsch v. Reisdorff ---------- 165

15. Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. Botsch v. Reisdorff ---------- 165

16. It is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Botsch v. Reisdorff ---------- 165

17. A driver of a motor vehicle should have his automobile under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof are exercising due care. Botsch v. Reisdorff ---------- 165

18. In the determination of whether all the evidence in a specific case is sufficient to submit the issue of

gross negligence to the jury we have consistently held that the presence of imminence of danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration. Botsch v. Reisdorff ---------- 165

19. Section 39-6,191, R. R. S. 1943, the Nebraska guest statute, applies to the owner or operator of a motor vehicle and relieves both of them from liability for damages to a guest passenger unless such damage is caused by the driver being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. Gertsch v. Gerber ---------- 181

20. An owner of a motor vehicle who knowingly entrusts it to an under-age unlicensed minor in violation of statute is guilty of negligence. Gertsch v. Gerber ---------- 181

21. The act of knowingly entrusting a motor vehicle to an under-age unlicensed minor is negligence. It becomes a proximate cause of the injury when it combines with negligent acts of the driver to cause the damage. Gertsch v. Gerber ---------- 181

22. A party is answerable only for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonable in the nature of things to be contemplated or foreseen by him, and produces the injury, it is the dominant cause. Jensen v. Hawkins Constr. Co. ---------- 220

23. A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if (1) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger; (2) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved; and (3) the licensees do not know or have reason to know of the condition and the risk involved. Jensen v. Hawkins Constr. Co. ---------- 220

24. A duty of a possessor of land to warn a licensee may arise even though a defect or condition is in fact open and obvious where the circumstances are such that there is reason to believe the risk of harm involved would not be anticipated or appreciated. Jensen v. Hawkins Constr. Co. ---------- 220

25. 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. Jensen v. Hawkins Constr. Co. ---------- 220

26. The question of the existence of negligence or contributory negligence is for the trier of facts where different minds may reasonably draw different conclusions from the evidence. Jensen v. Hawkins Constr. Co. ---------- 220

27. Whether negligence may be attributed to a minor 11 years of age is usually a question of fact for the jury. Gadeken v. Langhorst ---------- 299

28. A minor 11 years of age is required to exercise that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. Gadeken v. Langhorst ---------- 299

29. In performing professional services a doctor who is a specialist must use the skill and knowledge ordinarily possessed and used under like circumstances by members of his specialty in good standing in his or similar localities. In the application of this knowledge and skill the doctor must also use reasonable care. Halligan v. Cotton ---------- 331

30. Whether a specific manner of treatment or exercise of skill by a physician or surgeon demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter that must usually be proved by expert testimony. Halligan v. Cotton -- 331

31. One of the exceptions to the requirement of expert testimony is the situation where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laymen. Halligan v. Cotton ---------- 331

32. Where, in the course of surgery, it was necessary to ligate bleeding blood vessels on the dome of the bladder and about 10 days later a perforation of the bladder resulted, expert opinion testimony is required before the trier of fact is permitted to infer that the hole was the result of a lack of or the failure to exercise the required degree of skill or care. Halligan v. Cotton ---------- 331

33. Until the driver of an automobile has notice of the presence or the likelihood of the presence of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume others will do likewise; and until he has such notice, the rule is the same as respects adults and children. Korbelik v. Johnson ---------- 356

34. Where a driver observes near his line of travel a child in the apparent control of an adult and the child quickly and unexpectedly moves into the street, it will normally be for the jury to determine under all the circumstances of the case whether the driver's duty of care was violated. Korbelik v. Johnson ---------- 356

35. The instruction that "a person may assume that every other person will use reasonable care and will obey the law until the contrary reasonably appears" should not be given where the only inference that could be adduced from the evidence is that the driver ought to have seen or anticipated the presence, in the street or near his line of travel, of a child not under the apparent control of an adult. Korbelik v. Johnson ---------- 356

36. The guest statute does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States nor any provision of the Constitution of the State of Nebraska. Lubash v. Langemeier ---------- 371
Circo v. Sisson ---------- 704

37. Generally it is negligence for a motorist to drive an automobile on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within his range of vision. Duling v. Berryman ---------- 409

38. Strict compliance with the provisions of the nonresident motorists statute relating to use of the postal service to notify a defendant that he has

been sued is mandatory and jurisdictional. Wilson v. Smith ---------- 433

39. In an action where the comparative negligence doctrine has application a verdict should not be directed against the plaintiff on the ground of contributory negligence unless it can be said as a matter of law that the plaintiff's negligence was more than slight in comparison with that of the defendant. Coleman v. Diamond Engineering Co. ---------- 487

40. The measuring of the comparison of negligence of the defendant and the contributory negligence of the plaintiff is ordinarily a factual question for the jury. Coleman v. Diamond Engineering Co. ----- 487

41. The existence or presence of elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of motor vehicles the duty to exercise a degree of care commensurate with such surrounding circumstances. Dort v. Swift & Co. ---------- 606

42. If the operator of a motor vehicle is familiar with a railroad crossing and the surroundings, it is his duty to look and listen at a time and place where looking and listening will be effective even though vision of the tracks is restricted, a failure to do so is less than the exercise of due or ordinary care and no recovery can be had for damages resulting from collision with a train. Starlin v. Burlington Northern, Inc. ---------- 619

43. It is the duty of the driver of the automobile to have his car under such control that, when it comes to a place where it is possible to see and to hear an approaching train, he can stop to avoid a collision. Starlin v. Burlington Northern, Inc. ------ 619

44. The contributory negligence of a guest is ordinarily a question of fact for the jury. Circo v. Sisson -- 704

45. It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributing cause of the injury. Circo v. Sisson ---------- 704

46. A guest is not required to use the same degree of care as the driver of the automobile. If a guest perceives danger, or should have perceived it under the circumstances shown by the evidence, a duty to warn the driver arises. Ordinarily, however, a

guest need not watch the road or advise the driver in the management of the automobile. Circo v. Sisson ---------- 704

47. It is not contributory negligence for a guest to sleep while riding in an automobile when he has no knowledge of negligent driving on the part of his host, or of impending danger on the highway. Circo v. Sisson ---------- 704

48. The defense of contributory negligence and assumption of risk are not inconsistent defenses, although the evidence as to one may tend to prove the other. Circo v. Sisson ---------- 704

New Trial.

1. When a new trial is granted, or a judgment vacated, as a matter of grace and not of right, the court may in its discretion impose reasonable conditions. Korte v. Betzer ---------- 15

2. The newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in the result. State v. Glouser ---------- 190

3. Newly discovered evidence must be competent, material, and credible and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial. It must appear that the unsuccessful party had no knowledge of the newly discovered evidence at the previous trial and could not have discovered it by the exercise of reasonable diligence. State v. Glouser ---------- 190

4. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown its determination will not be disturbed. State v. Fowler ---------- 420

5. In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon. State v. Cordell -- 562

Notice.

1. In order to perfect an appeal to the District Court from a decision of a county board of equalization, pursuant to section 77-1510, R. R. S. 1943, all ac-

tivities necessary to perfect such appeal, including the filing of notice of appeal, are required to be carried out within 45 days of the adjournment of the board. Knoefler Honey Farms v. County of Sherman ---------- 95

2. The District Court acquires jurisdiction by appeal from a decision of a county board of equalization, where the taxpayer gives notice of appeal, furnishes an appeal bond, and files in the office of the clerk of the District Court a transcript of the proceedings and order of the county board of equalization within the time allowed by law. Knoefler Honey Farms v. County of Sherman ---------- 95
3. The reading by an official court reporter of testimony of a witness examined on trial after the jury has retired for deliberation, when a disagreement arises within the jury as to certain testimony, is proper so long as such action is taken in the presence of or after notice to the parties or their counsel. Bakhit v. Thomsen ---------- 133
4. The filing and serving of notice of appeal as required by section 76-715, R. R. S. 1943, is jurisdictional. Estate of Tetherow v. State ---------- 150

Nudity.

1. Nudity and obscenity are not synonymous. A nude performance does not become an obscene performance unless, taken as a whole, it appeals predominantly to the prurient interest, a shameful interest in nudity or sex beyond the customary limits of candor, it describes in a patently offensive way sexual conduct specifically proscribed by state law, and, taken as a whole, it lacks serious artistic value as determined by the average person applying contemporary community standards. Midtown Palace, Inc. v. City of Omaha ---------- 785
2. A city may proscribe sexually oriented performances, not otherwise obscene or illegal, in establishments which it licenses to sell liquor by the drink. Midtown Palace, Inc. v. City of Omaha ---------- 785
3. A city ordinance which prohibits nudity in a liquor establishment is not rendered void by a statute which reserves solely unto the state the power to control obscenity. Midtown Palace, Inc. v. City of Omaha ---------- 785

Nuisances.

1. The attractive nuisance doctrine has no application to pools, ponds, or other bodies of water, artificial or natural, where there exist no unusual traps or hazards. Haden v. Hockenberger & Chambers Co. ---------- 713
2. The attractive nuisance doctrine does not apply to machinery in a static condition unless there is evidence that the machinery is enticing and inherently dangerous to indiscriminating children of tender years. Haden v. Hockenberger & Chambers Co. ---------- 713

Obscenity.

1. The Nebraska obscenity statutes are in full compliance with the criteria and standards required by recent Supreme Court decisions, including Miller v. California (1973), 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419. State v. American Theater Corp. -- 289
2. The four magazines involved herein depict or describe in a patently offensive way sexual conduct specifically covered by our state law, as authoritatively construed. State v. American Theater Corp. ---------- 289
3. A minimum requirement to merit First Amendment protection is that the work in question has serious literary, artistic, political, or scientific value. State v. American Theater Corp. ---------- 289
4. The "knowingly" language of the statute, and the construction given by the District Court in this case, satisfies the constitutional requirements of scienter. State v. American Theater Corp. ------- 289
5. A seller of magazines is ordinarily presumed to know what he is offering for sale, although it is not universally so. The operator of a book store, for instance, would not be presumed to know of every isolated obscene statement in the hundreds of books which he has for sale. But in a situation, as here, where the magazines are enclosed in plastic and the covers, front and back, are occupied with pictures of nude individuals in various poses, it can hardly be said that the jury could not infer knowledge of their contents by the defendant and an intent to sell obscene materials. State v. American Theater Corp. ---------- 289

6. The magazines involved herein are hard core pornography as repeatedly described by the United States Supreme Court. They are obscene whether we use the Miller test or the Roth-Memoirs test. State v. American Theater Corp. ---------- 289
7. The definition of obscenity is not a question of fact but one of law. State v. American Theater Corp. - 289
8. The word "obscene" as used in the statute is not merely a generic or descriptive term, but a legal term of art. It is sufficiently definite in legal meaning to give a defendant notice of a charge against him. State v. American Theater Corp. ---------- 289
9. Nudity and obscenity are not synonymous. A nude performance does not become an obscene performance unless, taken as a whole, it appeals predominantly to the prurient interest, a shameful interest in nudity or sex beyond the customary limits of candor, it describes in a patently offensive way sexual conduct specifically proscribed by state law, and, taken as a whole, it lacks serious artistic value as determined by the average person applying contemporary community standards. Midtown Palace, Inc. v. City of Omaha ---------- 785
10. A city ordinance which prohibits nudity in a liquor establishment is not rendered void by a statute which reserves solely unto the state the power to control obscenity. Midtown Palace, Inc. v. City of Omaha ---------- 785

Omitted Property.

