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GLENN E. BOTSCH ET AL., APPELLANTS, V. LEIGH LAND COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.

239 N. W. 2d 481

Filed March 4, 1976. No. 40071.

1. **Nuisances.** Ordinarily a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact. It may become such by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation.
2. ———. A legitimate business which does not in and of itself constitute a nuisance, when conducted in such a manner as to become a nuisance, is conducted negligently and improperly.
3. ———. The exercise of due care by the owner of a business in its operation is not a defense to an action to enjoin its operation as a nuisance.
4. ———. Even in an industrial or rural area one cannot conduct a business enterprise in such manner as to materially prejudice a neighbor.
5. **Nuisances: Injunction.** A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proved that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly.

Appeal from the District Court for Colfax County: ORVILLE L. COADY, Judge. On reargument. See *ante* p. 54, 236 N. W. 2d 815, for original opinion. Original opinion withdrawn. Reversed and remanded.

William A. Wieland of Healey, Healey, Brown, Wieland & Burchard and Fredrick L. Swartz, for appellants.

Joseph Ginsburg of Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee Leigh Land Co. et al.

Steven J. Flodman of Barlow, Watson & Johnson, for appellee Folken.

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

NEWTON, J.

On rehearing this case has been heard before the full court. The former opinion filed is withdrawn. See *ante* p. 54, 236 N. W. 2d 815.

Plaintiffs are the owners and occupants of a farm in Colfax County, Nebraska, upon which they conduct normal farming operations and a small livestock enterprise consisting of the raising of purebred cattle and the feeding of a small number of hogs and cattle. To the south, directly across the road from plaintiffs' farm-building site, the defendants have built cattle yards or pens in which they have fed from 408 to 3,746 head of cattle simultaneously. Four lagoons are maintained to catch the runoff of water and manure from the feedlot. Plaintiffs seek an injunction due to offensive odors, dust, and insects originating on the defendants' premises. At the conclusion of plaintiffs' evidence, the trial court dismissed their petition. We reverse that judgment and remand the cause for further proceedings.

Plaintiffs' assignment of errors is directed primarily at the finding of the court that as a matter of law a nuisance did not exist and that there was a failure to prove negligent operation. In its memorandum opinion the court stated that plaintiffs were subjected to intolerable odors in the use, comfort, and enjoyment of their dwelling and farmstead and suffered from a substantial increase in flies, all due to defendants' feeding operation and maintenance of the lagoons. These findings are amply sustained by the record.

The evidence establishes the following additional facts. The Leigh Land Company, in which the defendants Roland Langemeier, Kermit Wagner, and Leroy Folken are stockholders, leased a tract of land from the defendants Folken. On the leased land feedlots were constructed with two ponds to catch runoff water and manure. Later two more ponds were constructed on the Folken land in an area not covered by the lease. The ponds are almost directly across the road from

plaintiffs' farm home. Drainage through the entire feedlot is to the west into the ponds. The Folken premises, where as many as 1,100 head of cattle are fed, lies to the east of the feedlot, but drains through it into the ponds. The Folkens' individual feeding is not an issue in this case and they are included as defendants because they conduct the feeding operation in the Leigh Land Company lots for the other defendants and because they own the unleased area where two of the ponds are located. Manure accumulating in the feedlots was not ordinarily removed, but was piled up into large mounds.

Dust from the feedlots frequently blew across to plaintiffs' premises in considerable volume. Large numbers of flies were attendant on the feeding operations and infected plaintiffs' premises in large numbers. Odors originating in the ponds were very obnoxious and continuously present. One witness described the odor as a stagnant smell and stated he would not like to live next door to it. Another said the smell was "pretty stout," might make some people sick, and that he could not stand it all the time. Another stated that the odor penetrated clothing, and with the flies made it impossible for the plaintiffs to enjoy their lawn. Another said she found the smell "atrocious" and closed her car windows when passing by. Another said that the condition was such that he would not live on the plaintiffs' farm. Another neighbor said that on one occasion the smell was so bad that he and his wife left their home temporarily. Another said the smell was worse than from a dead animal and the flies were bad, so that he would not live on plaintiffs' farm. Another described it as a "dead sour smell" that "almost kills you." A representative of the Department of Environmental Control stated he had inspected the feedlot premises. He testified that the department was not concerned with air pollution and that the ponds were adequate to prevent pollution of a stream into which the area drained.

The evidence amply sustains the finding of the court that plaintiffs were subjected to intolerable odors and a substantial increase in flies due to defendants' operation.

The trial court found that as a matter of law a nuisance did not exist and appears to have based that finding on the theory that plaintiffs had to prove a negligent or improper operation of the feedlot. This conception of the law is erroneous.

Section 28-1016, R. S. Supp., 1974, makes it a criminal offense for anyone to use or maintain any place for the exercise of any trade or business which, "by occasioning noxious exhalations, noisome or offensive smells, becomes injurious and dangerous to the health, comfort or property of individuals or the public." Chapter 81, article 15, of the Nebraska statutes comprises the Environmental Protection Act. Section 81-1501, R. R. S. 1943, states its purpose is the conservation of the water, land, and air of the state and states: "To achieve and maintain such a reasonable degree of purity of the natural atmosphere of this state that human beings and all other animals and plants which are indigenous to this state will flourish in approximately the same balance as they have in recent history; and to promulgate laws, rules and regulations and enforce uniformly the same in such a manner as to give meaningful recognition to the protection of each element of the environment, air, water and land." The statutes referred to make it the definite responsibility of the Department of Environmental Control to prevent pollution, not only of the waters of this state, but also of the air and land of the state. Section 81-1506, R. S. Supp., 1974, makes it unlawful for any person: "(a) To cause pollution of any air, waters or land of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, waters or land of the state; or (b) To discharge or emit any wastes into any air, waters or land of the state which reduce the

quality of such air, waters or land below the air, water or land quality standards established therefor by the council. Any such action is hereby declared to be a public nuisance."

What is meant when it is said that a lawful business will not be enjoined in the absence of evidence that it is operated improperly? A feed yard question was presented in Francisco v. Furry, 82 Neb. 754, 118 N. W. 1102. In that case the court said: "The corruption of the atmosphere by the exercise of any trade or by any use of property that impregnates it with noisome stenches has ever been regarded as among the worst class of nuisances. The right to have the air floating over one's premises free from noxious and unnatural impurities is a right as absolute as the right to the soil itself * * *. A feeding yard is not necessarily a nuisance and it becomes such only by being improperly maintained or conducted. There is nothing in the evidence showing it to be impossible to maintain the yard in question in such a manner as to free it from the objections which the plaintiffs make. The situation of the yard is favorable to its being conducted in a cleanly and proper manner. That the defendants should be enjoined from conducting their business in the yard in such a manner as to make it a nuisance cannot be denied; but, when the court goes beyond this and limits the time of its use for keeping cattle or hogs, or the number to be kept, we think that it has extended its decree beyond proper bounds. Until it is shown that the yard cannot be maintained as a feeding yard without becoming a nuisance, the feeding of cattle therein should not be enjoined. The order of the court should go no further than to enjoin the defendants from making a nuisance of their feed yard." It will be noted that the court did enjoin the operation of the feed yard in such a manner as to create a nuisance. In other words, the court enjoined the nuisance, but not the lawful business operation. When a lawful business is operated in such a

manner as to become a nuisance it is operated improperly. Proof of the existence of a nuisance establishes that the business has been operated negligently or improperly.

Ordinarily a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact. It may become such by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation. See, City of Syracuse v. Farmers Elevator, Inc., 182 Neb. 783, 157 N. W. 2d 394; Sarraillon v. Stevenson, 153 Neb. 182, 43 N. W. 2d 509, 18 A. L. R. 2d 1025.

The exercise of due care by the owner of a business in its operation is not a defense to an action to enjoin its operation as a nuisance. See, Sarraillon v. Stevenson, *supra*; 58 Am. Jur. 2d, Nuisances, § 34, p. 597.

Prima facie, the existence of the conditions revealed by the record in this case clearly establishes that defendants' feeding activities, as operated, constituted a nuisance. The odors generated by the lagoons and the manure dust, together with the insects resulting from failure to remove manure, have rendered plaintiffs' premises well-nigh uninhabitable and the reduction in the number of cattle fed in recent months, due to unfavorable cattle prices or other conditions, cannot defeat this action when the potential for larger operations remains.

Defendants assert that since livestock feeding is essentially a rural activity and their project is located in a rural area, it cannot be denominated a nuisance and enjoined. It is true that rural residents must expect to bear with farm and livestock conditions normally found in the area where they reside. In the area under consideration almost every farm has a relatively small cattle-feeding operation, but nothing approaching in size the defendants' large commercial operation or resulting in comparably objectionable features. Even in an industrial or rural area one cannot conduct a business en-

terprise in such manner as to materially prejudice a neighbor. In Horn v. Community Refuse Disposal, Inc., 186 Neb. 43, 180 N. W. 2d 691, this court indicated that a dump yard in a rural area could become a nuisance if not properly operated. In Karpisek v. Cather & Sons Constr., Inc., 174 Neb. 234, 117 N. W. 2d 322, this court approved the enjoining of the operation of an asphalt plant in an industrial area. In Chicago, R. I. & P. R. R. Co. v. Liddle, 253 Iowa 402, 112 N. W. 2d 852, it was held that stockyards in an industrial area were not a nuisance per se but could be conducted so as to become a nuisance. In Albaugh v. Abbott, 253 Mich. 588, 235 N. W. 263, the feeding of garbage to pigs in a rural area was enjoined. In Bedford v. City of Cleveland Heights, 18 Ohio Op. 319, 32 Ohio L. Abs. 233, a similar operation was enjoined. The case of Baldwin v. McClendon, 292 Ala. 43, 288 S. 2d 761, is almost identical to the one before us. A large hog-raising operation, with lagoons, located in a strictly farm area was held to be a nuisance. The waste material in the lagoons generated offensive odors. The court held: "Fact that hog-raising operation was carried on in a rural community given over almost entirely to agricultural pursuits was a factor to be considered in determining whether odors emanating from the property constituted a nuisance, but there were other factors, including proximity of the operation to neighbors' home, intensity and volume of odors, their interference, if any, with neighbors' own well-being and enjoyment of their home, and any consequential depreciation in the value of the home." The court further stated: "Moreover, assuming that the apellants' operation met some set of sanitary standards for similar operations, this would not affect the appellees' right to equitable relief, because the issue is not whether the appellants were negligent, * * * or their business lawful, but whether or not from the inherent qualities of the business, or the manner in which it is conducted, it directly causes substantial injury to the

properties of the appellees, or produces material annoyance and inconvenience to them in the comfortable enjoyment of their home." See, also, § 28-1016, R. S. Supp., 1974; Tinsley v. Monson & Sons Cattle Co., Inc., 2 Wash. App. 675, 472 P. 2d 546; Kuhn v. Wood, 34 Ohio L. Abs. 265, 36 N. E. 2d 1006; Yeager & Sullivan, Inc. v. O'Neill (Ind. App.), 324 N. E. 2d 846.

The Nebraska statutes make it clear that defendants' operation constitutes a nuisance and the fact that the Department of Environmental Control saw fit to ignore the air and insect pollution features cannot excuse its maintenance. It may be noted that the statutes do not distinguish between rural and urban areas. They prohibit the generation of conditions injurious to the "health, comfort or property of individuals or the public." A rural home and a rural family, within reason, is entitled to the same relative protection as others. The fact that the residence is in a rural area requires an expectation that it will be subjected to normal rural conditions but not to such excessive abuse as to destroy the ability to live in and enjoy the home, or reduce the value of the neighboring property.