In order to sustain an addition of property by tax assessors to a return as omitted property it must appear that specific items were added which were not assessed in the original assessment. Sealtest Central Div.-Omaha, Kraftco Corp. v. Douglas County Board of Equalization ---------- 809

Ordinances.

1. A city may proscribe sexually oriented performances, not otherwise obscene or illegal, in establishments which it licenses to sell liquor by the drink. Midtown Palace, Inc. v. City of Omaha ---------- 785
2. A city ordinance which prohibits nudity in a liquor establishment is not rendered void by a statute which reserves solely unto the state the power to

control obscenity. Midtown Palace, Inc. v. City of Omaha ---------- 785

Outrageous Conduct.

1. One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. Paasch v. Brown ---------- 368
2. Liability exists only where the severe emotional distress is inflicted intentionally or recklessly and only where the conduct is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. Paasch v. Brown ---------- 368
3. A mere failure to comply with a court judgment or decree does not give rise to a separate tort liability for outrageous conduct in favor of the person for whose benefit the original court judgment or decree was entered. Paasch v. Brown --- 368

Parent and Child.

1. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent. Bigley v. Tibbs 4
2. A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed. Bartlett v. Bartlett -- 76
3. An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must ordinarily be founded upon new facts and circumstances which have arisen since the entry of the decree. Bartlett v. Bartlett ---- 76
4. 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. Bartlett v. Bartlett ---------- 76
5. In a proceeding involving the custody of minor children, the court may place custody in the court in order to facilitate judicial supervision and summary power to act swiftly in the best interests of the children. Bartlett v. Bartlett ---------- 76

6. A change of circumstances, which will permit a modification of a divorce decree relating to child custody, includes those not known to the court and the opposing party at the time of the entry of the decree and which could not have been discovered by the exercise of reasonable diligence at the time of the entry of the original decree. Bartlett v. Bartlett ---------- 76
Youngberg v. Youngberg ---------- 394

7. The discovery of material facts which existed but were unknown to the court and the opposing party and could not have been ascertained with reasonable diligence, which, if known to the court, might have warranted the entry of a different decree, are changed circumstances which the court will consider in an application for a change of child custody. Bartlett v. Bartlett ---------- 76

8. When custody of minor children is placed in the court, the court, at a subsequent hearing, may consider predivorce activities of the parties unknown to the court at the time the decree was entered. Bartlett v. Bartlett ---------- 76

9. 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. Bartlett v. Bartlett ---------- 76

10. A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children. Youngberg v. Youngberg ---------- 394

11. Whether or not a mother's meretricious relationship requires a change in child custody depends upon the circumstances in each case. Youngberg v. Youngberg ---------- 394

12. In determining who shall receive custody of the minor children of the parties to an action for the dissolution of marriage the controlling consideration is the best interests and welfare of the children. Lockard v. Lockard ---------- 400
Reynek v. Reynek ---------- 404

13. The fact that one of the parties to an action for

the dissolution of marriage has committed adultery, although a relevant consideration, will not necessarily be determinative of who shall be awarded custody of the minor children of those parties. Lockard v. Lockard ---------- 400

14. The action of a party to an action for the dissolution of marriage in accepting the benefits of a decree in respect to his or her own interests should not be permitted to affect adversely the interests of the children of the parties, and will not preclude consideration of an appeal to the extent such interests are involved. Reynek v. Reynek ------- 404

15. Section 13-102, R. R. S. 1943, when construed together with section 42-364, R. R. S. 1943, gives statutory authority for the court to modify the amount of child support in a paternity action decree because of a change in circumstances of the parties or in the best interests of the children. Riederer v. Siciunas ---------- 580

16. 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. Cumming v. Cumming -------- 601

17. Ordinarily the fixing of child support and alimony rests in the sound discretion of the court, and in the absence of abuse of discretion, will not be disturbed on appeal. Wheeler v. Wheeler ---------- 615

18. In determining the amount of child support to be awarded, the status, character, and situation of the parties and all attendant circumstances must be considered. Gregg v. Gregg ---------- 811

Parties.

1. When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. Gant v. City of Lincoln ---------- 108

2. In determining whether a class action is properly brought, considerable discretion is vested in the trial court. In the absence of appeal, that decision is final and even though it may have been erroneous, it is not void. Gant v. City of Lincoln ----- 108

3. The judgment in a class or representative suit, to

which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. Gant v. City of Lincoln 108

4. A court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it. Gant v. City of Lincoln ---------- 108
5. When there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it. Omaha P. P. Dist. v. Natkin & Co. ---------- 518
6. The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract. Omaha P. P. Dist. v. Natkin & Co. -- 518
7. Legal school voters of school districts have the right to intervene in any pending proceeding in the District Court brought by one of the districts involved and challenging district boundary changes ordered under section 79-402, R. R. S. 1943. School Dist. of Gering v. Stannard ---------- 624
8. Third persons may be joined in an action for dissolution of a marriage where it is necessary to determine interests in property to be awarded the parties to the marriage, or their interests may be adversely affected. Yelkin v. Yelkin ---------- 789

Paternity.

Section 13-102, R. R. S. 1943, when construed together with section 42-364, R. R. S. 1943, gives statutory authority for the court to modify the amount of child support in a paternity action decree because of a change in circumstances of the parties or in the best interests of the children. Riederer v. Siciunas ---------- 580

Penal Institutions.

An escapee breaks custody whenever he escapes by subterfuge, force, by walking away, or failing to return from a temporary leave. State v. Glenn -- 230

Physicians and Surgeons.

1. In performing professional services a doctor who

is a specialist must use the skill and knowledge ordinarily possessed and used under like circumstances by members of his specialty in good standing in his or similar localities. In the application of this knowledge and skill the doctor must also use reasonable care. Halligan v. Cotton 331

2. Whether a specific manner of treatment or exercise of skill by a physician or surgeon demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter that must usually be proved by expert testimony. Halligan v. Cotton 331

3. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a doctor in a particular community, the test is that which physicians or surgeons in the same neighborhood and in similar communities engaged in the same or similar lines of work would ordinarily exercise for the benefit of their patients. Mecham v. McLeay 457

Pleadings.

1. A petition may be attacked at any stage of the proceedings on the ground it fails to state a cause of action, but where the attack is delayed until appeal the pleading will be liberally construed. Johnson v. Hays 54

2. In an appeal from the award of the appraisers, the party first appealing has the burden of filing the petition in the District Court. Estate of Tetherow v. State 150

3. The failure of the party first appealing to timely file a petition in the District Court does not affect or defeat jurisdiction. Estate of Tetherow v. State 150

4. The failure of the appealing party to plead within the time required may, unless good cause is shown, be grounds in the exercise of sound discretion by the District Court for dismissal of the appeal. Estate of Tetherow v. State 150

5. In a proceeding under the Post Conviction Act, the appellant is required to allege facts which, if proved, constitute a violation or infringement of constitutional rights, and alleging mere conclusions of fact or of law are not sufficient to require the court to grant an evidentiary hearing. State v. Russ 308

6. The filing of an amended petition in a pending action when summonses are issued thereon and served upon the defendants is, for all intents and purposes, the filing of a new action in that case. Caradori v. Hamilton ---------- 500
7. In determining the validity of an instrument filed for the purpose of complying with statutory procedures required in a proceeding to change school district boundaries, the substance and not the form of the instrument controls. School Dist. of Seward v. Stannard ---------- 624
8. Formal unequivocal judicial admissions which waive any evidence by the adverse party on the admitted matter are conclusive on the pleader. Ordinary evidentiary admissions in pleadings may be overcome by evidence explaining an apparent inconsistency, such as showing the pleader's ignorance of the contents of the pleadings, his misunderstanding of the facts, or mistake on his part. Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc. 781
9. The right to interest under the provisions of section 76-711, R. R. S. 1943, on an award in an eminent domain proceeding does not depend upon a prayer for such interest in some pleading, but exists by virtue of the provisions of the statute. Thacker v. State ---------- 817

Police Officers and Sheriffs.

A policeman's knowledge of a suspect's reputation is a practical consideration of everyday life upon which an officer or magistrate may properly rely in assessing the reliability of an informant's tip. State v. Graves ---------- 797

Political Subdivisions.

1. Section 23-2406, R. R. S. 1943, requires that actions under the Political Subdivisions Tort Claims Act shall be heard without a jury but otherwise determined in the same manner as other suits. The action is similar to a law action in which a jury has been waived and is governed by the same rules. Buttner v. Omaha P. P. Dist. ---------- 515
2. On an appeal to this court of an action under the Political Subdivisions Tort Claims Act the findings of the trial court will not be disturbed unless clearly wrong. Buttner v. Omaha P. P. Dist. ---------- 515

3. Where an action is brought pursuant to section 23-930, R. R. S. 1943, the trial court is without authority to award the plaintiff an attorney's fee or to charge an award of attorney's fees as costs against the defendant. Willms v. Nebraska City Airport Authority ---------- 567

Post Conviction.

1. In a proceeding under the Post Conviction Act, the appellant is required to allege facts which, if proved, constitute a violation or infringement of constitutional rights, and alleging mere conclusions of fact or of law are not sufficient to require the court to grant an evidentiary hearing. State v. Russ ------ 308
2. An illegal search and seizure or arrest issue cannot be considered in a post conviction review where the circumstances of the search and seizure or arrest were fully known to the defendant at the time of the trial resulting in his conviction. State v. Russ 308
3. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Russ -------- 308
4. Matters relating to sentences within statutory limits are not a basis for post conviction relief. State v. Taylor ---------- 388
5. The denial of request for court-appointed counsel on appeal of a post conviction proceeding is properly refused when the record and files show the defendant is not entitled to relief. State v. Taylor 388

Powers.

1. A city may proscribe sexually oriented performances, not otherwise obscene or illegal, in establishments which it licenses to sell liquor by the drink. Midtown Palace, Inc. v. City of Omaha ---------- 785
2. A city ordinance which prohibits nudity in a liquor establishment is not rendered void by a statute which reserves solely unto the state the power to control obscenity. Midtown Palace, Inc. v. City of Omaha ---------- 785

Presentence Reports.

1. Unless it is impractical to do so, the court shall not impose sentence upon an offender convicted of

a felony without first ordering a presentence investigation of the offender and giving due consideration to the report of the investigation. State v. Hilderbrand ---------- 233

2. If a sentence imposed is within the statutory limits it will not be disturbed by this court on appeal in the absence of an abuse of judicial discretion. The trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment, and includes the sentencing judge's observation as to demeanor, attitude, and all the facts and circumstances surrounding the life of the defendant. State v. Wade ---------- 365

Principal and Agent.

1. Generally an agent acting for a disclosed principal is not liable for the contracts of the principal. Reed v. Nice-Pak Products, Inc. ---------- 505
2. The payment of fees alone is not enough to create an agency relationship. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---------- 586
3. An agency relationship exists only when there has been a manifestation of consent that one person shall act on behalf of another and is subject to that person's control. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---------- 586

Probable Cause.