In the case of Sarraillon v. Stevenson, *supra,* this court held: "There is no reasonable doubt but that appellants have used their property for purposes and in a manner which deprives appellees and other residents of normal and ordinary sensibilities living in the area around it of the reasonable and comfortable use of their property, and so that the accepted law of decency is violated and the value of their property because thereof has been substantially depreciated. Complete freedom and full use and enjoyment of home life in the neighborhood has been limited if not destroyed. A court of equity has jurisdiction to enjoin such a use of private property when its continuance would occasion a constantly occurring grievance. * * * There is no difference in effect between a physical invasion which limits the use of or destroys the property and an in-

vasion by permeating or by noise and insects that results in the same kind of a limitation of use or depreciation of property. A legitimate industry is generally not a nuisance, but it may become a nuisance in fact by reason of the manner of its operation and conditions implicit in and that unavoidably result from its operation, especially in a residential or other closely occupied area."

"A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proven that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly." Prauner v. Battle Creek Coop. Creamery, 173 Neb. 412, 113 N. W. 2d 518.

On the evidence thus far submitted, it appears that the lagoons and the manner of handling manure constitute a nuisance. Defendants have not as yet introduced evidence and it may be that they can successfully rebut plaintiffs' evidence of a nuisance. If no nuisance is finally established, judgment must be for the defendants; however, if a nuisance is finally established but it is shown that the nuisance-creating factors may be dispensed with by enlarging or otherwise handling the lagoons, removing manure or other means, then the nuisance only but not the feeding business would be subject to injunction.

The judgment of the District Court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

McCOWN, J., dissenting.

The majority opinion now holds that evidence of intolerable odors and a substantial increase in flies is sufficient to constitute a prima facie case for the granting of a mandatory injunction against a cattle feedlot op-

eration in a wholly rural area, without any evidence that a cattle feedlot can be operated in a different method or manner which will not produce excessive odors and flies.

The court assumes that feeding 1,100 cattle does not constitute a nuisance, but the feeding of 3,746 cattle does. That in itself would not constitute a problem if there were evidence to establish that a feedlot of a larger size could be operated in a fashion which would not produce odors and flies to the degree that it constituted a nuisance. That evidence is wholly lacking here and the majority opinion simply assumes that a large cattle feeding operation can be reasonably conducted without excessive odors and flies. The record wholly fails to establish that fact, and there is no basis whatever for taking judicial notice of facts which the plaintiffs failed to prove. Plaintiffs had their opportunity to prove those facts and did not do so. They failed to establish a prima facie case and there is no justification for letting them try again.

For other matters involved, see my dissent in Botsch v. Leigh Land Co., *ante* p. 54, 236 N. W. 2d 815.

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

CARROLL A. MARCUS, APPELLANT, V. JAMES C. EVERETT ET AL., APPELLEES.

239 N. W. 2d 487

Filed March 4, 1976. No. 40072.

1. **Motor Vehicles: Negligence: Trial: Parties.** It is not required that one suing the "head of a family" as an individual under the family purpose doctrine for personal injuries received in an automobile accident must first file his claim in the estate of the member of the family driving the vehicle who was killed in the accident; and neither section 24-517, R. S. Supp., 1974, nor Mueller v. Shacklett, 156 Neb. 881, 58 N. W. 2d 344 (1953), is applicable to that situation.

2. ———: ———: ———: ———. The family purpose doctrine may be applied in an action by an injured third party to impose liability upon a husband who is head of the family for negligence of the wife in driving an automobile titled in both of their names as coowners, which automobile was purchased with funds contributed by both husband and wife, and both of whom have the right to use the automobile.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded.

Casey & Elworth, for appellant.

Ronald J. Palagi of Shrout, Caporale, Krieger, Christian & Nestle, for appellee Everett.

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

BRODKEY, J.

There are two questions involved in this appeal, first, whether the District Court erred in granting a motion for summary judgment filed by appellee, James C. Everett, defendant below, and in dismissing said action on the ground that the court did not have jurisdiction of the action brought by appellant Carroll A. Marcus to recover damages for personal injuries; and, second, whether the family purpose doctrine is applicable under the facts of the case. We reverse and remand.

On May 11, 1973, appellant, Carroll A. Marcus, sustained personal injuries when the truck which he was driving was involved in a collision in Douglas County, Nebraska, with an automobile driven by Clarice A. Everett, wife of the appellee, James C. Everett. Clarice was killed in the accident. On or about May 22, 1973, James C. Everett filed a petition for letters of administration for the estate of Clarice A. Everett in the county court of Howard County, Nebraska, and was named administrator of his wife's estate, which was closed on September 19, 1974. It is undisputed that appellant Marcus did not file a claim in that estate for his personal

injuries allegedly incurred in the accident in Douglas County. However, on July 30, 1973, appellant Marcus did file suit in the District Court for Douglas County, Nebraska, against James C. Everett to recover damages for such injuries. In his petition, he alleged, among other things: "That at all times herein the defendant, James C. Everett, was the owner of a 1967 Ford 4 door station wagon bearing 1973 Nebraska license #49-D734, serial number 7P72H167062 and that said car was maintained by the defendant for his use and his family's use, particularly his wife, Clarice A. Everett, who at the time of the hereinafter alleged accident was the operator of said vehicle." Without in any way considering whether the above allegations pleaded facts necessary for the application of the family purpose doctrine, it is clear that appellant's theory of recovery was premised upon the applicability of that doctrine in this case.

In his answer, appellee denied all allegations of negligence, and specifically denied that the vehicle operated by Clarice A. Everett came within the "family use" doctrine. Thereafter, appellee, James C. Everett, filed a motion for summary judgment alleging as grounds therefore: "* * * that the pleadings, together with the Defendant's request for Admissions and Plaintiff's response, demonstrate that this Court has no jurisdiction of the case, nor has Plaintiff alleged a cause of action against the Defendant." Following a hearing on the motion for summary judgment, the District Court for Douglas County sustained appellee's motion for summary judgment and dismissed appellant's action, finding specifically: "I. That Clarice A. Everett, Deceased, was the wife of Defendant James C. Everett. II. That the Estate of Clarice A. Everett was probated in the Howard County Court during the period May 22, 1973 through September 19, 1974, and that no claim was filed by the Plaintiff in said Estate. III. That James C. Everett, Administrator of the Estate of Clarice A.

Everett, is not named as a party defendant nor is said Estate in any other way made a party defendant in this action. IV. That this Court is without jurisdiction in this suit."

Nowhere in its judgment did the court refer to or discuss the applicability of the family purpose doctrine to the facts before it; but it is clear that it based its decision solely and exclusively upon the conclusion that the court had no jurisdiction because of failure of the appellant to first file his claim in the estate of Clarice A. Everett while it was being probated in Howard County, Nebraska.

In support of the action taken by the District Judge, appellee cites section 24-517, R. S. Supp., 1974, and Mueller v. Schacklett, 156 Neb. 881, 58 N. W. 2d 344 (1953), which he cites for the proposition that where exclusive jurisdiction of a subject matter is constitutionally conferred on county courts, and where relief sought in an action instituted in a District Court is such that the county court, under power so conferred, is authorized to grant it, the District Court does not have original jurisdiction of the case. We believe counsel for appellee misconstrues the import of the foregoing authorities. They are not applicable to this case. Appellant Marcus seeks neither to recover against the estate of the deceased, Clarice A. Everett, nor against James C. Everett, in his capacity as administrator of her estate. He seeks recovery only against James C. Everett as an individual, based upon the liability imposed upon him under the law of this state under the family purpose doctrine. That doctrine has its roots in, or at least is similar to, the liability imposed upon a principal or master for the actions of his agent or servant. It is clear that if an agent were driving the automobile of his principal in the course and scope of his employment, and was involved in a collision with a third party, as the result of which the agent died, it would not be necessary for the third party to first file a claim in the estate of the agent in

order to recover for the agent's negligence in an action against the principal only. We think the District Court erred in sustaining appellee's motion for summary judgment and dismissing appellant's action on the ground that it lacked jurisdiction because of appellant's failure to first file his claim in the estate of the deceased. Appellant is entitled to a trial of the merits of his claim against appellee.

We now examine appellant's second assignment of error which is that the trial court erred in holding that the family purpose doctrine was not applicable to this case. As previously noted, the trial court did not specifically rule on this issue in its judgment order, nor is there any reference to, or discussion of, that facet of the case therein. Nevertheless, appellant in his oral argument to this court has urged that we decide this issue to avoid the necessity of another appeal in this case on that issue in the event we remand this case for further proceedings, requiring a resolution of the issue. Under the circumstances, we believe appellant's point is well taken. We shall therefore examine the nature of the family purpose doctrine, both generally and also under the Nebraska decisions, to determine whether that doctrine should be considered in the trial of this case, assuming, of course, that the necessary underlying facts are established to the satisfaction of the trier of facts.

The only evidence before this court is contained in what has been entitled "Partial Bill of Exceptions," covering a hearing held on February 6, 1975, approximately 2½ months after the judgment of dismissal entered by the court on the motion for summary judgment. The exact nature or purpose of the hearing is not clear, but apparently the testimony contained in the record on appeal was from the deposition of James C. Everett, dated October 30, 1973. He testified that he was 67 years of age and a resident of St. Paul, Nebraska, having lived there for a period of 9 years, and

that he operated a liquor store. Before that he and his wife, Clarice, to whom he had been married for 34 years, operated a cafe at West Point, Nebraska. They had three children born to the marriage, all of whom were of age, and also he had an older boy by a previous marriage. His wife, Clarice, worked in the liquor store for approximately 6 to 8 hours a day. She did not have a regular salary but just took what money she wanted. While they had a joint bank account for the liquor store, they also had a separate joint account to which they both contributed. Although he testified that he was the sole owner of the liquor store, he also testified that it was currently licensed in his wife's name because he had had heart attacks 3 years previous and at that time they put the "business" in her name so she could build up her social security. Prior to that time it had been licensed in his name. He further testified that they had two cars, a 1971 Buick Electra and a 1967 Ford, which was the car driven by his wife at the time of the accident. Both cars were registered in both their names as coowner's, and the money for the purchase of the cars came from their joint bank account. He testified that both cars were family automobiles and were used by both him and his wife interchangeably. The money for gas and oil, insurance, taxes, and licenses came out of their joint account. On the morning of the accident, Mrs. Everett had driven to Omaha to visit their daughters, which was a regular occurrence. Mr. Everett had no objection to the trip. He had no personal knowledge as to how the accident occurred.

Appellee contends that because the automobile in question was owned jointly by him and his wife, the family purpose doctrine is not applicable; and the negligence of the driver, his wife, may not be imputed to him. We do not agree.

The family purpose doctrine has been recognized and applied in Nebraska for over 50 years. Stevens v. Luther, 105 Neb. 184, 180 N. W. 87 (1920); Linch v. Dobson,

108 Neb. 632, 188 N. W. 227 (1922). It has been stated, explained, and applied in varying language and under varying circumstances in an unbroken line of cases to the present date. See, for example, Hogg v. MacDonald, 128 Neb. 6, 257 N. W. 274 (1934); Jennings v. Campbell, 142 Neb. 354, 6 N. W. 2d 376 (1942); Piechota v. Rapp, 148 Neb. 442, 27 N. W. 2d 682 (1947); Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130 (1951); Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466 (1955); Christensen v. Rogers, 172 Neb. 31, 108 N. W. 2d 389 (1961); Garska v. Harris, 172 Neb. 339, 109 N. W. 2d 529 (1961); McBroom v. Wolsleger, 180 Neb. 622, 144 N. W. 2d 199 (1966); Schaffer v. Bolz, 181 Neb. 509, 149 N. W. 2d 334 (1967); Forman v. Anderson, 183 Neb. 715, 163 N. W. 2d 894 (1969); Demont v. Mattson, 188 Neb. 277, 196 N. W. 2d 190 (1972). The family purpose doctrine, as developed by Nebraska case law, may be fairly stated to be that where the head of the family purchases, owns, maintains, furnishes, or provides a motor vehicle for the general use, pleasure, and convenience of the family, and a family member is using the car with the express or implied consent or permission of the owner, the negligence of the family member driver is imputed to the head of the family. It is considered that the use of the vehicle for the pleasure and convenience of the family is in furtherance of the purpose of the head of the family in providing it, and under such circumstances it is treated as if it were being used in the conduct of the business of the head of the family. The Nebraska court has not been entirely consistent in its explanation of the basis of the doctrine. Some cases state that the doctrine is a development of the rules applicable to the relation of master and servant and principal and agent, which have been extended to meet a new situation brought about by the common use of the automobile. Linch v. Dobson, *supra;* Hogg v. MacDonald, *supra;* Piechota v. Rapp, *supra;* Lund v. Holbrook, *supra;* Garska v. Harris, *supra.* Other cases have agreed

that the family purpose doctrine is not a restatement of the rules of principal and agent or master and servant, but rather a development from those principles, and that it is based on public policy. Jennings v. Campbell, *supra;* Bartek v. Glasers Provisions Co., Inc., *supra;* Christensen v. Rogers, *supra.* The cases basing the doctrine on public policy do so on the theory that it enables the injured party to reach the most financially responsible individual, the owner or supplier of the vehicle, as opposed to a judgment proof infant or spouse; and also in the belief that the head of the family is generally in a far better position to determine who is competent to drive the vehicle and to control or forbid its use by the members of his family. They point out that the agency rationale is to a large extent a fiction or myth.

Of interest in this connection, is the language in Prosser, Law of Torts (4th Ed.), § 73, pp. 483, 486, as follows: "There is obviously an element of unblushing fiction in this manufactured agency; and it has quite often been recognized, without apology, that the doctrine is an instrument of policy, a transparent device intended to place the liability upon the party most easily held responsible. * * * It clearly is to be regarded as an ingenious fiction, resorted to as a partial and inadequate step in the direction of an ultimate rule which will hold the owner of the car liable in all cases for the negligence of the driver to whom he entrusts it. When such a rule is adopted by statute, the doctrine will have served its purpose, and is to be discarded." See, also, Annotation, 8 A. L. R. 3d 1191. In 1 Harper and James, The Law of Torts, § 8.13, p. 661, it is stated: "It is to be observed that the agency explanation of the 'family car' principle is not very convincing. This, however, in no sense militates against the desirability of the doctrine as a matter of social engineering. The appalling toll of accidents, steadily mounting, affords startling evidence of the hazards due to the use of high-powered motor vehicles. The dangers of the public from

incompetent and financially irresponsible drivers is a menace of such gravity that every precaution is necessary to reduce such perils to the minimum. When a parent provides an automobile for the pleasure and convenience of his family, it is not too much to demand that he insure society against its negligent use for such purposes. He may avail himself of the protection of insurance against such hazards, but he should not be permitted to throw the risk upon the innocent victims of his family's negligence in such an agency as an automobile with which he has provided them."

The Nebraska Supreme Court Committee on Pattern Jury Instructions in the preparation of its book "Nebraska Jury Instructions" (NJI), which instructions have been approved and their use made mandatory by this court, studied and analyzed the Nebraska cases involving the family purpose doctrine, which were available as of the date of the publication of that volume in 1969. The committee prepared a standard jury instruction covering that doctrine, setting forth the requirements for its applicability in NJI No. 7.20. It is clear from the Nebraska cases and from NJI No. 7.20, that to recover under the family purpose doctrine the essential elements which must be proved are (1) that the defendant who is sought to be charged with liability was the head of his family, (2) that he furnished the car for the use and pleasure of his family, (3) that the driver of the automobile was a member of his family and one for whose use or pleasure the car was furnished, and (4) that the driver was, at the time of the accident, using the car for which it was furnished with the authority, expressed or implied, of the head of the family.

Let us now examine each of the foregoing requirements in the light of the evidence now before us in the record of this case, and with full realization that other or different evidence may be presented to the trier of facts in the event of a trial in District Court.

There would seem to be little question that James C.

Everett was the head of his family. Although not always necessarily true as a matter of fact, this court has specifically held that the father is the head of the household as a matter of law. Demont v. Mattson, *supra*. This is logical because the law is well settled in this state that it is the duty of the husband to provide for the reasonable support and maintenance of his wife during the continuance of the marriage relationship. Schalk v. Schalk, 168 Neb. 229, 95 N. W. 2d 545 (1959). Likewise the law is well settled that a father is primarily liable for the support of his minor children, his liability being independent of the assets of the mother. Schneider v. Schneider, 188 Neb. 80, 195 N. W. 2d 227 (1972); Benton v. Benton, 187 Neb. 205, 188 N. W. 2d 685 (1971). Likewise, there would seem to be little question that Clarice, his deceased wife, was a member of his family and one for whose use or pleasure the car was furnished. Also, on the basis of the evidence now before us, the trier of fact might well find that at the time of the accident, Clarice, in visiting their daughters in Omaha, was using the car for the purpose for which it was furnished. In cases of joint ownership by the husband and wife, problems arise in the application of the requirements that the head of the household furnish the car and that the driver be operating the car with the husband's express or implied consent or permission. The automobile driven by Clarice was jointly owned by them, being titled in both of their names as co-owners, and was purchased with funds supplied by both of them. Also, it was maintained from their mutual funds. Under the circumstances, can it be stated that James "furnished" the car for the use and pleasure of Clarice?

Although the evidence indicates that Clarice was a co-owner of the automobile, the fact still remains that James was also. We believe that in contributing the use of his "moiety" in the automobile, he was in fact "furnishing" the automobile to Clarice, a member of his

family. The Comment to NJI No. 7.20, as well as the Nebraska case law, makes it clear that the head of the family sought to be held liable does not even have to be the owner of the car. Likewise, although technically it might be argued that as coowner of the vehicle Clarice was not driving the automobile "with the express or implied consent" of the head of the family, but rather by virtue of her own consent, as coowner, this argument would completely disregard the realities of the situation, and would emphasize form over substance. He could, and apparently did, consent to her driving the automobile as a member of his family, at least so far as ownership was concerned. There would seem to be no rational basis for holding that the family purpose doctrine will apply if the head of the family is the sole owner of the automobile, but not if his wife, in contemplation of law, is part owner. The beneficent purposes of the doctrine would be thwarted by such an over-technical interpretation.

There is a dearth of cases discussing the specific issue whether the doctrine applied to a vehicle jointly owned by husband and wife, and a split of authority exists in the few cases that do discuss it. Although some jurisdictions do not require that the one sought to be charged under the family purpose doctrine be the head of the family, it is clear under the decisions previously cited that it is an indispensible element to recovery under Nebraska law. Our neighboring State of Colorado has the same requirement, and the Supreme Court of Colorado has used it as a basis for denying recovery under its family purpose doctrine where the wife was defendant, and the husband was the driver. In Lee v. Degler, 169 Colo. 226, 454 P. 2d 937 (1969), the Supreme Court of Colorado held that the family car doctrine could not be employed to impose liability on a wife for the alleged negligence of the husband in driving their jointly owned automobile, where the husband was the sole wage earner, had provided all the money for the

purchase of the automobile, and he had exclusive control of the automobile. The wife did not know how to drive the automobile and was not the head of the household. In that case the court specifically ruled that where the defendant is not the head of the household, mere legal title alone is insufficient to justify the application of the family car doctrine. The clear inference is that had she been the head of the household a contrary result would have obtained. In a subsequent case, Suazo v. Black, 477 P. 2d 488 (1970), the Colorado Court of Appeals held that a wife who was coowner of the automobile but who was not shown to have been the head of the household, was not liable under the family car doctrine for injuries negligently inflicted by her husband, the other coowner, while driving the vehicle. In making its decision in that case, the court followed the previous decision by the Supreme Court of Colorado in Lee v. Degler, *supra*. The court also noted in its opinion that the plaintiff did not allege that the defendant was the head of the household.

On the other hand, in Rushing v. Polk, 258 N. C. 256, 128 S. E. 2d 675 (1962), the Supreme Court of North Carolina refused to apply the family purpose doctrine to husband and wife joint owners of an automobile without the proof of actual agency between them, stating that: "Where husband and wife are joint owners of a motor vehicle and are members of the same household, the family purpose doctrine, *nothing else appearing,* does not apply as between them." (Emphasis supplied.) Dictum in an earlier Nebraska case has been cited as indicating an intention not to apply the family purpose doctrine in cases of joint ownership by husband and wife. In Doleman v. Burandt, 160 Neb. 745, 71 N. W. 2d 521 (1955), the court held that: "When an automobile is owned jointly and one of the two co-owners entrusts its use to the other, any negligence of the owner driving the automobile is imputed to the other owner in an action brought by the owners as plaintiffs

against the third party for property damage to the jointly owned automobile." The court stated however: "We adopt this rule only in the above situation where the action is brought by the co-owners as plaintiffs against a third party. It would not necessarily apply in all cases, especially where the co-owners are parties defendant and one owner operating the car. In such a case the question of imputable negligence would still require proof of the relationship of principal and agent, joint enterprise, or some community of interest." We point out, however, that this case did not involve a discussion of the application of the family purpose doctrine, and is not authority for the assertion that the family purpose doctrine would not be applicable if elements other than mere coownership of the vehicle were involved.

The family purpose doctrine was developed as a response to the advent of motor vehicle transportation and the inevitable, numerous, and often serious mishaps resulting from the use of the car. Under that doctrine the injured party is enabled to reach the most financially responsible individual, the owner, as opposed to a judgment proof infant or spouse. We believe the doctrine is applicable to this case and is viable, particularly because of the policy considerations concerning the alleviation of the burden of costs in the aftermath of often traumatic and expensive auto accidents. The strength of the doctrine lies in its use as a policy instrument. The burden of bearing the costs of a driver's negligence is shifted to one who is generally both more able to afford to pay for the results of an accident and also more able to prevent the accident by careful entrustment of the car. The doctrine is humanitarian in design and purpose. We are not unaware of the admonition of Justice Carter in Christensen v. Rogers, *supra,* a case totally dissimilar factually from this case, that: "If the negligent operation of automobiles has become such a menace as to require the imposition of extraordinary

liabilities which exceed the scope of the common-law liability, it is a matter for the Legislature and not the courts." The same argument may well have been made against the original adoption by this court of the family purpose doctrine in Nebraska in 1920. It has proved to be helpful and beneficial, and should be retained, at least until the Legislature should decide to substitute something better to take its place. When and if this state should adopt a statute similar to those adopted in a number of other states, including our neighboring states of Minnesota and Iowa, rendering the owner of a motor vehicle liable for the negligence of anyone operating his vehicle with his permission, express or implied, whether in the business of the owner or otherwise, then the family purpose doctrine will have served its purpose and will no longer be needed. See, Jacobsen v. Daley, 228 Minn. 201, 36 N. W. 2d 711 (1949); McMartin v. Saemisch, 254 Iowa 45, 116 N. W. 2d 491 (1962).

We conclude, therefore, that the family purpose doctrine is applicable and may be applied to the fact situation involved in this case, if the necessary elements of the family purpose doctrine are supported by the evidence. We reverse and remand.

REVERSED AND REMANDED.

NEBRASKA CHILDREN'S HOME SOCIETY, APPELLEE, V. HATTIE B. COLLINS, APPELLANT, IMPLEADED WITH WILLIAM E. COLLINS, APPELLEE.

239 N. W. 2d 258

Filed March 4, 1976. No. 40145.

1. **Habeas Corpus: Appeal and Error.** The appeal procedure in habeas corpus actions is the same as that required for a like purpose in civil actions.
2. **New Trial: Time.** Under section 25-1143, R. R. S. 1943, an application for a new trial must be made within 10 days after

the verdict, report, or decision is rendered, except where unavoidably prevented or where there is newly discovered evidence.

3. ———: ———. A motion for a new trial which is not filed within the time specified by statute, and not within one of the exceptions, is a nullity and of no force and effect.
4. **New Trial: Appeal and Error.** In a law action, where no motion for a new trial is filed, this court on appeal will examine the record only for the purpose of determining whether or not the judgment is supported by the pleadings.
5. **Judgments.** In the absence of a motion for a new trial, where a judgment is sustained by the pleadings, it will ordinarily be affirmed.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Vard R. Johnson and Glenn H. Stevens, for appellant.

Craig W. Thompson of Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellee Nebraska Children's Home Soc.

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

BRODKEY, J.