1. The proof of probable cause which must be made before a search warrant may be issued must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. State v. Kallos ---------- 113
2. Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. State v. Dussault ---------- 122
3. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Dussault ---------- 122
4. Upon a hearing on a motion to suppress where the

sufficiency of the affidavit is challenged, its contents supporting probable cause may be supplemented by additional information proved to have been known to the officers at the time the affidavit was made and the warrant issued. State v. Dussault ---------- 122

5. Where the police were advised by an informant that a certain individual, identified by name and address, was departing by a specified airline flight for a California destination and was in possession of a large sum of money for the purpose of purchasing a specified quantity and type of drugs and would be returning on one or the other of two specified days on the same airline with the drugs in his luggage; and the police pursuant to this tip verify by their own personal observation and that of other law enforcement officers the departure, return, and identity of the individual and observe him pick up his luggage, probable cause for arrest and search without warrant may be said to exist. State v. Dussault ---------- 122

6. Where the process on which an arrest is made is regular and legal in form and issued by a court of competent authority, but is sued out maliciously and without probable cause, the remedy is an action for malicious prosecution. Cimino v. Rosen ------ 162

7. Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty. Cimino v. Rosen ---------- 162

8. To maintain an action for malicious prosecution the plaintiff must prove malice and want of probable cause. Cimino v. Rosen ---------- 162

9. In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant. Cimino v. Rosen ---------- 162

10. The test as to whether or not there was probable cause is to be determined in the light of facts and circumstances as they existed and were known at the time the prosecution was commenced and not from the viewpoint of subsequently appearing facts. Cimino v. Rosen ---------- 162

11. The applicable standard for an arrest without war-

rant is that there must exist reasonable ground to believe both that a felony has been committed and that the person arrested is guilty of such offense. This standard, under our statutory and case law, is the same standard as that of the Fourth Amendment to the Constitution of the United States protecting persons against unreasonable seizures. State v. Russ ---------- 308

12. When authorized to make an arrest for a felony without a warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance. The constitutional exercise of such authority is subject to the condition that the officer has probable cause to believe the person sought is within the building. No search warrant is required in this circumstance. State v. Russ ---------- 308

13. The existence of probable cause must be determined by a practical and not any technical standard. State v. Micek ---------- 379

14. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. State v. Micek ---------- 379

15. The applicable standard for an arrest without warrant is that there must exist reasonable ground to believe both that a felony has been committed and that the person arrested is guilty of such offense. State v. Atwater ---------- 669

16. There is no formula for the determination of reasonableness for an arrest without a warrant. Each case is to be decided on its own facts and circumstances. The ultimate test is whether the action of the officers was reasonable. State v. Atwater 669

Probation and Parole.

1. A finding that a defendant has violated his proba-

tion must be established by clear and convincing evidence. State v. Howard ---------- 45
2. A proceeding to revoke probation may be instituted within the probationary period or within a reasonable time thereafter. State v. White ---------- 93
3. An uninvolved hearing officer, who has had no direct connection with the case, should determine whether probable cause exists for revocation of probation in order to meet due process requirements. State v. Moreno ---------- 351
4. When subsequent to a defendant's conviction a statutory change is made in the law governing parole and the defendant thereafter violates his parole, the amendatory law is applicable and is not ex post facto in its application. Berry v. Wolff ---------- 717
5. In imposing sentence and denying probation in a criminal case, the judgment of the District Court will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Ens ------- 852

Process.

Strict compliance with the provisions of the nonresident motorists statute relating to use of the postal service to notify a defendant that he has been sued is mandatory and jurisdictional. Wilson v. Smith-- 433

Property.

1. A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if (1) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger; (2) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved; and (3) the licensees do not know or have reason to know of the condition and the risk involved. Jensen v. Hawkins Constr. Co. ---- 220
2. A duty of a possessor of land to warn a licensee may arise even though a defect or condition is in fact open and obvious where the circumstances are such that there is reason to believe the risk of harm involved would not be anticipated or appreciated. Jensen v. Hawkins Constr. Co. ---------- 220

3. Section 36-107, R. R. S. 1943, requires that a sale of real estate made through a broker be in writing between the broker and the landowner. Donahoo v. Home of the Good Shepherd of Omaha, Inc. -- 586
4. Third persons may be joined in an action for dissolution of a marriage where it is necessary to determine interests in property to be awarded the parties to the marriage, or their interests may be adversely affected. Yelkin v. Yelkin ---------- 789

Prosecuting Attorneys.

1. While substantial, the prosecutor's duty of candor i.e., to disclose material evidence favorable to accused, is not all-encompassing; it neither requires full disclosure nor permits a combing of the prosecutor's files in search of evidence possibly useful to the accused. State v. Richards ---------- 345
2. A prosecutor's failure to disclose a report does not violate due process when there is no significant chance that the report, which could have been used solely for impeachment purposes, would induce a reasonable doubt in the jurors' minds or is inherently unfair. State v. Richards ---------- 345
3. The conviction herein is reversed for the failure of the trial court to grant a mistrial for the inexcusable conduct of the prosecution in presenting before the jury possible inferences of previous crimes on the part of the defendant. State v. Atwater ---- 563
4. Defendants must be given fair trials, and it is the responsibility of the prosecution to see that each defendant receives one. State v. Atwater -------- 563
5. A maxim sanctioned by centuries of experience is that ignorance of the law is no excuse. This maxim is particularly applicable to a county attorney who should make himself fully conversant with the duties of his office. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729
6. Misconduct of an attorney acting in an official capacity has been held to constitute ground for his suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729
7. Respondent was guilty of extreme negligence in his failure to familiarize himself with section 77-1918, R. R. S. 1943. The fact that he was extremely busy does not absolve him of this responsibility. State ex rel. Nebraska State Bar Assn. v. Holscher 729

8. Disciplinary Rule 8-101(A) (2) prohibits a lawyer who holds public office from using that office to influence or attempt to influence a tribunal to act in favor of himself or a client. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729

Proximate Cause.

1. A party is answerable only for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonable in the nature of things to be contemplated or foreseen by him, and produces the injury, it is the dominant cause. Jensen v. Hawkins Constr. Co. ---------- 220
2. The proximate cause of an injury is that cause which, in natural and continuous sequence, unaccompanied by any efficient, intervening cause, produces the injury, and without which the result would not have occurred. Starlin v. Burlington Northern, Inc. ---------- 619
3. Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury. Starlin v. Burlington Northern, Inc. 619
4. It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributing cause of the injury. Circo v. Sisson ---------- 704

Public Officers and Employees.

1. L.B. 549, Laws 1973, page 1309 (now section 5-108, R. S. Supp., 1974), does not permanently change the method of electing governing boards by districts but provides for at large elections for counties with district elections until the county is properly redistricted. State ex rel. Hansen v. Seiler ------ 9
2. An order of a county superintendent changing school district boundaries under the provisions of section 79-402, R. R. S. 1943, may be collaterally attacked if the superintendent is without jurisdiction to act. School Dist. of Seward v. Stannard ------ 624

3. Legal school voters of school districts involved in district boundary changes under section 79-402, R. R. S. 1943, are entitled to judicial review of the action of the county superintendent ordering such changes, including, when appropriate, the right of collateral attack; and such rights may not be barred by a statute of limitations enacted subsequent to the commencement of suit to challenge or review the same. School Dist. of Gering v. Stannard ---- 624
4. Laws 1971, L.B. 743, which amended section 77-1918, R. R. S. 1943, was to be effective so far as compensation was provided for county attorneys as soon as it could become operative under the Constitution of the State of Nebraska. State ex rel. Nebraska State Bar Assn. v. Holscher ------- 729
5. The fee provided for county attorneys in section 77-1918, R. R. S. 1943, is not payable until the tax foreclosure decree is entered and the property sold pursuant to such decree. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729

Public Service Commissions.

1. The exercise of jurisdiction by the Federal Communications Commission over the terms and conditions governing the interconnection of customer-provided telephone equipment to the nationwide telephone network has established the primacy of federal authority and preempts conflicting or inconsistent state regulation. Sherdon v. Dann ------- 768
2. The action of the Federal Communications Commission does not foreclose any state from taking action of its own in the telephone interconnect area so long as such action does not derogate the interstate rulings. Sherdon v. Dann ---------- 768
3. Federal action in the telephone interconnect area does not foreclose any state from the full exercise of its investigatory powers with respect to the effects of interconnection as related to the quality of telephone service or the regulation by the state of intrastate rate structures and revenue requirements for services subject to its jurisdiction. Sherdon v. Dann ---------- 768

Public Welfare.

An administrative agency may not act unreasonably

or capriciously. Its judgment must be based on a factual foundation, and the agency or officer must give due consideration to all the essential elements involved. If material elements have not been given due consideration, the decision is void. Godden v. Department of Public Welfare ---------- 269

Railroads.

1. The term "car service" includes the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59
2. Congress delegated, under the supervision of the Interstate Commerce Commission, the power and the duty of every carrier by railroad to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59
3. If the operator of a motor vehicle is familiar with a railroad crossing and the surroundings, it is his duty to look and listen at a time and place where looking and listening will be effective even though vision of the tracks is restricted, a failure to do so is less than the exercise of due or ordinary care and no recovery can be had for damages resulting from collision with a train. Starlin v. Burlington Northern, Inc. ---------- 619
4. It is the duty of the driver of the automobile to have his car under such control that, when it comes to a place where it is possible to see and to hear an approaching train, he can stop to avoid a collision. Starlin v. Burlington Northern, Inc. ------ 619

Rape.

1. In a prosecution for rape, after the prosecutrix has testified to the commission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made. State v. Castor ------- 86
State v. Escamilla ---------- 503

2. The testimony concerning such complaint should, on direct examination, be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae. State v. Castor ---------- 86
State v. Escamilla ---------- 503
3. A woman who is chaste is one who has never had sexual intercourse with a male person. An act of sexual intercourse without her consent and against her will if she is capable of consent does not destroy her chastity. State v. Richards ---------- 345

Records.

1. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. State v. Micek - 379
2. A judicial record of this state, or of any federal court of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he has one. State v. Micek ---------- 379
3. A judicial record of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of a judge, chief justice, or presiding magistrate, that the attestation is in due form of law. State v. Micek ---------- 379
4. The decision in this case is controlled by our opinion and holding in State v. Lewis, 192 Neb. 518, 222 N. W. 2d 815, filed October 31, 1974. State v. Shropshire ---------- 470
5. The summary judgment statute, section 25-1332, R. R. S. 1943, requires the record before the court to show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Reed v. Nice-Pak Products, Inc. ---------- 505

6. A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. State v. Atwater 669
7. After an administrative hearing, the Nebraska Liquor Control Commission must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. Hadlock v. Nebraska Liquor Control Commission _ 721
8. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. Hadlock v. Nebraska Liquor Control Commission _____ 721
9. Purported evidence which does not appear in the record cannot be considered by this court on appeal. Schetzer v. Sullivan _____ 841

Res Judicata.

The judgment of the District Court in the former action is final as to every issue there decided and every other issue which could have been decided in the case. This rule of res judicata is grounded on public policy and necessity to end litigation and the hardship imposed on a person by being vexed twice for the same cause. Caradori v. Hamilton __ 500

Right to Counsel.

1. In both civil and criminal cases the right to a hearing includes the right to appear by counsel, and the arbitrary refusal of such right constitutes a deprivation of due process. Simon v. Lieberman __ 321
2. The Legislature can create a small claims court where informal hearings may be held without the assistance of counsel, so long as the right to appear by counsel is guaranteed in a real sense somewhere in the proceedings. Simon v. Lieberman _____ 321
3. In an appeal to the District Court from a judgment of the small claims court under section 24-527, R. S. Supp., 1974, a party has the right to provide his own counsel and appear by such counsel in the District Court. Simon v. Lieberman _____ 321
4. The denial of request for court-appointed counsel on appeal of a post conviction proceeding is prop-

erly refused when the record and files show the defendant is not entitled to relief. State v. Taylor -- 388

Rules of Court.

This court will not take judicial notice of the rules of practice of the District Court. Fanning v. Richards 431

Savings and Loan Associations.

Where a federal savings and loan association installs a computer terminal in a retail store as authorized by the Federal Home Loan Bank Board for the purpose of facilitating the electronic transfer of funds between the association and its depositors, the owner or operator of the store, by manning the computer terminal and assisting in such electronic transfer of funds under the facts here, is not engaging in either a banking or savings and loan business. State ex rel. Meyer v. American Community Stores Corp. ---------- 634

Schools and School Districts.

1. The selection of a site for a new school building in a Class III school district is an administrative determination to be made by the board of education of the district. Christian v. Geis ---------- 146
2. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation. Exceptions are made only where right and justice so demand. Christian v. Geis ---------- 146
3. Estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice. Christian v. Geis ---------- 146
4. In selecting school districts for the purpose of comparison pursuant to section 48-818, R. R. S. 1943, the ultimate question is whether, as a matter of fact, the school districts selected for comparison are sufficiently similar to the subject district to fulfill the requirements of section 48-818, R. R. S. 1943, and the mere fact that one set of school districts was deemed adequate in one case does not

mean that a different set of school districts would necessarily be inadequate in a different case. Crete Education Assn. v. School Dist. of Crete ---------- 245

5. School tax money received by one school district from lands apparently, but not legally, within its exterior boundaries, levied and collected for its uses and purposes, cannot be recovered by the school district within whose territory the lands actually lie, where no levy was made or taxes collected on said lands by such district for its uses and purposes; each district obtained exactly the amount of money for which its budget called and neither district obtained or had the use of money intended for the other district. School Dist. of Gering v. Stannard ---------- 624

6. An order of a county superintendent changing school district boundaries under the provisions of section 79-402, R. R. S. 1943, may be collaterally attacked if the superintendent is without jurisdiction to act. School Dist. of Gering v. Stannard ---------- 624

7. In determining the validity of an instrument filed for the purpose of complying with statutory procedures required in a proceeding to change school district boundaries, the substance and not the form of the instrument controls. School Dist. of Gering v. Stannard ---------- 624

8. The Legislature has the plenary power to fix school district boundaries by direct legislative action which, if otherwise valid, is unaffected by constitutional guaranties of procedural due process. Where, however, the Legislature has authorized school district boundary changes by private persons acting within guidelines and procedures established by the Legislature, procedural due process is required. School Dist. of Gering v. Stannard ---------- 624

9. Legal school voters of school districts involved in district boundary changes under section 79-402, R. R. S. 1943, are entitled to judicial review of the action of the county superintendent ordering such changes, including, when appropriate, the right of collateral attack; and such rights may not be barred by a statute of limitations enacted subsequent to the commencement of suit to challenge or review the same. School Dist. of Gering v. Stannard ---- 624

10. Legal school voters of school districts have the

right to intervene in any pending proceeding in the District Court brought by one of the districts involved and challenging district boundary changes ordered under section 79-402, R. R. S. 1943. School Dist. of Gering v. Stannard ---------- 624

Searches and Seizures.

1. The proof of probable cause which must be made before a search warrant may be issued must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. State v. Kallos ---------- 113
2. Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. State v. Dussault ---------- 122
3. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Dussault ---------- 122
4. Upon a hearing on a motion to suppress where the sufficiency of the affidavit is challenged, its contents supporting probable cause may be supplemented by additional information proved to have been known to the officers at the time the affidavit was made and the warrant issued. State v. Dussault ------- 122
5. Where the police were advised by an informant that a certain individual, identified by name and address, was departing by a specified airline flight for a California destination and was in possession of a large sum of money for the purpose of purchasing a specified quantity and type of drugs and would be returning on one or the other of two specified days on the same airline with the drugs in his luggage; and the police pursuant to this tip verify by their own personal observation and that of other law enforcement officers the departure, return, and identity of the individual and observe him pick up his luggage, probable cause for arrest and search without warrant may be said to exist. State v. Dussault ---------- 122
6. For an affidavit based upon a tip from an informant

to be sufficient, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible. State v. Glouser ---------- 190
State v. Graves ---------- 797

7. Affidavits for search warrants must be tested in a common sense, realistic fashion. State v. Glouser 190

8. An affidavit for a search warrant may be based on hearsay information and need not reflect direct observations of affiant so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions. State v. Glouser 190
State v. Graves ---------- 797

9. An illegal search and seizure or arrest issue cannot be considered in a post conviction review where the circumstances of the search and seizure or arrest were fully known to the defendant at the time of the trial resulting in his conviction. State v. Russ 308

10. A policeman's knowledge of a suspect's reputation is a practical consideration of everyday life upon which an officer or magistrate may properly rely in assessing the reliability of an informant's tip. State v. Graves ---------- 797

11. Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. State v. Graves ---------- 797

12. The information supplied to a judicial officer issuing a search warrant on a sworn complaint may be supplemented by additional information which the arresting officers themselves have or have acquired before the arrest and which is corroborative of the complicity of the arrestee in the crime. State v. Graves ---------- 797

Sentences.

1. 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. Glouser ---------- 186
State v. Atwater ---------- 669

2. Unless it is impractical to do so, the court shall not impose sentence upon an offender convicted of a felony without first ordering a presentence investigation of the offender and giving due consideration to the report of the investigation. State v. Hilderbrand ---------- 233

3. Where a sentence not authorized by law has been imposed, an appellate court may remand the cause with directions to impose a lawful sentence even though a part of the invalid sentence has been served. State v. Gaston ---------- 259

4. If the sentence first imposed was invalid, the sentence imposed after remand does not violate the constitutional prohibition against double jeopardy. State v. Gaston ---------- 259

5. The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses arising out of the same transaction or the same chain of events is whether the offense charged in one count involves any different elements than an offense charged in another count. State v. Saxon 278

6. Constitutional provisions against double jeopardy are not violated by the imposition of consecutive sentences, one for robbery in violation of section 28-414, R. R. S. 1943, and one for the use of a firearm in the commission of a felony in violation of section 28-1011.21, R. S. Supp., 1974, even though both of the offenses charged arise out of the same transaction or the same chain of events. State v. Saxon ---------- 278

7. An action by the District Court in denying probation and imposing a sentence to confinement will not be disturbed on appeal unless an abuse of discretion can be found in the record. State v. Roberts 363

8. If a sentence imposed is within the statutory limits it will not be disturbed by this court on appeal in the absence of an abuse of judicial discretion. The trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment, and includes the sen-

tencing judge's observation as to demeanor, attitude, and all the facts and circumstances surrounding the life of the defendant. State v. Wade 365
9. Matters relating to sentences within statutory limits are not a basis for post conviction relief. State v. Taylor 388
10. It is within the discretion of the District Court to direct that sentences imposed for separate crimes be served consecutively. State v. O'Kelly 390
State v. Gochenour 855
11. It is frivolous to suggest that the refusal of a District Court to make a Nebraska sentence concurrent with a sentence in another jurisdiction is an abuse of discretion. State v. O'Kelly 390
12. A sentence imposed within the statutory limits will not be disturbed on appeal unless an abuse of discretion appears in the record. State v. Anderson .. 465
State v. Gochenour 855
13. Unless an abuse of discretion appears, a sentence within statutory limits will not be disturbed on appeal. State v. Svitak 660
14. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. State v. Graves 797
15. In imposing sentence and denying probation in a criminal case, the judgment of the District Court will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Ens 852

Specific Performance.

1. An action for specific performance is triable de novo on appeal to this court. Dowd Grain Co., Inc. v. Pflug 483
2. In the ordinary contract for the sale of real estate, time is not of the essence unless so provided in the instrument itself or is clearly manifested by the agreement construed in the light of the surrounding circumstances. Where time is not of the essence, performance must be within a reasonable time. Dowd Grain Co., Inc. v. Pflug 483
3. Specific performance should, in general be granted as a matter of course, of a written contract cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced

without hardship and when the ends of justice will be served thereby. Dowd Grain Co., Inc. v. Pflug - 483

4. In a contract for the sale of land, specific performance may properly be decreed in spite of a minor breach by the plaintiff involving no substantial failure of the exchange for the performance to be compelled. Dowd Grain Co., Inc. v. Pflug ---------- 483

5. Before there can be specific performance of an oral contract, the contract itself must be proved. Preisendorf v. Jenkins ---------- 611

States.

Where a subject is national in its character and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one to another, Congress alone can provide the needed regulations. In such a case the federal power is exclusive, and the states may not act even though Congress has not exerted its legislative authority, the silence of Congress being equivalent to a declaration that the particular commerce shall be free from regulation. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59

Statutes.

1. L.B. 549, Laws 1973, page 1309 (now section 5-108, R. S. Supp., 1974), does not permanently change the method of electing governing boards by districts but provides for at large elections for counties with district elections until the county is properly redistricted. State ex rel. Hansen v. Seiler -- 9

2. The extent of federal preemption is determined by an inquiry into the congressional intent underlying the federal law. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59

3. The fact that the Interstate Commerce Commission has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the act delegating the power. The question is whether the federal act was intended to occupy the field. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59

4. Congress intended in the enactment of Title 49 U. S. C., section 1(15), that the exclusive power is

vested in the Interstate Commerce Commission to regulate the distribution of railroad cars and to suspend administrative order-making due process pursuant to a declaration of emergency because of equipment shortage, priorities in use on a national level, or congestion. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59

5. Where one statute refers to another, which is subsequently repealed, the statute repealed becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned. Knoefler Honey Farms v. County of Sherman ---- 95

6. Where one statute refers to another and incorporates it, the subsequent independent repeal of the incorporated statute does not affect the repeal of the incorporated statute insofar as the statute which adopted it is concerned. Estate of Tetherow v. State ---------- 150

7. The statutory procedure for appealing from an award of the appraisers in an eminent domain proceeding was not modified by the enactment of L.B. 1032, Laws 1972. Estate of Tetherow v. State ---- 150

8. Under our guest statute, section 39-6,191, R. R. S. 1943, the owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver because of the gross negligence of the owner or operator in the operation of such motor vehicle. Botsch v. Reisdorff -- 165

9. The test, under the Fourteenth Amendment to the Constitution of the United States, when a state statute operates to single out a class of people for special treatment, is whether the suspect classification bears some rational relationship to the legitimate purposes of the legislation. Botsch v. Reisdorff ---------- 165

10. In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution of the United States simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Botsch v.