This is an appeal from an order of the District Court for Douglas County in a habeas corpus action commenced by Nebraska Children's Home Society against Hattie B. Collins and William E. Collins, respondents, to recover custody and possession of a minor child, Shawneewa Danielle McLucas, also known and referred to as Angela Collins. Following a hearing held on April 4, 1975, the court found that the Nebraska Children's Home Society was the legal guardian and had the right to "custody, power and control" over Shawneewa, and ordered her delivered forthwith to the custody of the Nebraska Children's Home Society. On April 28, 1975, Hattie B. Collins, as next friend of the minor child and for and on her behalf, filed a motion for a new trial, about which more will be said later on in this opinion. The District Judge overruled the motion for new trial and

an appeal was then taken to this court. We affirm the decision of the District Court with certain precatory comments.

This case comes to us with the following factual background. Shaweenwa Danielle McLucas was born out of wedlock to one Princella McLucas on April 16, 1970. On November 24, 1972, Princella McLucas, the natural mother, executed a relinquishment of the child to the Nebraska Children's Home Society, providing, among other things: "I do hereby voluntarily relinquish to the Nebraska Children's Home Society all right to and custody of and power and control over the said Shaweenwa Danielle McLucas * * * to the end that said Society may become the legal guardian of said child and do authorize the said Society to place said child in a suitable family home during minority and to consent to and procure the adoption of said child by any person deemed by said Society to be fitted to become the guardian of said child." On June 28, 1973, Clark Dean Long, the biological father of the child, also executed an identical relinquishment to the society. We take judicial notice of the fact that the Nebraska Children's Home Society is, and for many years has been, a licensed child placement agency in Nebraska. At the habeas corpus hearing, a case worker for the society testified that the Nebraska Children's Home Society was the legal guardian of the child; and the court so found in its decree. There is no showing in the record, however, by what means, manner, or proceedings the society became the legal guardian of the child; but, in any event, there is no question that the society obtained legal custody of the child by virtue of the aforesaid relinquishments. In November 1972, the society placed the child in the home of Hattie B. Collins and William E. Collins on a foster home basis. This was later changed to an adoptive parent arrangement. The child remained in their home until the trial of the habeas corpus action on April 4, 1975, at which time the child was approximately 5

years of age. At no time during the entire period that the child was in the possession of the Collinses did they take any action to adopt her. An investigation by the society revealed that Mr. and Mrs. Collins were having marital problems and that Mrs. Collins had filed a petition for dissolution of the marriage on March 6, 1975. This caused the society some concern, and it requested the Collinses to come in and discuss the matter with them. The Collinses failed or refused to do so, whereupon the society decided to regain possession of Shawneewa, and filed the habeas corpus action.

The trial in the habeas corpus matter was held on April 4, 1975, on which date the court announced its decision and made a docket entry reflecting that Hattie B. Collins had appeared at the hearing with counsel and with the minor child, and that evidence was adduced by both parties, and the child ordered delivered to the petitioner. The court also directed that a formal order be submitted. The transcript reflects that the signed order was received by the journal clerk and recorded on April 9, 1975. So far as revealed by the record, nothing further transpired in the matter until April 28, 1975, or approximately 24 days after the date of the hearing and order of the court, at which time there was filed what is entitled a "Motion for a New Trial." The opening paragraph of that motion reads as follows: "Comes now Shawneewa Danielle McLucas, also known as Angela Collins, by her next friend Hattie B. Collins and for her motion states * * *." The substance of the motion was that Shawneewa was a 5-year-old minor child who was the subject of the habeas corpus action tried to the court on April 4, 1975. That she was not represented at the hearing, and that Hattie was filing the motion out of time, pursuant to sections 25-1142 and 25-1143, R. R. S. 1943, for the reason that she was "unavoidably prevented" from filing it on time. The society filed objections to the motion. After

hearing on the motion and objections, the court overruled it.

At no time did Hattie file a motion for a new trial on her own behalf, although she did file notices of appeal to this court, both for herself, and subsequently also for Shawneewa Danielle McLucas, also known as Angela Collins. Both notices of appeal were prepared and signed by the same counsel, who, however, was not the attorney who represented the respondents in the habeas corpus hearing.

The rule is that the procedure to obtain a review in this court of a final order made by a District Court or Judge in a proceeding in habeas corpus must be such as is required to be followed for a like purpose in civil actions. State v. Decker, 77 Neb. 33, 108 N. W. 157 (1906). Section 25-1143, R. R. S. 1943, provides that the application for a new trial must be made within 10 days after the verdict, report, or decision was rendered, except where unavoidably prevented, or on the grounds of newly discovered evidence. There is no claim of newly discovered evidence; and the alleged basis for the late filing, as contained in the motion for new trial filed by Hattie B. Collins on behalf of the child, is that she was "unavoidably prevented" from filing it on time for various reasons set out, none of which deals specifically with the reason the motion could not just as easily have been filed within the 10-day period provided by statute. There is no supporting affidavit or other proof in connection with the motion for new trial in any way establishing an excuse for the late filing, or explaining why such occurred. Since the motion for the new trial was filed by Hattie B. Collins, herself, as next friend of the child, it is difficult to preceive why that same motion could not have been prepared and filed by her within the 10-day period, as she obviously was fully acquainted with what had occurred in the prior proceedings. Also, so far as we are made aware, she was at all times represented by counsel. We conclude there

is no showing in the record of any valid reason why Hattie B. Collins was unavoidably prevented from filing the motion for a new trial as next friend of the child within the time provided by statute.

The words "unavoidably prevented" refer to circumstances beyond the control of the party desiring to file a pleading in our courts. The law requires diligence on the part of clients and attorneys and the mere neglect of either will not enable a party to relief on that ground. Community Credit Co. v. Gillham, 191 Neb. 198, 214 N. W. 2d 384 (1974); Vacek v. Marburger, 188 Neb. 180, 195 N. W. 2d 515 (1972).

We also note, in connection with the efforts of Hattie B. Collins to bring the child into the litigation at this late stage, that there is nothing of record to indicate she made any effort to have herself appointed as guardian ad litem for the child for that purpose, or to intervene in the proceedings as "next friend," or to have the pleadings on appeal amended to reflect the addition of the name of the child as a party, or to substitute the child as a party.

A motion for a new trial which is not filed within the time specified by statute is a nullity and of no force and effect. Neudeck v. Buettow, 166 Neb. 649, 90 N. W. 2d 254 (1958). It is the rule that this court will not review alleged errors occurring during the trial of a cause in the District Court, unless a motion for a new trial was made in that court and a ruling obtained thereon. In a law action, where no motion for a new trial is filed, this court on appeal will examine the record only for the purpose of determining whether or not the judgment is supported by the pleadings. In the absence of a motion for a new trial, where a judgment is sustained by the pleadings it will ordinarily be affirmed. Lincoln Nat. Bank & Trust Co. v. School Dist. No. 41, 131 Neb. 773, 270 N. W. 311 (1936); Wellensiek v. Britza, 117 Neb. 52, 219 N. W. 808 (1928). The pleadings in the habeas corpus proceeding in this case are in

the usual form, and are sufficient to sustain the order of the court. The decision of the court must therefore be affirmed.

However, we believe some additional remarks are warranted at this point. It appears to be the principal contention of the appellant that the trial court in the habeas corpus proceeding based its decision exclusively on the right to custody and possession of the child by the society because of the fact there was evidence it was her legal guardian, and had been given her custody by the biological parents. It is appellant's claim that the hearing should have been conducted and decided solely upon the issue of what was in the best interests of the child, and that this was not done. There is evidence in the record that during the approximately 2 years the child was in the Collinses' home, Hattie B. Collins took exceptionally fine care of the child, and nursed her from sickness to excellent health. There is no doubt that she has developed a deep love and affection for the child, and it is altogether possible the child apparently looks upon Hattie as her natural mother. It was undoubtedly a traumatic experience for Shawneewa to be wrenched from that environment and taken to a strange place, although in some instances it still may be in the best interests of a child to do so. We do not pass upon this issue. The child has already been returned to the society. Frequent moves of a child in these circumstances are universally recognized as being undesirable, and harmful to the child. We do not know the status of the divorce action between the Collinses; but in his oral argument to this court, counsel for Hattie B. Collins assured the court that Hattie intended to apply to adopt the child. This would appear to be a felicitous solution to her problem, affording her what she claimed was missing in the original habeas corpus proceeding, a hearing on the best interests of the child. Our adoption statutes require that in an adoption hearing, the decision as to whether or not to permit

adoption is made by the court on the basis of the best interests of the child. § 43-109, R. R. S. 1943. In the event of an adoption proceeding in this case it would be possible, and perhaps desirable, to have a guardian ad litem or attorney appointed to represent the interests of the child. Also, at such hearing the issue of whether or not the society is arbitrarily withholding consent to Hattie B. Collins to adopt the child, if such issue should arise, could be explored, and a decision made. 2 Am. Jur. 2d, Adoption, § 39, pp. 891, 892. This procedure would seem to be a desirable solution to appellant's problems, and one which involves less danger of further trauma to the child. We recommend its consideration.

For reasons heretofore expressed we affirm the decision of the District Court.

AFFIRMED.

CLINTON, J., concurring.

I concur in the majority opinion except for the "additional remarks." It is not appropriate for this court, under the circumstances of this case, to suggest views as to what one of the parties ought to do next.

SPENCER, J., joins in this concurrence.

McCOWN, J., concurring specially.

The District Court order to deliver the child to the plaintiff rests solely on a finding that the plaintiff society was her legal guardian. The Nebraska Children's Home Society is a licensed child placement agency, which held custody and possession of the child here for the purpose of adoption. Where a licensed child placement agency places a child with prospective adoptive parents for the purpose of adoption, it cannot arbitrarily and unreasonably terminate that placement merely by asserting and proving that it is still the legal guardian. The District Court here proceeded upon the assumption that proof of legal guardianship was alone sufficient to terminate a placement for adoption and require the delivery of the child in a habeas corpus proceeding. That assumption was incorrect. In such a case there must be

also some evidence of reasonable grounds for terminating a placement for adoption by a licensed placement agency in this state.

BOSLAUGH, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. MELVIN ISLEY, APPELLANT.
239 N. W. 2d 262

Filed March 4, 1976. No. 40166.

1. **Verdicts: Evidence.** The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it.
2. **Juries: New Trial.** In order for jury misconduct to be the basis for a new trial, the misconduct must be prejudicial to the defendant.
3. **Witnesses: Trial: Evidence.** Proof of contradictory statements of a witness is received not as evidence of the facts declared, but for the purpose only of aiding the jury in estimating the credibility of the witness.
4. ———: ———: ———. A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to matters relative to the issues. Such declarations are not substantive evidence of the fact declared.
5. ———: ———: ———. The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated in the impeaching testimony.
6. **Criminal Law: Discovery: Trial.** In a criminal case, the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

Padley & Dudden, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

WHITE, C. J.

The defendant was found guilty of manslaughter after a trial before a jury and sentenced by the District Court to the Nebraska Penal and Correctional Complex for a period of 3 to 5 years. The defendant appeals that conviction. We affirm the judgment of the District Court.

The defendant was convicted of manslaughter in connection with the death of Fred C. Roberts, Jr. On March 11, 1974, Roberts entered the Sahara Lounge and was seated at the bar. The manager of the bar apparently asked that Roberts be removed from the Sahara Lounge because he was drunk and was using obscene language. The defendant grabbed Roberts from the bar stool and dragged him out of the premises. One witness testified that she saw the defendant pull Roberts' shirt off outside the bar, and as Roberts attempted to flee, the defendant chased after him. Three other witnesses testified that the defendant remained outside of the building for 3 to 5 minutes before returning. These same three witnesses also testified that the defendant, upon his return, boasted that Roberts would not cause any more trouble because the defendant had "just beat his brains in," or that "he had broke his neck."

Roberts' unconscious body was found on the ground outside the bar. He died 3 days later from massive head injuries. The jury found the defendant guilty of manslaughter and the District Court gave the defendant a sentence of 3 to 5 years.