Reisdorff ---------- 165

11. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. Botsch v. Reisdorff ---------- 165

12. Section 39-6,191, R. R. S. 1943, the Nebraska guest statute, applies to the owner or operator of a motor vehicle and relieves both of them from liability for damages to a guest passenger unless such damage is caused by the driver being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. Gertsch v. Gerber ---------- 181

13. The legislative intent is the cardinal rule in the construction of statutes. All statutes relating to the same subject are considered as parts of a homogeneous system and later statutes are considered as supplementary to preceding enactments. Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together. Matzke v. City of Seward ---- 211

14. The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. Matzke v. City of Seward ---------- 211

15. A water extension district described in section 19-2402, R. R. S. 1943, is an area of land or contiguous tracts of land located apart and outside any area served and benefited by an existing municipal water service system, wherein water extension mains are to be constructed and municipal water service extended. Matzke v. City of Seward ---------- 211

16. Under section 52-102, R. R. S. 1943, the risk of all payments made to the original contractor is upon the owner until the expiration of the time for filing any subcontractor's lien. Westland Homes Corp. v. Hall ---------- 237

17. Under section 3-802, U.C.C., unless otherwise agreed, where a personal check is taken for an underlying obligation, the obligation is suspended pro tanto until the presentment of the check. If the check is dishonored an action may be maintained

on either the check or the obligation. Westland Homes Corp. v. Hall ---------- 237

18. 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. Crete Education Assn. v. School Dist. of Crete ---------- 245

19. That provision of section 48-817, R. R. S. 1943, prohibiting a retroactive order is interpreted to mean that the orders of the Court of Industrial Relations cannot apply to a period prior to that embraced within the dispute submitted to it. Crete Education Assn. v. School Dist. of Crete ---------- 245

20. In selecting school districts for the purpose of comparison pursuant to section 48-818, R. R. S. 1943, the ultimate question is whether, as a matter of fact, the school districts selected for comparison are sufficiently similar to the subject district to fulfill the requirements of section 48-818, R. R. S. 1943, and the mere fact that one set of school districts was deemed adequate in one case does not mean that a different set of school districts would necessarily be inadequate in a different case. Crete Education Assn. v. School Dist. of Crete ---------- 245

21. The Court of Industrial Relations, in establishing wage rates is compelled by section 48-818, R. R. S. 1943, to consider the entire situation regarding the fringe benefits made available by the subject employer and those made available by comparable employers. Crete Education Assn. v. School Dist. of Crete ---------- 245

22. The general rule is that the Legislature may not delegate legislative powers to an administrative agency. State v. Cutright ---------- 303

23. To declare what shall constitute a crime and how it shall be punished is a power vested solely and exclusively in the Legislature and may not be delegated to an administrative agency. State v. Cutright ---------- 303

24. The exercise of a legislatively delegated authority to make rules and regulations to carry out an express legislative purpose, or for the complete operation or enforcement of a law with clearly designated limitations and standards, is not an exercise of legislative power. State v. Cutright ---------- 303

25. There is no unconstitutional delegation of legislative authority where the Legislature by statute defines a crime and provides a penalty therefor, but delegates to administrative or executive authority the implementation of the details thereof. State v. Cutright ---------- 303
26. The guest statute does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States nor any provision of the Constitution of the State of Nebraska. Lubash v. Langemeier ---------- 371
Circo v. Sisson ---------- 704
27. Section 28-477, R. S. Supp., 1974, is not unconstitutional on the ground that it is vague and indefinite. State v. Cialkowski ---------- 372
28. When the Legislature has adopted a revision of the statutes, reference to or consideration of the original title will not be made in a determination of constitutionality. Lost Creek Drainage Dist. v. Kring ---------- 450
29. An amendatory statute is germane to the original statute when it is alike, closely allied, or related to such original statute. Lost Creek Drainage Dist. v. Kring ---------- 450
30. Where the language of a statute is plain and unambiguous, no interpretation is needed and the court is without authority to change the language. State v. Gallegos ---------- 651
31. Where the statutory definition of the crime is the attempt to do a certain act or acts, it is immaterial whether or not the objective of the attempt is successful, and the actual commission of a crime represents the execution of an attempt to commit it. State v. Gallegos ---------- 651
32. Where the Legislature delegates to an administrative body authority to settle labor relation disputes, the delegation is valid if the statute making the delegation establishes a sufficient basic standard — a definite and certain policy and rule of action for the guidance of the agency created to administer the law. The standards set forth in section 48-818, R. R. S. 1943, meet the above criterium. Orleans Education Assn. v. School Dist. of Orleans -- 676
33. The jurisdiction of the Court of Industrial Relations is limited to what are clearly legislative concerns

and the quasi-judicial powers which it exercises are merely incidental thereto. Section 48-818, R. R. S. 1943, does not delegate judicial powers to an administrative body in violation of Article II, section 1, or Article V, section 1, of the Nebraska Constitution. Orleans Education Assn. v. School Dist. of Orleans ---------- 676

34. The authority given to the Court of Industrial Relations to establish rates of pay and conditions of employment in accordance with the standards prescribed by section 48-818, R. R. S. 1943, does not constitute the delegation of legislative authority to act in violation of Article III, section 1, or Article VIII, section 6, of the Nebraska Constitution. Orleans Education Assn. v. School Dist. of Orleans - 676

35. The act creating the Court of Industrial Relations is not amendatory of section 79-810, R. R. S. 1943, granting budget-making authority to school districts and hence does not violate Article III, section 14, of the Nebraska Constitution. Orleans Education Assn. v. School Dist. of Orleans ---------- 676

Subrogation.

Even in the absence of a contractual policy provision so providing, where an insurer of a joint judgment debtor jointly liable in tort for damage negligently caused discharges more than its insured's proportionate share of the common liability, such insurer is subrogated to the right of its insured to recover contribution from the other judgment debtors. Royal Ind. Co. v. Aetna Cas. & Sur. Co. --------- 752

Summary Judgments.

1. A party is entitled to summary judgment if he can show (1) there is no genuine issue of material fact, and (2) where, under the facts, he is entitled to judgment as a matter of law. The Geer Co. v. Hall County Airport Authority ---------- 17

2. The summary judgment statute, section 25-1332, R. R. S. 1943, requires the record before the court to show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Reed v. Nice-Pak Products, Inc. ---------- 505

Taxation.

1. The procedure and manner of appealing from an action of a county board of equalization is that formerly prescribed for an appeal of a judgment of a justice of the peace court to the District Court, but the time provisions therein referred to are inapplicable for the perfecting of such an appeal. Knoefler Honey Farms v. County of Sherman ---- 95
2. In order to perfect an appeal to the District Court from a decision of a county board of equalization, pursuant to section 77-1510, R. R. S. 1943, all activities necessary to perfect such appeal, including the filing of notice of appeal, are required to be carried out within 45 days of the adjournment of the board. Knoefler Honey Farms v. County of Sherman ---------- 95
3. The District Court acquires jurisdiction by appeal from a decision of a county board of equalization, where the taxpayer gives notice of appeal, furnishes an appeal bond, and files in the office of the clerk of the District Court a transcript of the proceedings and order of the county board of equalization within the time allowed by law. Knoefler Honey Farms v. County of Sherman ---------- 95
4. School tax money received by one school district from lands apparently, but not legally, within its exterior boundaries, levied and collected for its uses and purposes, cannot be recovered by the school district within whose territory the lands actually lie, where no levy was made or taxes collected on said lands by such district for its uses and purposes; each district obtained exactly the amount of money for which its budget called and neither district obtained or had the use of money intended for the other district. School Dist. of Gering v. Stannard - 624
5. In order to sustain an addition of property by tax assessors to a return as omitted property it must appear that specific items were added which were not assessed in the original assessment. Sealtest Central Div.-Omaha, Kraftco Co. v. Douglas County Board of Equalization ---------- 809

Telecommunications.

1. The exercise of jurisdiction by the Federal Communications Commission over the terms and condi-

tions governing the interconnection of customer-provided telephone equipment to the nationwide telephone network has established the primacy of federal authority and preempts conflicting or inconsistent state regulation. Sherdon v. Dann 768

2. The action of the Federal Communications Commission does not foreclose any state from taking action of its own in the telephone interconnect area so long as such action does not derogate the interstate rulings. Sherdon v. Dann 768

3. Federal action in the telephone interconnect area does not foreclose any state from the full exercise of its investigatory powers with respect to the effects of interconnection as related to the quality of telephone service or the regulation by the state of intrastate rate structures and revenue requirements for services subject to its jurisdiction. Sherdon v. Dann 768

Time.

1. A defendant's character witness may, on cross-examination, be asked if he has heard that the defendant has been previously convicted or arrested for other crimes, provided such misconduct occurred prior to, and not after, the commission of the crime charged. State v. Casados 28

2. An application for modification of a divorce decree with respect to the care, custody, and maintenance of minor children must ordinarily be founded upon new facts and circumstances which have arisen since the entry of the decree. Bartlett v. Bartlett 76

3. A change of circumstances, which will permit a modification of a divorce decree relating to child custody, includes those not known to the court and the opposing party at the time of the entry of the decree and which could not have been discovered by the exercise of reasonable diligence at the time of the entry of the original decree. Bartlett v. Bartlett 76
Youngberg v. Youngberg 394

4. The discovery of material facts which existed but were unknown to the court and the opposing party and could not have been ascertained with reasonable diligence, which, if known to the court, might have warranted the entry of a different decree, are

changed circumstances which the court will consider in an application for a change of child custody. Bartlett v. Bartlett ---------- 76

5. When custody of minor children is placed in the court, the court, at a subsequent hearing, may consider predivorce activities of the parties unknown to the court at the time the decree was entered. Bartlett v. Bartlett ---------- 76

6. A proceeding to revoke probation may be instituted within the probationary period or within a reasonable time thereafter. State v. White ---------- 93

7. In order to perfect an appeal to the District Court from a decision of a county board of equalization, pursuant to section 77-1510, R. R. S. 1943, all activities necessary to perfect such appeal, including the filing of notice of appeal, are required to be carried out within 45 days of the adjournment of the board. Knoefler Honey Farms v. County of Sherman ---------- 95

8. The District Court acquires jurisdiction by appeal from a decision of a county board of equalization, where the taxpayer gives notice of appeal, furnishes an appeal bond, and files in the office of the clerk of the District Court a transcript of the proceedings and order of the county board of equalization within the time allowed by law. Knoefler Honey Farms v. County of Sherman ---------- 95

9. A judgment which is not void may only be set aside after the term at which it was entered as authorized in section 25-2001, R. R. S. 1943. Gant v. City of Lincoln ---------- 108

10. The proof of probable cause which must be made before a search warrant may be issued must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. State v. Kallos ---------- 113

11. A motion for continuance or for postponement of trial is addressed to the sound discretion of the trial court and an order denying it will not be disturbed on appeal unless there is a clear abuse of discretion. State v. Newton ---------- 129

12. An affidavit in support of a motion to continue a trial indefinitely until a witness can be found is insufficient where there is no information as to the witness' whereabouts nor any showing that

either the witness' personal attendance or testimony will probably be obtained. State v. Newton _ 129

13. The failure of the party first appealing to timely file a petition in the District Court does not affect or defeat jurisdiction. Estate of Tetherow v. State 150

14. The failure of the appealing party to plead within the time required may, unless good cause is shown, be grounds in the exercise of sound discretion by the District Court for dismissal of the appeal. Estate of Tetherow v. State ---------- 150

15. The test as to whether or not there was probable cause is to be determined in the light of facts and circumstances as they existed and were known at the time the prosecution was commenced and not from the viewpoint of subsequently appearing facts. Cimino v. Rosen ---------- 162

16. That provision of section 48-817, R. R. S. 1943, prohibiting a retroactive order is interpreted to mean that the order of the Court of Industrial Relations cannot apply to a period prior to that embraced within the dispute submitted to it. Crete Education Assn. v. School Dist. of Crete ---------- 245

17. No action may be maintained on a guardian's bond until the amount due thereon has been ascertained and judgment therefor entered. Sherwood v. Merchants Mut. Bonding Co. ---------- 262

18. The limitation contained in section 25-210, R. R. S. 1943, does not commence to run until the guardian has obtained approval of his final account and been discharged by order of the probate court. Sherwood v. Merchants Mut. Bonding Co. -------- 262

19. The exact time of the commission of an alleged prior felony is not of the essence of a charge under the Habitual Criminal Act and the failure of the information to accurately state the time of a prior felony does not render the information insufficient. State v. Silvacarvalho ---------- 447

20. The time required for premeditation and deliberation may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. State v. Bautista _ 476

21. In the ordinary contract for the sale of real estate, time is not of the essence unless so provided in the instrument itself or is clearly manifested by

the agreement construed in the light of the surrounding circumstances. Where time is not of the essence, performance must be within a reasonable time. Dowd Grain Co., Inc. v. Pflug ---------- 483

22. Legal school voters of school districts involved in district boundary changes under section 79-402, R. R. S. 1943, are entitled to judicial review of the action of the county superintendent ordering such changes, including, when appropriate, the right of collateral attack; and such rights may not be barred by a statute of limitations enacted subsequent to the commencement of suit to challenge or review the same. School Dist. of Gering v. Stannard ---- 624

23. When subsequent to a defendant's conviction a statutory change is made in the law governing parole and the defendant thereafter violates his parole, the amendatory law is applicable and is not ex post facto in its application. Berry v. Wolff ------ 717

24. The fee provided for county attorneys in section 77-1918, R. R. S. 1943, is not payable until the tax foreclosure decree is entered and the property sold pursuant to such decree. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729

25. Where the obligation is clear and its essential character has not been changed by lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, especially between the immediate parties to the litigation. Lammers v. Lammers ---------- 836

26. An action for an injury to the rights of the plaintiff accrues under section 25-207, R. R. S. 1943, when the damage occurs and not when plaintiff discovers the cause of the damage. Omaha Paper Stock Co., Inc. v. Martin K. Eby Constr., Co., Inc. ------ 848

Torts.

1. One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. Paasch v. Brown ---------- 368

2. Liability exists only where the severe emotional distress is inflicted intentionally or recklessly and only where the conduct is so outrageous in character and

so extreme in degree as to go beyond all possible bounds of decency. Paasch v. Brown ---------- 368

3. A mere failure to comply with a court judgment or decree does not give rise to a separate tort liability for outrageous conduct in favor of the person for whose benefit the original court judgment or decree was entered. Paasch v. Brown ---------- 368

4. Section 23-2406, R. R. S. 1943, requires that actions under the Political Subdivisions Tort Claims Act shall be heard without a jury but otherwise determined in the same manner as other suits. The action is similar to a law action in which a jury has been waived and is governed by the same rules. Buttner v. Omaha P. P. Dist. ---------- 515

5. On an appeal to this court of an action under the Political Subdivisions Tort Claims Act the findings of the trial court will not be disturbed unless clearly wrong. Buttner v. Omaha P. P. Dist. ---------- 515

6. To the extent that Tober v. Hampton, 178 Neb. 858, 136 N. W. 2d 194, and Farmer's Elevator Mut. Ins. Co. v. American Mut. Liability Ins. Co., 185 Neb. 4, 173 N. W. 2d 378, announced the rule that there may be no contribution between negligent joint tort-feasors, those cases are overruled. Royal Ind. Co. v. Aetna Cas. & Sur. Co. ---------- 752

7. A right to equitable contribution exists among judgment debtors jointly liable in tort for damages negligently caused, which right becomes enforceable on behalf of any party when he discharges more than his proportionate share of the judgment. Royal Ind. Co. v. Aetna Cas. & Sur. Co. ---------- 752

8. Even in the absence of a contractual policy provision so providing, where an insurer of a joint judgment debtor jointly liable in tort for damage negligently caused discharges more than its insured's proportionate share of the common liability, such insurer is subrogated to the right of its insured to recover contribution from the other judgment debtors. Royal Ind. Co. v. Aetna Cas. & Sur. Co. ---- 752

Trespass.

1. A person on the premises of another, without the permission of the owner, who is of sufficient age, mentality, experience, and ability to observe, realize, and avoid a particular danger or peril is an adult

trespasser and cannot recover under the special rule pertaining to children. Haden v. Hockenberger & Chambers Co. ---------- 713

2. The attractive nuisance doctrine has no application to pools, ponds, or other bodies of water, artificial or natural, where there exist no unusual traps or hazards. Haden v. Hockenberger & Chambers Co. - 713

3. The attractive nuisance doctrine does not apply to machinery in a static condition unless there is evidence that the machinery is enticing and inherently dangerous to indiscriminating children of tender years. Haden v. Hockenberger & Chambers Co. -- 713

Trial.

1. A defendant's character witness may, on cross-examination, be asked if he has heard that the defendant has been previously convicted or arrested for other crimes, provided such misconduct occurred prior to, and not after, the commission of the crime charged. State v. Casados ---------- 28

2. The scope of the cross-examination of a character witness, in the absence of an abuse of discretion, is discretionary with the trial court. State v. Casados ---------- 28

3. The cross-examination of a character witness as to other misconduct on the part of a defendant is admissible, not to establish the truth of the facts, but to test the credibility of the witness and ascertain the weight to be given to his testimony, and must be made in good faith. State v. Casados 28

4. A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Wrasse v. Gustavson --------- 41

5. In an action wherein there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him. Wrasse v. Gustavson ---------- 41

6. A finding that a defendant has violated his probation must be established by clear and convincing evidence. State v. Howard ---------- 45

7. In the absence of a valid authorizing statute, such as section 39-669.08 et seq., R. R. S. 1943, the results of a test of blood for alcoholic content are inadmissible where the blood sample is taken involuntarily and the constitutional requirements of the Fourth Amendment to the United States Constitution have not been satisfied. State v. Howard 45
8. In the absence of some statute making provision for the effect to be given a test of body fluid for alcoholic content, expert testimony is necessary to make the results admissible. State v. Howard ---- 45
9. If a driver fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross an intersection is for the jury. Stapleton v. Norvell ---------- 71
10. In order for the plaintiff to recover upon the ground of negligence, the evidence must show with reasonable certainty the negligent act complained of. Fritz v. Marten ---------- 83
11. Where several inferences may be drawn from the facts proved, which inferences are opposed to each other, but are equally consistent with the facts proved, the plaintiff may not sustain his position by a reliance alone on the inference which would entitle him to recover. Fritz v. Marten ---------- 83
12. In a prosecution for rape, after the prosecutrix has testified to the commission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made. State v. Castor -- 86
State v. Escamilla ---------- 503
13. The testimony concerning such complaint should, on direct examination, be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae. State v. Castor ---------- 86
State v. Escamilla ---------- 503
14. The admission of incompetent evidence is not prej-

udicial where the same facts are established by the testimony of the defendant. State v. Castor ------ 86
15. It is not error to refuse an instruction on an issue which is not supported by the evidence. State v. Temple ---------- 89
16. Related instructions must be read and construed together and if when so read and construed they correctly state the law, there is no error. State v. Temple ---------- 89
17. 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 are not proof. There must be something more which would lead a reasoning mind to one conclusion rather than another. Sherman v. Travelers Ind. Co. ---------- 104
18. Evidence as to damages must be such that a jury could determine the amount with reasonable certainty and the determination may not be based on pure speculation and conjecture. Sherman v. Travelers Ind. Co. ---------- 104
19. In determining whether a class action is properly brought, considerable discretion is vested in the trial court. In the absence of appeal, that decision is final and even though it may have been erroneous, it is not void. Gant v. City of Lincoln ------ 108
20. A witness may be interrogated as to his previous convictions for a felony, but no other proof of such conviction is competent except the record thereof. State v. Kallos ---------- 113
21. Where a witness on cross-examination admits previous conviction of a felony, it is error to allow further inquiry of the witness on the subject other than as to the number of his prior felony convictions. State v. Kallos ---------- 113
22. A verdict for damages will not be set aside unless it is so clearly exorbitant as to indicate prejudice or disregard of evidence or controlling rules of law. Bakhit v. Thomsen ---------- 133
23. The reading by an official court reporter of testimony of a witness examined on trial after the jury has retired for deliberation, when a disagreement arises within the jury as to certain testimony, is

proper so long as such action is taken in the presence of or after notice to the parties or their counsel. Bakhit v. Thomsen ---------- 133

24. Ordinarily the trial judge is required to be present at all stages of the trial, although his absence at a certain stage will not be grounds for reversal on appeal in the absence of a showing of prejudice. Bakhit v. Thomsen ---------- 133

25. Although the taking of notes by jurors of the testimony of witnesses has been frowned upon and may under certain circumstances constitute prejudicial error, such practice is not absolutely prohibited in this state. Bakhit v. Thomsen ---------- 133

26. The prejudicial effect of juror note-taking depends on the eventual use of such notes. Bakhit v. Thomsen ---------- 133

27. Where a presumption of negligence does not arise as a matter of law, the plaintiff must make proof of the negligent acts of the defendant on which he bases the cause of action. Ware v. Yellow Cab, Inc. ---------- 159

28. To maintain an action for malicious prosecution the plaintiff must prove malice and want of probable cause. Cimino v. Rosen ---------- 162

29. In an action for malicious prosecution where there is sufficient undisputed evidence to show probable cause, the trial court should direct a verdict for the defendant. Cimino v. Rosen ---------- 162

30. In the determination of whether all the evidence in a specific case is sufficient to submit the issue of gross negligence to the jury we have consistently held that the presence of imminence of danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration. Botsch v. Reisdorff ---------- 165

31. The question of the existence of negligence or contributory negligence is for the trier of facts where different minds may reasonably draw different conclusions from the evidence. Jensen v. Hawkins Constr. Co. ---------- 220

32. There is no requirement that the arraignment and the sentencing hearing be conducted by the same District Judge. State v. Hilderbrand ---------- 233

33. An instruction which submits an issue not supported by the evidence to the jury is erroneous. State v. Garza ---------- 283
34. Error cannot be predicated on an instruction given at the request of the complaining party. State v. American Theater Corp. ---------- 289
35. In cases where reasonable value of loss of use of personal property is a measure of damages, rental value is not necessarily the "measure" of damages, but proof of what the item whose use has been lost would have rented for is admitted as evidence of the value of loss of use. American Tel. & Tel. Corp. v. Thompson ---------- 327
36. The question of determining the amount of damages is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damages proved. American Tel. & Tel. Corp. v. Thompson ---------- 327
37. One of the exceptions to the requirement of expert testimony is the situation where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laymen. Halligan v. Cotton 331
38. Where, in the course of surgery, it was necessary to ligate bleeding blood vessels on the dome of the bladder and about 10 days later a perforation of the bladder resulted, expert opinion testimony is required before the trier of fact is permitted to infer that the hole was the result of a lack of or the failure to exercise the required degree of skill or care. Halligan v. Cotton ---------- 331
39. If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case unless proper instruction has been requested by the party complaining. State v. Claire ---------- 341
40. Ordinarily if a witness is examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party conducting the examination. State v. Claire ---------- 341
41. Evidence which does not tend to impeach any witness on a material point and which is not substan-

tive proof of any fact relative to the issue is properly excluded. State v. Claire ---------- 341

42. In a criminal case this court will not interfere on appeal with a verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Richards ---------- 345

43. In a criminal case where the sufficiency of the evidence is challenged on appeal, the Supreme Court will not interfere with a verdict of guilty or a finding of guilty by the court where a jury is waived, or not required, unless the evidence is so lacking in probative force that this court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Digilio ---------- 348

44. The ruling of the trial court upon a severance of criminal prosecutions properly joined in a single indictment, information, or complaint will not be disturbed on appeal, in the absence of an abuse of discretion. State v. Micek ---------- 379

45. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. State v. Micek -- 379

46. A judicial record of this state, or of any federal court of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he has one. State v. Micek ---------- 379

47. A judicial record of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of a judge, chief justice, or presiding magistrate, that the attestation is in due form of law. State v. Micek ---------- 379

48. When the jury is admonished to disregard objectionable questions and answers, a mistrial ordinarily will not be granted. State v. O'Kelly ---------- 390

49. Instructions to the jury must be considered as a

whole, and when thus considered, if the law is correctly stated and the case fairly submitted, and the jury could not have been misled, a claim of prejudicial error in the instructions is not available. Duling v. Berryman ---------- 409