The defendant's first contention on appeal is that there was not sufficient evidence to support a jury verdict of guilty. We do not agree. This court stated in State v. Combs, 192 Neb. 551, 222 N. W. 2d 833: "After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of

law, be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt." There was clearly sufficient evidence before the jury to sustain a rational theory of guilt. Numerous witnesses testified that the defendant dragged the victim, Roberts, out of the bar. Three witnesses testified that the defendant remained outside for 3 to 5 minutes, a period of time long enough to inflict the beating. The same three witnesses also testified that they heard the defendant admit he had severely beaten the victim. Another witness testified that she saw the defendant chasing Roberts outside. The above testimony easily sustains a rational theory of guilt.

The defendant's next contention is that the District Court erred in refusing to grant a new trial on the basis of jury misconduct. In support of the defendant's motion for a new trial, the defendant's attorney, Mr. Padley, submitted his own affidavit which revealed that an alternate juror had told Mr. Padley, while in the presence of the District Court Judge, that during the course of the trial the jurors had discussed the witnesses during recesses and had expressed opinions relating to the credibility of witnesses and the conflicts in the testimony. The jury, if in fact it discussed the case outside the courtroom, did act improperly. The District Court had admonished the jury not to discuss the case during recesses. However, in order for jury misconduct to be the basis for a new trial, the misconduct must be prejudicial to the defendant. See Williams v. State, 115 Neb. 277, 212 N. W. 606. If there was jury misconduct in this case, there is no evidence that the defendant was prejudiced by such misconduct. In fact, in Mr. Padley's affidavit, he states that the alternate juror said that, "it would be difficult to conclude how the jurors would decide the case in view of the conversations which he had overheard." Thus, there is no indication that any of the jurors had made up their minds as to the defendant's guilt or innocence prior to the conclusion of

the trial. No prejudice to the defendant has been shown, and therefore the District Court was correct in denying the defendant's motion for a new trial based on jury misconduct.

The defendant next contends that the District Court erred in refusing to allow Cathy Tucker, a bartender at the Sahara Lounge, to testify as to the contents of an alleged conversation with Mike Slankard. Slankard, called by the defendant, testified that he was not at the Sahara Lounge at the time of the incident, and that he did not witness the attack on Mr. Roberts. Cathy Tucker was then called as a witness by the defendant, and she testified that Slankard had told her he had pulled into the parking lot at the Sahara Lounge at the time of the incident. When the defendant's attorney asked Cathy Tucker what Slankard had told her that he had seen, the prosecutor objected to the question as calling for hearsay. The District Court sustained the objection. The defendant made an offer of proof to the effect that Cathy Tucker would testify that Slankard had told her that he saw the attack and the defendant was not one of the assailants. We agree with the District Court that the testimony of Cathy Tucker relating to what Slankard told her was inadmissible.

It is true that in Nebraska, prior inconsistent statements of a witness are admissible. However, these hearsay statements are admissible only as impeachment evidence, not as substantive evidence. As stated in Texter v. State, 170 Neb. 426, 102 N. W. 2d 655: " 'Proof of contradictory statements of a witness is received not as evidence of the facts declared, * * * but for the purpose only of aiding the jury in estimating the *credibility* of the witness. * * * "A witness may be impeached by showing that he made statements *out of court contrary to those made in court* in regard to some matters relative to the issue. * * * Such declarations are not substantive evidence of the fact declared, * * *." ' " (Emphasis supplied.)

In State v. Witmer, 174 Neb. 449, 118 N. W. 2d 510, this court held as follows: "The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated [in the impeaching testimony]." See the same holding in Insurance Co. of North America v. Omaha Paper Stock, Inc., 189 Neb. 232, 202 N. W. 2d 188.

Slankard was impeached as to all the direct testimony he gave when Cathy Tucker testified he told her (at a subsequent time) that he was in the Sahara Lounge parking lot at the time of the incident. Slankard's testimony that he was not there was therefore impeached. The only possible result in admitting *further* Tucker hearsay testimony as to what Slankard told her would be to influence the jury as to the truth of the facts "believed" to be present in the offer of proof as to Tucker's testimony. But Slankard never testified as to any conversation. The offer of proof (outside of stating he was not there) contains nothing contrary to the testimony that he gave in court. It is an attempt to offer hearsay proof of substantive facts under the guise of impeachment testimony. This cannot be permitted. Even in the defendant's brief, his theory is that the alleged conversation should be admitted so as to factually prove to the jury that the defendant was not the assailant. It is clearly not admissible, and on the other hand demonstrates the necessity to protect a jury trial from the danger of manufactured and unreliable testimony as to conversations out of court, not under oath, and by witnesses not parties to the case.

It should be noted that the testimony of Cathy Tucker relating to her conversation with Slankard would also be inadmissible as substantive evidence under the new Nebraska Evidence Rules, which are now in effect. See section 27-801 (4)(a)(i), R. S. Supp., 1975, which makes admissible prior inconsistent statements of a wit-

ness only if the prior statement was given under oath.

The defendant's final contention is that the District Court erroneously refused to order the State of Nebraska to turn over to the defendant certain documents. More specifically, the defendant argues that he was entitled to the statements given to the police by Jack Shelton and Theron Shelton, and to a police report, taken by an officer at the scene of the incident which contained a description of the assailant.

As for the statements given to the police by Jack and Theron Shelton, the defendant cannot claim that he was prejudiced by the District Court's denial of his request to view the statements prior to trial. In fact, upon cross-examination of Theron Shelton, the defendant's attorney was given a copy of both Theron Shelton's and Jack Shelton's prior statements. The District Court gave the defendant's attorney, Mr. Padley, a recess for the purpose of reviewing the statements. Cross-examination continued by Mr. Padley after the recess. Since Mr. Padley was given the statements of the Shelton brothers during the trial, the denial of access to these statements prior to trial did not in any way prejudice the rights of the defendant.

As to the police report, the pertinent portion requested by defendant was based on interviews with three witnesses, the two Shelton brothers and one other witness. The Shelton brothers did not sign the report, and it did not contain any direct statements of either Jack or Theron Shelton. Thus, the police report could not have been of any help in impeaching either of the Shelton brothers' testimony. Moreover, the contents of the police report are generally consistent with the Shelton brothers' testimony. We see no prejudice.

In addition, in a criminal case, the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion. In Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323, this court said: "* * * the

trial court has a broad judicial discretion and it is only when such discretion is abused that error can be based thereon." It is clear that there was no abuse of discretion in denying the defendant the police report or the statements of the Shelton brothers.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD STEINMARK, APPELLANT.
239 N. W. 2d 495

Filed March 4, 1976. Nos. 40171, 40172.

1. **Criminal Law: Indictments and Informations: Trial: Verdicts.** In an information containing three counts, a verdict of guilty on two of the counts and an acquittal on the other is not inconsistent, although the evidence would have justified the conviction on all the counts.
2. **Evidence: Witnesses: Trial.** The polygraph, commonly known as a lie detector, used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory.

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

Andrew J. McMullen and Richard Hove, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

WHITE, C. J.

The defendant was convicted on two counts of delivery of a controlled substance in violation of section 28-4,125, R. S. Supp., 1974. He was given a sentence of 3 to 9

years on each count, with the sentences to run consecutively. The defendant appeals. We affirm the judgment and sentences of the District Court.

The defendant was charged on three counts of delivering a controlled substance; first, for the delivery of amphetamines on December 12, 1974; second, for the delivery of marijuana on December 16, 1974; and third, for another delivery of marijuana on December 19, 1974. The prosecution's only witness with respect to the delivery of the controlled substances was an informer, Mr. Landrie. Landrie testified that the defendant sold him the controlled substances on the three dates listed above. Numerous defense witnesses contradicted Landrie's testimony relating to the defendant's presence on December 16, 1974, when Landrie testified that he had purchased marijuana from the defendant. Based on Landrie's testimony, the District Court, sitting without a jury, found the defendant guilty on the first and third counts but acquitted the defendant on the second court.

The defendant appeals the convictions on three grounds. First, the defendant contends that, once a witness has willfully sworn falsely at a trial, his testimony cannot be sufficient, if uncorroborated, to support a finding of guilty.

For authority, the defendant cites the case of Jahnke v. State, on rehearing, 68 Neb. 181, 104 N. W. 154. The defendant's reliance on Jahnke is misplaced. Jahnke involved an accomplice, rather than an ordinary disinterested witness. An accomplice' testimony by its very nature raises some doubts as to its veracity. In Jahnke the accomplice told two directly contradictory stories under oath. Under those circumstances, it was reasonable for the court to require corroboration of his testimony. Those circumstances which require corroboration in Jahnke do not exist in the present case. Landrie was not an accomplice of the defendant. There is no proof that Landrie lied under oath. There was testimony which conflicted with Landrie's testimony relating to the

defendant's whereabouts on December 16, 1974. But this is not proof that Landrie lied under oath. The fact that the District Court acquitted the defendant on the second count does not mean that the District Court found that Landrie had lied. Rather, the acquittal could mean that the District Court found the prosecution had not carried its burden of proving the defendant's guilt beyond a reasonable doubt.

The defendant next contends that where identical evidence is offered on several counts, and the judge acquits on one count and convicts on the other counts, the verdicts are reversibly inconsistent and the convictions cannot stand. In essence, what the defendant argues is that the District Court acquitted the defendant under one count, and since the same evidence was used to convict him under the other two counts, the acquittal and the two convictions are inconsistent. However, the defendant's contention fails because: First, the evidence relied on in the different counts is not identical, the witness is the same, but not his testimony; second, this court has affirmed convictions in which information in multiple counts resulted in conviction on one count and acquittal on the other count. In Weinecke v. State, 34 Neb. 14, 51 N. W. 307, the court stated: "The evidence would have justified a conviction under both counts of the information. Both offenses were committed by the same person and at the same time. It is, indeed, unexplainable how the jury arrived at the verdict returned. As a separate offense is charged in each count, the verdict is not void. The defendant cannot complain because he was acquitted of the first offense. The error was in his favor." Then, in Wentz v. State, 108 Neb. 597, 188 N. W. 467 (1922), in which it was claimed that a not guilty verdict on count two required an acquittal on count three, on which a guilty verdict was rendered, the court stated as follows: "The second and third counts charge different offenses, and, while it may be that the same proof would have justified a con-

viction on both counts, the fact that a verdict of not guilty was rendered on the second count does not affect (require) an acquittal on the third count."

The defendant's final contention is that the District Court erroneously refused to order the prosecution to stipulate that the results of a polygraph examination of the defendant would be admissible into evidence at the trial. By motion, the defendant offered to take a polygraph test and have the test be admitted into evidence, regardless of the results of the test. The District Court correctly denied the motion.

We have consistently held that polygraph examinations are not admissible into evidence in this state. In Parker v. State, 164 Neb. 614, 83 N. W. 2d 347, this court stated that: "The polygraph, commonly known as a lie detector, used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory." See, also, State v. Temple, 192 Neb. 442, 222 N. W. 2d 356.

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

AFFIRMED.

BRODKEY, J., concurs in the result.

McCOWN, J., dissenting.

On each of the three counts of delivery of a controlled substance, the State's only witness as to delivery by the defendant was Dennis Landrie. The testimony of this chief witness for the prosecution was the sole foundation upon which all three counts rested. The two regular police officers under whom Landrie was working simply confirmed that after Landrie had made a purchase or purchases, he would report to them; put on tape his account of the circumstances under which, and the person from whom, he obtained the substance; and deliver the substances to them for preservation as evidence. There was no evidence that the regular of-

ficers verified or checked the accuracy of his reports, other than to have the substances analyzed by chemists.

It is not entirely unusual that the chief prosecution witness in a controlled substances case is an undercover agent, but it is almost unbelievable that the prosecution undercover agent here was a three-times convicted felon, whose testimony was uncorroborated by law enforcement officers except to test the substances brought in. The undercover agent was employed by a drug investigator of the State Patrol to gather information against defendants and make undercover purchases of controlled substances in Kearney, Nebraska. He was employed about a week before December 12, 1974, at a compensation of $75 per week, plus expenses. His compensation was raised to $100 per week very shortly and his officer supervisor conceded that his success rate in Kearney had something to do with his rapid increase in pay. He was making $125 per week and expenses at the end of the second week in January, when his employment in Kearney was terminated. An ironic sidelight is that the State Patrol was paying expense claims to a convicted forger simply on his oral request.

The defendant testified in his own defense and flatly denied that he had ever delivered any controlled substance to Landrie. The defendant's testimony was uncontradicted, except by Landrie. The trial court, as the fact finder, acquitted the defendant on one of the three counts. The evidence for defendant overwhelmingly established that defendant could not have been guilty of doing what Landrie said he did at the time and place Landrie said he did it. Charitably it might be said that the undercover agent was mistaken rather than that he lied, but by whatever name it be called, the testimony smelled just the same. On the two counts on which the defendant was convicted, there was more than ample evidence to raise serious doubts as to Landrie's veracity. Both of those alleged deliveries took place in a bar where the defendant had been the bartender for 6

years. No witness testified to corroborate Landrie's story of the purchases from defendant, while every witness who had been in the bar who testified said it did not occur or that he did not see any suspicious conduct. It was perhaps only luck that enabled the defendant to be able to produce witnesses to clear him for the night of December 16th because of the fact that the Liberty Bowl football game was on the bar TV that night and disinterested witnesses could fix the times in their memories specifically. He was not so lucky for the nights of December 12 and December 19. There were many customers in the bar during the hours Landrie testified that he was there on each occasion on which a conviction is based. With the lack of corroboration present in this record, Landrie might have accused any one of them and that individual might have been faced with defending himself against the same charges and the same evidence as the defendant was here.

The responsibility for what occurred here must be placed largely with the prosecutor. It is unfortunate indeed when a criminal prosecution must rest essentially upon the uncorroborated testimony of one witness. It is even more critical if that one witness is a convicted felon. The situation must be weighed carefully by a prosecutor before he puts the power of the State behind the testimony of a witness in a criminal prosecution, particularly when the truthfulness of that testimony is unconfirmed. It is in such situations that a prosecutor ought to take special care to be able to verify, validate, and check the truthfulness of information received from informers. The use of regular law enforcement officers in backup roles ought to consist of more than simply accepting reports and evidence from undercover informants. The investigations here were obviously initiated by the prosecutor or the State Patrol, or both, and apparently not even such elementary precautions as using marked funds for purchases were resorted to. Neither was there any evidence of surveillance to verify collater-

al facts as to delivery. No search warrants were issued nor testified about and if, in fact, any of these methods were used, then the results obviously did not support Landrie's testimony against the defendant or they would have been introduced.

In State v. Gurule, 194 Neb. 618, 234 N. W. 2d 603, this court held that an undercover agent, employed under the identical circumstances as in this case, had no greater personal interest in supplying evidence against the defendant than any other public officer, and that a defendant was not entitled to a cautionary instruction as to the weight and credibility to be given to the informer's testimony. The essence of our holding was that such testimony was to be treated the same as that of regular public law enforcement officers. Under that holding, the employment of an habitual criminal as an undercover agent makes him an instant public law enforcement officer and clothes his testimony with the same aura of reliability as that of a uniformed police officer. When a prosecutor rests a criminal prosecution on the unconfirmed testimony of such an instant police officer, he is inviting the situation which occurred here. Two police officers of the City of Omaha and a deputy county attorney of Douglas County all attempted to testify against Landrie. The trial court excluded all such testimony, even including an offer of proof from a deputy county attorney of Douglas County that Landrie's reputation for truth and veracity was bad. Such conflicts can only be damaging to the public concept of the administration of criminal justice in Nebraska.

Obviously, it is extremely difficult to obtain or employ effective undercover agents whose character and background are equal to those of a regular police officer. The necessities of the circumstances, particularly in controlled substances cases, may well require the services of an informer. When a particular informer is a convicted felon, the duty of a prosecutor to see that the informer's testimony is confirmed is magnified many

times. The law must not allow a criminal conviction to stand which essentially rests only on the story of an habitual criminal, acting as an undercover agent, against the directly contrary testimony of a defendant citizen who has never been convicted of a felony. In this case the defendant had never been charged or convicted of any drug offense, misdemeanor, or felony, prior to these charges.

In the present state of society it is critically important that the controlled substances laws be vigorously and thoroughly enforced. The attainment of that end, however, cannot justify such a complete departure from traditional basic principles of justice. The defendant was acquitted on one count. He should have been acquitted on the other two as well.

CLINTON, J., concurring.

I concur in the majority opinion with the following exception. The statement about the use of polygraph examinations is too broad. I construe the past holdings of this court simply to mean that we may not yet take judicial notice that the results of polygraph examinations are generally admissible in all cases. The result of a polygraph examination might be admissible in some instances if some scientific foundation is laid. The defendant in this case laid no foundation whatever.

IN RE INTEREST OF RAYMOND LOOMIS, JR., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND LOOMIS, SR., APPELLANT.

239 N. W. 2d 266

Filed March 4, 1976. No. 40206.

1. **Appeal and Error: Words and Phrases.** An order affecting a substantial right made in a special proceeding is a final order which may be appealed to this court.

2. **Infants: Parent and Child.** The first and primary consideration in any case involving the custody of a child is the best interest of the child.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed and remanded with directions.

Thomas R. Wolff and Richard Jeffries, for appellant.

Donald L. Knowles and John S. Slowiaczek, for appellee.

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

SPENCER, J.

This was a proceeding brought pursuant to Chapter 43, article 2, R. R. S. 1943, to have Raymond Loomis, Jr., the minor child of Raymond Loomis, Sr., and Alice Loomis, adjudicated to be a neglected and dependent child, and to have the parental rights between the parents and child terminated. The Juvenile Court appointed guardians ad litem for the minor and for the father, and an attorney for the father. After several hearings, the court ordered that the minor, Raymond Loomis, Jr., be placed in the custody of the Douglas County social services for foster home placement, with visitation rights for the father; that the parental rights of the natural parents be taken under advisement; and that a review of said matter be held in approximately 6 months. Raymond Loomis, Sr., prosecutes this appeal.

Appellant sets out three assignments of error: (1) The Douglas County welfare department should not be allowed to act as both the benefactor of supportive services and as an investigative arm of the prosecutor's office; (2) the Juvenile Court committed reversible error in overruling the objection of appellant to photographs obtained by the Omaha police department in the home of appellant; and (3) the evidence is insufficient

to support findings of dependency, neglect, and a termination of parental rights. We affirm.

At the outset, we are met with the State's argument that the parental rights have not been terminated nor acted upon in any way. They were taken under advisement and the final action delayed for approximately 6 months. Section 25-1911, R. R. S. 1943, requires a final trial order as a prerequisite to an appeal. Section 25-1902, R. R. S. 1943, defines a final order as follows: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter."

In the present action the Juvenile Court took the child out of the home, placed his custody in the Douglas County social services, and, without terminating the parental rights, took them under advisement with a review of the matter in approximately 6 months. There can be little question that the ruling herein does affect a substantial right of the appellant, who, if he is entitled to it, is deprived of the custody of his child for at least 6 months. See Ripley v. Godden (1954), 158 Neb. 246, 63 N. W. 2d 151.

Raymond Loomis, Jr., was born January 27, 1971. Immediately after his birth he was abandoned by his mother. From July 1, 1972, until February or March 1973, the child stayed with appellant's stepsister, pursuant to an arrangement with appellant and the welfare department. His custody was thereafter with the appellant until he was removed from the home by the Douglas County social service child protective unit in September 1974.

Appellant was institutionalized at the Beatrice State Home from 1952 until 1968. He is mentally retarded, with an I.Q. in the range of 50 to 70. The evidence

strongly indicates the appellant was not taking proper care of the child. A worker for the chance development center testified that she often had to bath the child, on an average of two times per week, and that it was often necessary to clean dried feces from his body. She also testified that it was not unusual for the child to return to school 2 days in succession wearing the same diaper, and that school counsellors had discussed this problem with the appellant.

The general condition of the home was extremely filthy, even when appellant was availing himself of the use of homemakers. The social workers found bottles, medication bottles with tops off, food, paper, dirty dishes, clothes, auto parts, an open paint can, and on at least one occasion cat and dog feces, as well as other general clutter.

Appellant's stepsister testified that while the child was with her from July 1972, until March 1973, appellant visited the child on only two occasions. He did not visit the child over the Christmas holidays, nor give him a present. She also testified that in December of 1973, when she observed the child he had dried feces on his body and was extremely dirty, with indentations on his ears. She also testified that she had observed the appellant strike the child and pull him by the ears.

An employee of M.U.D. testified that the water in the home was shut off May 3, 1974, and the gas was shut off August 19, 1974. Both services were resumed on October 23, 1974. During August of 1974, while these utilities were shut off, the appellant purchased an automobile with a check he received from A.D.C.

A caseworker for the Douglas County social service child protective unit, who was assigned to the Loomis case, called at that home on September 23, 1974. He was admitted by a woman whom he believed to be living in the home on that date, due to his conversation with her and the fact that he observed women's clothing in the living room and an additional bed made in the living

room. He summoned the police because of the extremely filthy condition of the home and the fact that the child was wearing a headband which was completely black due to filth. He testified he feared the child's ear might become infected due to the filth of the bandage. The police arrived and called for a photographer from the department. This police technician took the photographs admitted in evidence over the appellant's objection.

There is no merit to any of the appellant's assignments of error. The Douglas County welfare department is not an investigative arm of the prosecutor's office but acts primarily as a benefactor of supportive services. Such services are necessary under particular circumstances to protect abused or neglected persons and preserve the family environment. Inherent in the duty of a welfare worker is the responsibility to call to the attention of the proper officials any condition materially affecting the welfare of a child of tender years.

The agencies, with their supportive services, worked with appellant for more than 3½ years in an attempt to stabilize his home atmosphere. If criticism is to be directed at the agency it is not for failure to cooperate with the appellant but rather for permitting the dangerously unsanitary conditions to continue so long.

There is no merit to appellant's second assignment, and as to the third, the evidence is more than sufficient to support the action. The questions we raise on the record before us is why an order of dependency and neglect was not entered and why it was necessary to continue the matter for an additional 6 months to reach a decision on the termination of parental rights.

While every effort should be made to protect the rights of parents to their children, the public also has a paramount interest in the protection of the rights of those children. The right of parental control is a natural, but not an inalienable right. Here, the father is mildly mentally retarded. The conditions of the home

over a long period were filthy and dangerously unsanitary. The appellant has been living with a woman not his lawful spouse, who, because of employment away from the home, was too tired to attempt to remedy conditions or care for the child. Coupling these facts with the fact the child bore every indication of extreme neglect, it would seem necessary that the court first consider the welfare of the child rather than the natural right of the parent.

The first and primary consideration in any case involving the custody of a child is the best interest of the child. Bigley v. Tibbs (1975), 193 Neb. 4, 225 N. W. 2d 27.

If there is any criticism of the decision herein, it is for failure to take decisive action. We affirm the judgment and remand the cause with directions that the matter under advisement be quickly determined.

AFFIRMED AND REMANDED WITH DIRECTIONS.

CLINTON, J., concurring in the result only.

I concur in the result only in this case. I disagree with what I consider the gratuitous criticism of the action of the juvenile judge in taking under advisement the matter of the termination of parental rights. I wish to make two points. First, decisions on such matters are of great importance and a procedure which may help to preserve a family ought to be encouraged. However clearcut this case may seem to the writer of the opinion based wholly upon the cold record, it may not be so clear to one who has had direct contact with the parties and the witnesses. Second, it is not our function as an appellate court to decide issues which are not before us. The expression of opinion on the failure of the court to terminate parental rights is therefore inappropriate and mere dictum because the trial court has entered no order on that matter.

STATE OF NEBRASKA, APPELLEE, V. ALVARO ESCAMILLA, APPELLANT.
239 N. W. 2d 270

Filed March 4, 1976. No. 40252.