50. An expert witness testifying from observation or personal knowledge must ordinarily testify to the facts upon which his opinion is based. Duling v. Berryman ---------- 409

51. Rulings on questions calling for expert testimony will not ordinarily be reversed on review unless plainly prejudicial to the rights of the complaining party. Duling v. Berryman ---------- 409

52. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Fowler -- 420

53. This court will require a stronger showing of abuse of discretion where the motion to vacate is allowed than in cases where a trial on the merits is denied. Fanning v. Richards ---------- 431

54. Ordinarily when an objection to proper evidence is not timely made, such objection is waived. Mecham v. McLeay ---------- 457

55. In determining the sufficiency of the evidence to support the submission of an issue to the jury, the asserting party is entitled to have all the conflicts in the evidence and all reasonable inferences therefrom resolved in his favor. Mecham v. McLeay ---- 457

56. A jury's action cannot become a verdict until it is finally rendered in open court and received and accepted by the trial judge. State v. Anderson -- 467

57. Whether or not a jury should be sequestered during the trial of a criminal case is left to the sound discretion of the court. State v. Bautista -------- 476

58. In order for a verdict to be set aside because of prejudicial effect of newspaper accounts on jurors, there must be evidence presented that the jurors read newspaper accounts and that the accounts were unfair or prejudicial to the defendant. State v. Bautista ---------- 476

59. Exclusion and sequestration of witnesses is within the discretion of the trial court, and the denial of a motion to sequester will not be disturbed in absence of prejudice to the accused. State v. Bautista 476

60. An action for specific performance is triable de

novo on appeal to this court. Dowd Grain Co., Inc. v. Pflug ---------- 483

61. In an action where the comparative negligence doctrine has application a verdict should not be directed against the plaintiff on the ground of contributory negligence unless it can be said as a matter of law that the plaintiff's negligence was more than slight in comparison with that of the defendant. Coleman v. Diamond Engineering Co. ------ 487

62. The measuring of the comparison of negligence of the defendant and the contributory negligence of the plaintiff is ordinarily a factual question for the jury. Coleman v. Diamond Engineering Co. ------ 487

63. It is not the province of this court to resolve conflicts in the evidence, to determine plausibility or reasonableness of explanations, or to weigh the evidence. State v. Kelly ---------- 494

64. When there is substantial evidence sustaining the jury's finding, it will not be set aside. State v. Kelly ---------- 494

65. Where recovery is not a mere matter of computation and depends upon the intangible and quite subjective elements of pain and suffering, and emotional distress, it will not be interfered with unless it is so excessive as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury. Crouter v. Rogers ---------- 497

66. The summary judgment statute, section 25-1332, R. R. S. 1943, requires the record before the court to show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Reed v. Nice-Pak Products, Inc. ---------- 505

67. Section 23-2406, R. R. S. 1943, requires that actions under the Political Subdivisions Tort Claims Act shall be heard without a jury but otherwise determined in the same manner as other suits. The action is similar to a law action in which a jury has been waived and is governed by the same rules. Buttner v. Omaha P. P. Dist. ---------- 515

68. It is not within the province of this court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court will review the judgment rendered, will presume the controverted facts were decided by the trial court

in favor of the successful party, and the findings will not be disturbed on appeal unless clearly wrong. Buttner v. Omaha P. P. Dist. ---------- 515

69. The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong. Buttner v. Omaha P. P. Dist. ---- 515

70. On an appeal to this court of an action under the Political Subdivisions Tort Claims Act the findings of the trial court will not be disturbed unless clearly wrong. Buttner v. Omaha P. P. Dist. ---------- 515

71. The admissibility of expert testimony is ordinarily within the discretion of the trial court and its ruling will be upheld on appeal unless an abuse of discretion is shown. Y Motel, Inc. v. State ---------- 526

72. In order to obtain a review of alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon. State v. Cordell ---------- 562

73. The conviction herein is reversed for the failure of the trial court to grant a mistrial for the inexcusable conduct of the prosecution in presenting before the jury possible inferences of previous crimes on the part of the defendant. State v. Atwater --- 563

74. Defendants must be given fair trials, and it is the responsibility of the prosecution to see that each defendant receives one. State v. Atwater -------- 563

75. This court will consider the fact that the trial court saw and heard the witnesses, and observed their demeanor, and will give great weight to the trial court's judgment as to credibility. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ------ 586

76. A motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant 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. Starlin v. Burlington Northern, Inc. ---------- 619

77. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to

decide the question, as a matter of law, rather than submit it to a jury for determination. Starlin v. Burlington Northern, Inc. ---------- 619

78. Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury. Starlin v. Burlington Northern, Inc. 619

79. When testimony is offered in the trial court and proper objection is not made nor preserved in motion for new trial, such objection will not be heard on appeal. Anderl v. Willsey ---------- 698

80. The contributory negligence of a guest is ordinarily a question of fact for the jury. Circo v. Sisson ---------- 704

81. Upon appeal in actions in equity, when the testimony of witnesses orally examined before the court upon the vital issues is conflicting, this court will, while trying the case de novo, 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. Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc. ---------- 781

82. Formal unequivocal judicial admissions which waive any evidence by the adverse party on the admitted matter are conclusive on the pleader. Ordinary evidentiary admissions in pleadings may be overcome by evidence explaining an apparent inconsistency, such as showing the pleader's ignorance of the contents of the pleadings, his misunderstanding of the facts, or mistake on his part. Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc. 781

83. In the absence of a proper request, the trial court is not required to instruct in regard to lesser included offenses. State v. Maxwell ---------- 807

84. It is only when there is a total want of proof to support a material allegation of the information, or where the testimony in a criminal case is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that a court will be justified in directing a verdict of not guilty. State v. Maxwell ---------- 807

85. In eminent domain proceedings where the sales

price of other tracts is offered as evidence of market value of the tract taken, a wide discretion must be granted the trial judge in determining the admissibility of the evidence of the other sales. The evidence should not be admitted where there is a marked difference in the situation of the properties. Thacker v. State ---------- 817

86. The question of the admission of the sales price of other land and the sufficiency of the foundation for admission of such evidence is within the sound discretion of the trial court. Thacker v. State ---- 817

87. The determination of the similarity of tracts for purposes of deciding the admissibility of sales of such tracts in order to show market value of the tract taken or damages is to be left largely to the discretion of the trial court. Thacker v. State ---- 817

88. In order for the testimony of either an expert or lay witness to be admissible on the question of market value of real estate, the witness must not only be familiar with the property in question, but also with the state of the market. Thacker v. State 817

89. Upon appeal this court will not usually predicate prejudicial error on the exclusion of largely redundant testimony of a particular witness. Thacker v. State ---------- 817

90. It is not error to refuse a properly requested instruction where the subject matter is properly covered in instructions which are given. Thacker v. State ---------- 817

91. The value of property includes its value for any reasonable use to which it may be put. If because of its artificial improvements or its intrinsic character it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown. Harmony Lanes v. State ---------- 826

92. Anything connected with the land which would influence the market value thereof in the mind of a good faith intending purchaser is an element for consideration in determining damages in a condemnation case. Harmony Lanes v. State ---------- 826

93. In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury. Harmony Lanes v. State ---------- 826

94. The amount of damages sustained in a condemnation action is peculiarly of a local nature and ordinarily is to be determined by the jury. Where the evidence is conflicting this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. Harmony Lanes v. State ---------- 826

Trusts.

The county court and the District Court have concurrent jurisdiction in supervision over the administration of testamentary trusts. Johnson v. Hays - 54

Vendor and Purchaser.

1. A contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered, and such procedure would not offend against justice and equity. Riffey v. Schulke ---------- 317
2. Applications for strict foreclosure of land contracts are addressed to the sound legal discretion of the court, and will be granted where it would be inequitable and unjust to refuse them. Riffey v. Schulke ---------- 317
3. Strict foreclosure will be decreed only under peculiar and special circumstances where the purchaser does not have a substantial equity in the property. Riffey v. Schulke ---------- 317
4. Where strict foreclosure is granted, the defaulting party is entitled to a reasonable time to avoid its consequences by performing the contract. Riffey v. Schulke ---------- 317
5. A provision in a contract for the sale of land prohibiting an assignment of the contract without the consent of the other party is usually considered to be a provision to safeguard performance of the contract. Where the contract has been performed, or performance has been tendered, the provision is usually considered unenforceable. Riffey v. Schulke ---------- 317
6. In determining whether a sale is by the acre or in gross, the intention of the parties is controlling, as in other contracts, and must be given effect. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---------- 586

7. If there is ambiguity in the contract as to whether a sale is strictly in gross or one by the acre, extrinsic evidence, such as the circumstances which surround the parties, and their situations, may be admissible as an aid in interpreting the contract to ascertain the intention of the parties. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---- 586
8. A contract of sale by the tract or in gross is one wherein boundaries are specified but quantity is not specified or, if specified, the existence of exact quantities specified is not material; each party takes the risk of the actual quantity varying to some extent from what he expected it to be. Donahoo v. Home of the Good Shepherd of Omaha, Inc. --- 586
9. A contract may be originally one by the acre and subsequently so modified as to be turned into a sale in gross. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---------- 586
10. Section 36-107, R. R. S. 1943, requires that a sale of real estate made through a broker be in writing between the broker and the landowner. Donahoo v. Home of the Good Shepherd of Omaha, Inc. ---- 586
11. A contract for sale of real estate may not be strictly foreclosed where it is clear that the value of the property greatly exceeds the amount due. Yelkin v. Yelkin ---------- 789

Venue.

1. Under section 29-1305, R. R. S. 1943, where an offense is committed on a county line, the trial of such offense may be had in either county divided by such line. State v. Lindsey ---------- 442
2. 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. Lindsey ---------- 442

Verdicts.

1. A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all

material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Wrasse v. Gustavson ---------- 41

2. In a criminal case this court will not interfere on appeal with a verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Richards ---------- 345

3. In a criminal case where the sufficiency of the evi- is challenged on appeal, the Supreme Court will not interfere with a verdict of guilty or a finding of guilty by the court where a jury is waived, or not required, unless the evidence is so lacking in probative force that this court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Digilio 348

4. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Fowler -- 420

5. A court's final judgment of guilt must be based on a valid jury verdict. State v. Anderson ---------- 467

6. A jury's action cannot become a verdict until it is finally rendered in open court and received and accepted by the trial judge. State v. Anderson ---- 467

7. In order for a verdict to be set aside because of prejudicial effect of newspaper accounts on jurors, there must be evidence presented that the jurors read newspaper accounts and that the accounts were unfair or prejudicial to the defendant. State v. Bautista ---------- 476

8. When there is substantial evidence sustaining the jury's finding, it will not be set aside. State v. Kelly ---------- 494

9. To justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake. Dort v. Swift & Co. ---------- 606

10. A motion for directed verdict must, for the purpose of decision thereon, be treated as an admission of

the truth of all material and relevant 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. Starlin v. Burlington Northern, Inc. ---------- 619

11. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. Starlin v. Burlington Northern, Inc. ---------- 619

12. Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury. Starlin v. Burlington Northern, Inc. 619

13. It is only when there is a total want of proof to support a material allegation of the information, or where the testimony in a criminal case is of so weak or doubtful a character that a conviction based thereon cannot be sustained, that a court will be justified in directing a verdict of not guilty. State v. Maxwell ---------- 807

Waiver.