1. **Criminal Law: Homicide: Assault: Trial: Evidence.** It is the general rule that in a homicide or assault case a defendant may show the dangerous and turbulent character of the victim, but may do so only after laying a foundation by evidence tending to show self-defense.
2. **Criminal Law: Confessions: Trial: Evidence.** An illegally obtained confession may be used to impeach a defendant's testimony and if he elects not to testify he has not been deprived of his constitutional right to testify.
3. ———: ———: ———: ———. In the absence of a request for a hearing to determine voluntariness of a confession, a defendant cannot complain of the failure to hold a Jackson v. Denno-type hearing.

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

T. Clement Gaughan, Richard L. Goos, and Paul M. Conley, 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.

Defendant, an inmate of the Nebraska Penal and Correctional Complex, was convicted of murder in the second degree. He was charged with killing another inmate, Luther W. Wilson, by stabbing. Errors assigned are the exclusion of evidence as to the deceased's character; failure to hold a Jackson v. Denno-type hearing; and denial of a motion to produce the defendant's jacket. We affirm.

The record is devoid of any evidence to support a plea of self-defense and no instruction was given or requested as to such a defense. Neither is error assigned

for failure to so instruct. It is the general rule that in a homicide or assault case a defendant may show the dangerous and turbulent character of the victim, but may do so only after laying a foundation by evidence tending to show self-defense. See, Annotation, 1 A. L. R. 3d 571; Carleton v. State, 43 Neb. 373, 61 N. W. 699; State v. Kimbrough, 173 Neb. 873, 115 N. W. 2d 422.

The defendant contends that the obtaining of certain confessions which were not placed in evidence "chilled" his ability to testify in his own behalf in that they might have been used for impeachment purposes. This proposition was not mentioned in the motion for new trial, nor included in the errors assigned. It will nevertheless be disposed of. That confessions illegally obtained may be used for impeachment purposes has been established. See, Harris v. New York, 401 U. S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1; State v. Bazis, 190 Neb. 586, 210 N. W. 2d 919. Under such circumstances it is for the defendant to decide whether or not he should testify. He has not been deprived of his constitutional right to testify, but has voluntarily elected not to.

Exhibits 12 and 13 received in evidence are notes written by defendant and passed to another inmate. There is no confession of guilt contained in the notes, only a plea that the recipient assume responsibility for the stabbing. The defense objected to the notes being received in evidence on the ground that they were not confessions and were hearsay, irrelevant, and immaterial. There was no request for a hearing on voluntariness under the rule set forth in Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908. In Jackson v. Denno, *supra,* the court stated that in the absence of a request for a hearing to determine voluntariness, the defendant cannot complain of the failure of the court to hold such a hearing. See, also, State v. Oliva, 183 Neb. 620, 163 N. W. 2d 112.

During the cross-examination of an eyewitness to the crime, the defense requested that the defendant's coat

and undershirt be produced for use in the cross-examination. The request was denied on the ground that it was not within the scope of the direct examination, but defendant was given permission to use the articles in his case-in-chief. He did not do so, but the State later introduced in evidence a jacket found under the defendant's mattress. Obviously the defense intended to use the jacket to try and impeach the evidence of the eyewitness by showing an absence of blood stains. Although the court might well have acceded to the defendant's request, there was no prejudicial error. Defendant could have introduced the jacket himself and used it to impeach the evidence given by the witness if it were in a condition to make impeachment feasible. Furthermore, the jacket found in the defendant's bed and introduced was apparently the jacket requested.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL ALLEN, ALSO KNOWN AS JOSE JONES, APPELLANT.

239 N. W. 2d 272

Filed March 4, 1976. No. 40294.

1. **Appeal and Error: Notice: Docket Fee.** An appeal shall be deemed perfected, and the Supreme Court shall have jurisdiction of the cause when notice of appeal shall have been filed, and the docket fee deposited in the office of the clerk of the District Court, and after being so perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional.
2. **Appeal and Error: Courts: Jurisdiction.** Any order made by the District Court subsequent to the vesting of jurisdiction in this court is void and of no effect.
3. **Appeal and Error: New Trial.** Alleged errors not brought to the attention of the trial judge in any way in a motion for new trial are not entitled to be considered or reviewed by this court.

4. **Criminal Law: Sentences.** A sentence imposed within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion.

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

J. Joseph McQuillan, Gerald E. Moran, Robert C. Sigler, and Paul E. Watts, for appellant.

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

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

SPENCER, J.

This case involves the jurisdiction of the District Court to rule on a motion after an appeal has been taken. On April 30, 1975, Michael Allen entered a plea of guilty to a charge of possession of a controlled substance with the intent to deliver. On June 30, 1975, defendant was sentenced to 1½ to 2 years in the Nebraska Penal and Correctional Complex. On July 29, 1975, defendant filed a notice of appeal and paid his appeal docket fee. He also filed a motion to withdraw his plea of guilty, which, after a hearing, was overruled. Defendant prosecutes this appeal from that order. We affirm.

Defendant had originally pled not guilty. At the time he appeared to withdraw his plea the court was advised that pursuant to a plea bargain, a second charge was to be dropped provided the sentence of the defendant on the current charge was not probation. After defendant was sentenced, the second charge was dropped.

Defendant's motion to withdraw his plea of guilty alleged that he had been deprived of effective assistance of counsel; that the entry of his guilty plea was not knowingly, intelligently, and voluntarily made; and that he should be allowed to withdraw his guilty plea in order to avoid a manifest injustice. He was granted an

evidentiary hearing which was held on September 23, 1975. The trial court found defendant understood the plea bargain; and that it was explained to him by the court. It further found that prior to its acceptance, it was explained to him by his own counsel, and overruled the motion.

On July 29, 1975, the same day, the defendant filed his motion to withdraw his plea of guilty, he filed a notice of appeal, a request for a bill of exceptions, and paid the docket fee. The prime question presented herein is whether the District Court had jurisdiction to entertain or rule upon a motion to withdraw a guilty plea after an appeal had been perfected.

Section 25-1912, R. R. S. 1943, provides in part: "* * * an appeal shall be deemed perfected, and the Supreme Court shall have jurisdiction of the cause when such notice of appeal shall have been filed, and such docket fee deposited in the office of the clerk of the district court, and after being so perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional."

The defendant completed the jurisdictional steps to lodge the appeal in this court, and this court became vested with jurisdiction of the appeal. Any order made by the District Court subsequent to the vesting of jurisdiction in this court is void and of no effect. See Schlueter v. Schlueter (1954), 158 Neb. 233, 62 N. W. 2d 871. The Supreme Court and the District Court should not exercise concurrent jurisdiction over the same case. The District Court lost jurisdiction the instant the appeal was perfected.

While defendant filed his motion and notice of appeal, he neglected to file a motion for a new trial. Alleged errors not brought to the attention of the trial judge in any way in a motion for a new trial are not entitled to be considered or reviewed by this court. State v. Svoboda (1975), 194 Neb. 663, 234 N. W. 2d 901.

On the record the only issue properly before us is the question of the alleged excessiveness of sentence. We have repeatedly held that a sentence imposed within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. State v. Green (1975), 194 Neb. 770, 235 N. W. 2d 633. The statutory limits herein are from 1 to 5 years in the Nebraska Penal and Correctional Complex or a fine of not more than $2,000 or a term of imprisonment in the county jail of not more than 6 months or both such fine and imprisonment. The sentence imposed of 1½ to 2 years is in the lower range of the authorized sentences.

The present offense involved the delivery of 40,000 amphetamine tablets. Another charge, involving more amphetamine tablets, was dropped. The record would indicate defendant was apprehended early in his drug operation but the amounts involved are large and he said he was able to obtain them on credit. While the defendant was cooperative in other respects, he refused to reveal the source of the tablets. Defendant pled guilty to possession of marijuana in Minnesota and the proceedings there were stayed for a year. The plea bargain herein was made contingent upon the defendant receiving incarceration for his offense. On the record we find no basis whatsoever to hold the trial court abused his discretion.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN A. KORSMEYER, APPELLANT.

239 N. W. 2d 274

Filed March 4, 1976. Nos. 40321, 40322.

Appeals from the District Court for Lancaster County: WILLIAM D. BLUE and SAMUEL VAN PELT, Judges. Affirmed.

Toney J. Redman, J. Joseph McQuillan, Gerald E. Moran, Robert C. Sigler, and Paul E. Watts, for appellant.

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

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

NEWTON, J.

The defendant John A. Korsmeyer was charged with four instances of delivering controlled substances. He plead guilty to one count and was placed on probation. While on probation he was again charged with delivering a controlled substance and possession of a controlled substance with intent to deliver. On trial to a jury he was found guilty on both counts. His probation was then revoked. On all 3 charges he was sentenced to serve 18 months to 3 years, the sentences to run concurrently. Other charges were pending against the defendant.

Defendant's record indicates that he has been incorrigible for several years and was in and out of the juvenile and county courts on several occasions. At time of sentence he was 21 years of age.

Defendant appeals solely on the ground that the sentences are excessive. It is well established that a sentence within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. See State v. Wade, 193 Neb. 365, 227 N. W. 2d 400. The judgment of the District Court is affirmed.

AFFIRMED.

HENKLE & JOYCE HARDWARE COMPANY, APPELLANT, V. MACO, INC., ET AL., APPELLEES.

239 N. W. 2d 772

Filed March 11, 1976. No. 39794.

1. **Trial: Judgments.** The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong.
2. **Trial: Judgments: Evidence.** In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it.
3. **Trial: Judgments.** It shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it. § 25-1127, R. R. S. 1943.
4. ———: ———. Where no section 25-1127, R. R. S. 1943, request has been made, the correct rule is: If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.
5. ———: ———. A general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts.
6. ———: ———. The rules stated in the three immediately preceding syllabi are not made inapplicable merely because in addition to the general finding the trial court also mentioned certain matters specifically.
7. **Trade Secrets and Unfair Competition.** One who uses another's trade secret without a privilege to do so is liable to the other if his use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him.
8. ———. Some factors to be considered in determining whether given information is one's trade secret are: (1) The extent to which the information is known outside his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the informa-

tion; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

9. ———. Whether the information of a trade secret disclosed was intended to be appropriable by the disclosee will depend upon the relationship of the parties and the circumstances under which the disclosure was made.

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

Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Ginsburg, Rosenberg, Ginsburg & Krivosha and Rodney P. Cathcart, for appellees.

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

CLINTON, J.

This is an action sounding in tort for money damages, founded upon an allegedly unlawful use of a trade secret. As the legal underpinning for its claim, the plaintiff relies upon a principle embodied in the following quotation from Restatement, Torts, section 757, page 1: "One who . . . uses another's trade secret, without a privilege to do so, is liable to the other, if . . . (b) his . . . use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him." A jury was waived and the action tried to the court. After both sides had rested the court took the matter under advisement, found generally for the defendants, and dismissed the plaintiff's petition. The plaintiff appeals. Its position in this court is: (1) It was entitled on the basis of undisputed evidence to a favorable finding on the issue of liability. (2) The court erred in certain "findings" it made in a letter opinion to counsel written at the time it announced judgment. (3) The trial court erred in failing to consider certain matters which it ought to have considered and by reason of which a different result would have been reached. The assign-

ments made by the plaintiff are more specific than the language we have used to summarize them. However, since we do not try this matter de novo, the foregoing summary will suffice for present purposes and we will note as necessary the assignments more specifically later.

We affirm the judgment of the trial court.

The standards which we apply to our review on this appeal are the following: The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong. In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it. Burhoop v. Pegram, 194 Neb. 606, 234 N. W. 2d 828.