1. No procedural principle is more familiar than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. State v. Moreno ---------- 351

2. The action of a party to an action for the dissolution of marriage in accepting the benefits of a decree in respect to his or her own interests should not be permitted to affect adversely the interests of the children of the parties, and will not preclude consideration of an appeal to the extent such interests are involved. Reynek v. Reynek ---------- 404

3. Execution of a covenant not to levy in favor of an uninsured motorist bars recovery under uninsured motorist coverage where the policy provides the insured will hold all rights of recovery in trust for the benefit of the insurer and do nothing after

loss to prejudice such rights. Hastings v. Fireman's Fund American Ins. Co. ---------- 417
4. Ordinarily when an objection to proper evidence is not timely made, such objection is waived. Mecham v. McLeay ---------- 457
5. A written waiver of jury trial signed by the defendant is sufficient to constitute a valid waiver of a criminal defendant's right to a jury trial. State v. Svitak ---------- 660
6. The parties to a contract may avoid a provision requiring prior written authorization for additional work where their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment of the provision, or the party claiming the benefit of the provision is estopped to rely on it. Griffin v. Geneva Industries, Inc. ---------- 694

Waters.

The attractive nuisance doctrine has no application to pools, ponds, or other bodies of water, artificial or natural, where there exist no unusual traps or hazards. Haden v. Hockenberger & Chambers Co. 713

Wills.

1. Under our law, the testator's testamentary desires have little or no importance in relation to the best interests of the surviving spouse in electing to take under or against the will. Clarkson v. First Nat. Bank of Omaha ---------- 201
2. A testator is presumed to know that his widow may lawfully exercise her right under the statute to take against the will, and that such right is paramount to his will. Clarkson v. First Nat. Bank of Omaha 201
3. The statute requires the court to make the election which it deems is in the best interests of the incompetent spouse. This must be made without reference to whether she may be provided for otherwise. Clarkson v. First Nat. Bank of Omaha ---------- 201
4. A court, in making a choice for an incompetent whether to elect to take under or against the will, must consider only the best interests of the incompetent. Clarkson v. First Nat. Bank of Omaha 201
5. Section 30-228.03, R. R. S. 1943, directs that where a devisee, being a child or other relation of the testator, dies before the testator, such issue if any surviving the testator take the estate devised to

the ancestor unless a different disposition shall be made or directed by the will. Avery v. Evans --- 437

6. Where a testator makes a devise to four of his children by name and further provides: "Should any of my said children die before my decease I hereby give, will, devise and bequeath the share of said deceased child to the survivor or survivors of my said children, share and share alike," and where, at the time of the execution of the will, all the named children were parents of children then living, and also at that time the testator had another grandchild then living, the child of a daughter of the testator who had died years before the will was executed and for whom he made no provision in the will, it can be said with certainty that the testator has made a disposition so that the issue of one of the named children who predeceased the testator do not take the share of the parent under the terms of section 30-228.03, R. R. S. 1943. Avery v. Evans -- 437

7. A patent ambiguity in a will must be removed by interpretation according to legal principles and the intention of the testator must be found within the will; that intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention. Gretchen Swanson Family Foundation, Inc. v. Johnson ---------- 641

8. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. Gretchen Swanson Family Foundation, Inc. v. Johnson ---------- 641

9. It is competent for a testator to specify what property or class of property shall assume the burden of taxes on the transfer or the right of succession of his estate, as, for example, providing that such taxes shall be paid out of the residuary estate. Gretchen Swanson Family Foundation, Inc. v. Johnson ---------- 641

10. Where a possible construction of the words in a will leads to a highly improbable result, the court will lean toward a construction that will carry out the natural intention of the testator. Gretchen Swanson Family Foundation, Inc. v. Johnson ---- 641

Witnesses.

1. A defendant's character witness may, on cross-examination, be asked if he has heard that the defendant has been previously convicted or arrested for other crimes, provided such misconduct occurred prior to, and not after, the commission of the crime charged. State v. Casados ---------- 28
2. The scope of the cross-examination of a character witness, in the absence of an abuse of discretion, is discretionary with the trial court. State v. Casados ---------- 28
3. The cross-examination of a character witness as to other misconduct on the part of a defendant is admissible, not to establish the truth of the facts, but to test the credibility of the witness and ascertain the weight to be given to his testimony, and must be made in good faith. State v. Casados 28
4. A witness may be interrogated as to his previous convictions for a felony, but no other proof of such conviction is competent except the record thereof. State v. Kallos ---------- 113
5. Where a witness on cross-examination admits previous conviction of a felony, it is error to allow further inquiry of the witness on the subject other than as to the number of his prior felony convictions. State v. Kallos ---------- 113
6. Whether a specific manner of treatment or exercise of skill by a physician or surgeon demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter that must usually be proved by expert testimony. Halligan v. Cotton - 331
7. One of the exceptions to the requirement of expert testimony is the situation where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laymen. Halligan v. Cotton ---------- 331
8. Where, in the course of surgery, it was necessary to ligate bleeding blood vessels on the dome of the bladder and about 10 days later a perforation of the bladder resulted, expert opinion testimony is required before the trier of fact is permitted to infer that the hole was the result of a lack of or the failure to exercise the required degree of skill or care. Halligan v. Cotton ---------- 331

9. Ordinarily if a witness is examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party conducting the examination. State v. Claire ---------- 341
10. Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded. State v. Claire ---------- 341
11. An expert witness testifying from observation or personal knowledge must ordinarily testify to the facts upon which his opinion is based. Duling v. Berryman ---------- 409
12. Rulings on questions calling for expert testimony will not ordinarily be reversed on review unless plainly prejudicial to the rights of the complaining party. Duling v. Berryman ---------- 409
13. Exclusion and sequestration of witnesses is within the discretion of the trial court, and the denial of a motion to sequester will not be disturbed in absence of prejudice to the accused. State v. Bautista 476
14. The fact that an expert witness uses sales of properties in other states as a basis of comparison in determining value rather than comparable sales in the vicinity of the property condemned goes to the foundation for, and the weight to be given to, the expert's testimony. Y Motel, Inc. v. State ------- 526
15. The admissibility of expert testimony is ordinarily within the discretion of the trial court and its ruling will be upheld on appeal unless an abuse of discretion is shown. Y Motel, Inc. v. State --- 526
16. A beneficiary under a life insurance policy is not ordinarily a representative of a deceased person within the meaning of the dead man's statute. Anderl v. Willsey ---------- 698
17. In order for the testimony of either an expert or lay witness to be admissible on the question of market value of real estate, the witness must not only be familiar with the property in question, but also with the state of the market. Thacker v. State ---------- 817
18. In a condemnation case, the weight and credibility of the testimony of lay or expert witnesses upon the issues of valuation and damages are for the jury. Harmony Lanes v. State ---------- 826

Words and Phrases.

1. The term "car service" includes the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. ---------- 59
2. "Car service" connotes the use to which the vehicles of transportation are put; not the transportation service by means of them. Nebraska Public Service Commission v. Chicago & N. W. Transp. Co. -- 59
3. False imprisonment consists of the unlawful restraint against his will of an individual's personal liberty. Cimino v. Rosen ---------- 162
4. Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty. Cimino v. Rosen ---------- 162
5. "Break such custody" in section 28-736, R. R. S. 1943, does not mean force is required. It is unlawfully leaving a place of confinement which constitutes the breaking of custody and escape. State v. Glenn ---------- 230
6. The word "obscene" as used in the statute is not merely a generic or descriptive term, but a legal term of art. It is sufficiently definite in legal meaning to give a defendant notice of a charge against him. State v. American Theater Corp. -- 289
7. The term "cannabis sativa L" as used in section 28-4,115 (14), R. S. Supp., 1974, includes all species of the genus cannabis. State v. Claire ---------- 341
8. A woman who is chaste is one who has never had sexual intercourse with a male person. An act of sexual intercourse without her consent and against her will if she is capable of consent does not destroy her chastity. State v. Richards ---------- 345
9. The time required for premeditation and deliberation may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. State v. Bautista - 476
10. The phrases "in the course of" and "arising out of" are not synonymous, and where they are used conjunctively, as they are in the Workmen's Com-

pensation Act of this state, a double condition is imposed and both must exist to bring a case within the act. Reis v. Douglas County Hospital ------- 542

11. Even where it is established that an injury is one "arising out of" the employment, the right to recover benefits under the Workmen's Compensation Act must fail where there is no evidence indicating that the injury occurred "in the course of" the employment. Reis v. Douglas County Hospital -- 542

12. The words "in the course of" as used in section 48-101, R. R. S. 1943, refer to the time, place, and circumstances of the accident, and claimant must establish that there was a temporal and space nexus to the employment. Reis v. Douglas County Hospital ---------- 542

13. Construction "in a good and workmanlike manner" is determined according to good usage and accepted practice by a competent workman in the community. Newson Constr. Co. v. Calvary Assembly of God Church ---------- 556

14. We construe the words in section 48-148, R. R. S. 1943, "subject to the provisions of sections 48-109 to 48-147 files any claim" as intended to cover only claims arising out of and in the course of the employment. Marlow v. Maple Manor Apartments -- 655

15. A county board is a tribunal embraced within the ambit of Disciplinary Rule 8-101. State ex rel. Nebraska State Bar Assn. v. Holscher ---------- 729

16. Nudity and obscenity are not synonymous. A nude performance does not become an obscene performance unless, taken as a whole, it appeals predominantly to the prurient interest, a shameful interest in nudity or sex beyond the customary limits of candor, it describes in a patently offensive way sexual conduct specifically proscribed by state law, and, taken as a whole, it lacks serious artistic value as determined by the average person applying contemporary community standards. Midtown Palace, Inc. v. City of Omaha ---------- 785

17. Similarity of tracts does not mean identical, but having a resemblance. Thacker v. State -------- 817

Workmen's Compensation.

1. When the findings of fact by the trial court in a workmen's compensation case are supported by rea-

sonable, competent testimony, the cause will be not considered de novo on appeal. Jensen v. Western Printing Co. ---------- 481

2. An injury, to be the basis of a cause of action within the provisions of the Workmen's Compensation Act, must be one caused by an accident arising out of and in the course of the employment. § 48-101, R. R. S. 1943. Reis v. Douglas County Hospital ---------- 542

3. The phrases "in the course of" and "arising out of" are not synonymous, and where they are used conjunctively, as they are in the Workmen's Compensation Act of this state, a double condition is imposed and both must exist to bring a case within the act. Reis v. Douglas County Hospital ----- 542

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6. When a judge of the Workmen's Compensation Court enters a judgment which he is authorized by law to make, such judgment is conclusive on all parties at interest. Marlow v. Maple Manor Apartments ---------- 655

7. In construing the Workmen's Compensation Act, it has long been the policy of this court to give a liberal construction to it so that its beneficent purposes may not be thwarted by technical refinements of interpretation. Marlow v. Maple Manor Apartments ---------- 655

8. We construe the words in section 48-148, R. R. S. 1943, "subject to the provisions of sections 48-109 to 48-147 files any claim" as intended to cover only claims arising out of and in the course of the employment. Marlow v. Maple Manor Apartments -- 655

9. The operative fact is one of coverage, not of elec-

tion to file a claim for compensation. Marlow v. Maple Manor Apartments ---------- 655
10. If coverage exists, even though for some reason compensation may not be payable, the Workmen's Compensation Act is exclusive. Marlow v. Maple Manor Apartments ---------- 655

Zoning.

1. A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. It is the zoning resolution which has the force of law. Stones v. Plattsmouth Airport Authority ---------- 532
2. If there is a conflict between a comprehensive plan and a zoning ordinance, the zoning ordinance contains the controlling provisions when questions of a citizen's property rights are at issue. Stones v. Plattsmouth Airport Authority ---------- 532