Henkle & Joyce Hardware Company, plaintiff, is owner of the claimed cause of action by reason of an assignment from a previously wholly owned subsidiary, Pacific Gun Sight Company. For convenience we refer to plaintiff as "Pacific." The corporate defendants were or are wholly owned by the individual defendant, Harley J. Bair and his wife. We will refer to the defendants collectively as Bair. Pacific and its predecessors were engaged in the assembly and sale of a variety of shotgun and metallic shell loaders which are generally referred to in the record as Deitemeyer loaders. One Deitemeyer was the designer of the original prototypes and was general manager of Pacific. The business began with a predecessor organization in 1957. Bair manufactured for and sold to Pacific and its predecessor the parts for the various models of loaders in which it dealt. This arrangement continued until about June of 1967 when Bair, for reasons to be discussed later, declined to fill any further orders for Pacific. In or about October of 1967, Bair began the manufacture and sale of loaders substantially identical to the then current models sold by

Pacific. It is undisputed that in the manufacture of the loaders Bair used a number of molds, jigs, reamers, casts, and other devices collectively referred to as "tooling" which had been designed and made for the purpose of and actually used in the manufacture of the loader parts sold by Bair to Pacific. It is also undisputed that when Bair in 1967 commenced manufacture and sale for its own benefit it used parts from the inventory it had manufactured for later sale to Pacific. Pacific, in the latter part of 1967, began the design of new loaders and in 1968 began marketing the new models. Pacific claims damages because Bair in 1967 refused to fill its orders for parts and then went into production for itself, using tooling at least some of which was the property of Pacific. Pacific claims that it is this tooling and the prints of drawings of the product parts that constitute the trade secrets Bair unlawfully used. It also apparently relies to some extent upon a claim that Bair owed a contractual duty to continue to manufacture and sell parts to Pacific, at least until it was able to get its new models on the market. Pacific introduced evidence tending to show that Bair's failure to honor its orders for parts in 1967 and Bair's competing sales on and after October 1967 caused it substantial loss of sales. It prayed for damages in the amount of $508,583 on account of Bair's alleged unprivileged use of the trade secrets.

The trial court, in addition to its general finding for the defendants in the judgment of dismissal, stated in a letter opinion that it found there existed no trade secrets because "whatever advantage had been built into the particular tools was the result of the joint efforts of both parties. Hardly a case of trade secrets imparted from one to the other under a confidential relationship," and that in any event damages were not proved with sufficient certainty.

The evidence relating to some of the contentions of each party is conflicting. Much more of it is clouded

with uncertainty and witnesses in several instances contradict themselves on what would appear to be significant points. These conflicts, uncertainties, and contradictions relate primarily to three areas. In 1960 the parties attempted to negotiate a written contract to replace one under which they had earlier operated. A "final draft" of this contract was prepared but never executed. The parties contest in this court the extent to which the contract became embodied in an oral agreement and the extent to which its provisions governed and controlled the rights of the parties. The trial court, in its letter opinion, stated: ". . . the parties pretty well concede that they did accept Exhibit 82 (the final draft) except for Paragraph 4, which would prohibit defendants from manufacturing loaders for a competitor." Later comments by the court in the letter opinion, however, indicate it understood that the scope of diverse contentions was much wider than as stated in the quotation above.

The second important area of conflict relates to ownership of tooling and prints. The third is the extent to which Bair actually contributed to the developments of improvements in the loaders by reason of his assistance in design and improvements.

Pacific seems to contend that the failure of the trial court to make specific findings with reference to the ownership of tooling constitutes error of law which prevented Pacific from having a fair trial. As we understand it, this argument implies that findings by the court on certain specific matters in effect negate the general finding for Bair which appears in the judgment. This is not the rule.

Neither party in this case requested the trial court to make specific findings and to separately state conclusions of law as they might have done under the provisions of section 25-1127, R. R. S. 1943. That statute provides in part: ". . . it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or

defendant, unless one of the parties request it." Where no section 25-1127 request has been made, the correct rule is: If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. Wallace v. Insurance Co. of North America, 162 Neb. 172, 75 N. W. 2d 549. A general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. Mueller v. Keeley, 165 Neb. 243, 85 N. W. 2d 309. We do not believe that these rules are made inapplicable merely because in addition to the general finding the trial court also mentioned certain matters specifically. Accordingly, we must discuss briefly the areas of conflict and the evidence with relation thereto to determine whether the trial court was clearly wrong on some vital issue requiring reversal. Before so doing, clarity will be aided by discussing in more detail the legal principles which are applicable.

Restatement, Torts, section 757, page 5, defines trade secret as follows: "b. Definition of trade secret. A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business (see § 759) in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in

the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

"Secrecy. The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it. He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Others may also know of it independently, as, for example, when they have discovered the process or formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information. An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

The commentary then goes on to point out that the

novelty essential to patentability is not necessary in order for a device or process to be a trade secret. The comment states: "The protection is merely against breach of faith and reprehensible means of learning another's secret." Restatement, Torts, § 757, p. 7. In discussing the use of trade secrets the commentary also says: ". . . a manufacturer who is permitted by the owner of the secret to use it in his manufacturing may be subject only to a duty not to disclose the secret to third persons. Or the manufacturer may be permitted to use the secret only in the manufacture of products for the owner, with a duty not to disclose the secret or use it in the manufacture of products on his own account or for others." Restatement, Torts, § 757, p. 8. Comment d, Restatement, Torts, § 757, p. 9, is in part as follows: "A privilege to disclose or use another's trade secret may arise from the other's consent or from other conduct on his part by which he is estopped from complaining." With reference to the matter of breach of confidence under clause b, the comment states in part: "A breach of confidence under the rule stated in this Clause may also be a breach of contract which subjects the actor to liability under the rules stated in the Restatement of Contracts. But whether or not there is a breach of contract, the rule stated in this Section subjects the actor to liability if his disclosure or use of another's trade secret is a breach of the confidence reposed in him by the other in disclosing the secret to him." Restatement, Torts, § 757, p. 13.

Pacific, in addition to reliance on unprivileged use of trade secrets, places considerable reliance upon such authority as Kamin v. Kuhnau, 232 Ore. 139, 374 P. 2d 912, where the court said: "It has been noted that the 'tendency of the law, both legislative and common, has been in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade.' 3 Restatement, Torts, Introductory Note to ch 35, p 540. The cases adopting the higher standard of 'commercial

morality' emphasize the breach of the confidence reposed in the defendant, rather than the existence of the trade secret." The court also said: "Whether the information disclosed was intended to be appropriable by the disclosee will depend upon the relationship of the parties and the circumstances under which the disclosure was made. It is not necessary to show that the defendant expressly agreed not to use the plaintiff's information; the agreement may be implied. And the implication may be made not simply as a product of the quest for the intention of the parties but as a legal conclusion recognizing the need for ethical practices in the commercial world." In the cited case plaintiff had an idea for an improved garbage packer. He hired the defendant to help him with the mechanics of making a prototype. When that was accomplished and defendant had been paid for his work, defendant immediately began to manufacture the packer and sell it on his own account. The court granted equitable relief in the form of a permanent injunction. Pacific also cites Atlantic Wool Combing Co. v. Norfolk Mills, Inc., 357 F. 2d 866, where the court said: "In general, essence of wrong involving trade secret appropriation is obtaining of unjust enrichment and unfair competitive advantage through inequitable conduct, usually breach of confidence."

We have no quarrel with the holdings of the above and other similar cases cited. However, as our later discussion of the conflicting evidence will show, a finding in the present case that there was such a confidential relationship between the parties as necessitates a "legal conclusion" of an "implication" of a promise not to use the alleged "secrets" or a promise not to compete is not required.

The final draft of the 1960 "agreement" and the deliberate failure of the parties to sign it is significant in characterizing the relationship of the parties as confidential or not. That agreement, had it been adopted by the parties, would have been definitive of their respective

rights in this matter, except that it contained no express provision relative to ownership of tooling. It would, by implication at least, require that Bair furnish all tooling. That draft provided that Pacific would buy from Bair all its requirements for loaders from the date of the contract to July 1, 1970. It provided a means for determination of price. It prohibited Bair from using the trade names "Pacific" and "Deitemeyer." It provided that after termination of the agreement, Bair could not, for a period of 3 months sell any of the products to a competitor of Pacific. It bound Pacific not to buy from any other manufacturer and permitted Bair to terminate the agreement if it did. It provided that upon termination of the contract for any cause Pacific would purchase Bair's inventory of loader parts, but not to exceed a certain quantity, and gave Pacific the right to purchase all such inventory during a period of 3 months after termination. After that time, Bair would have the unrestricted right to manufacture and sell reloading equipment and accessories, except that it could not use the trademarks "Pacific" or "Deitemeyer." This proposed agreement provided that if the parties jointly developed new patentable products, any such patents, if issued, would be jointly owned. There were many other provisions which it is not helpful to note. The contract under which the parties had operated previous to 1960 provided that Bair would construct the tooling necessary to manufacture the parts, Pacific would pay the costs thereof, and title would vest in Pacific. The ownership of tooling built under this first contract is apparently not at issue here.

The evidence is in dispute as to whether the 1960 "agreement" controlled the relations of the parties in any degree from 1960 to 1967. Pacific pled that Bair "produced and sold parts for Deitemeyer loaders and accessories to Pacific Gun Sight Company under an arrangement which was controlled by an agreement substantially in accordance" with the 1960 final draft "al-

though neither party at this time can produce an executed copy." The testimony of Pacific's witnesses was that Pacific was in agreement with all parts of the contract except paragraphs 4 and 15 which included the provisions regulating the rights of Bair to manufacture for others and except paragraph 20 relating to cancellation. They testified that Bair's disagreement on these points was the reason the contract was not signed. Pacific's evidence fails to make clear whether the balance of the contract was intended as the contract although not signed, or whether, because of the failure to agree upon certain items the contract, whatever it may have been, was wholly oral. The effect of Bair's testimony was that it was operating without a written contract and that even those contract terms as to which there was no dispute were not to take effect because Bair did not agree on the provision re ownership of prints. The reason for the objection was because "We just didn't want to make it real easy for them to go somewhere else for a manufacturer in view of the fact that he was under the impression we didn't have a contract."

Nonetheless, despite the inability of the parties to agree in writing, Bair began manufacturing for Pacific. Bair made or caused to be made the tooling necessary to construct the loader parts. Bair billed Pacific for tooling and "setup charges" which Pacific paid. Except in a few instances, billing left uncertain the matter as to where ownership of the tooling lay. Bair testified that when he billed for less than the complete cost of tooling, including profit, that he retained ownership; he said it was the same way when he made only a setup charge. Ideas for changes and improvements in the models came from Pacific, from Pacific's customers through Pacific, and from Bair himself, as new models were designed and new tooling was made and acquired. Bair testified that when original tooling wore out, he replaced it without charge and he considered that he owned such replacement tooling. Some tooling fitted

only his machines and would be useless to anyone else. He considered such tooling to be his also. In about 1966 Bair considered selling his business. He made a list of all tooling which was in his plant at the time and indicated on this list the ownership of tooling, including that which was obsolete. This list indicated that tooling on some models was owned by Pacific, some by Bair, and in many cases, different pieces of tooling necessary to construct the same model where listed as owned some by Bair and some by Pacific. On the basis of this list, Pacific, in 1966, purchased an insurance policy on tooling owned by it and in the possession of others. Bair's claims of ownership are at least in some respects inconsistent with his acknowledgment of ownership in Pacific as indicated by the list which he made. Bair explained this inconsistency by stating that this list was prepared only to protect Pacific if the contemplated sale of his business went through. The list's purpose was not to indicate true ownership, but to exclude certain tooling from the sale in the event the new owner would not manufacture for Pacific. Pacific, to support its claim of ownership, introduced billings made to it by Bair for tooling and which billings had been paid by Pacific. The sale of the business which Bair contemplated in 1966 did not occur. The foregoing summary of evidence and contentions can be said to indicate that evidence was in dispute as to who owned tooling and cannot be decided as a mere matter of law.

In 1966 and 1967 Pacific complained many times to Bair over lack of quality control. In February 1967 Pacific asked one William Pearson, a former Bair engineer, then employed by another firm, if he was interested in working for Pacific. Pearson's testimony was that Deitemeyer, Pacific's manager, said: ". . . he would like to hire me and go into manufacturing and get rid of Bair." This testimony is uncontradicted. Pearson told Bair of the offer of employment. Bair then informed Pacific that if it hired Pearson he would not continue to

manufacture for the company. In May 1967 Pearson went to work for Pacific and worked for it until February 1968. At the time of trial he was working for Bair.

The evidence tends to establish that Bair was worried about Pacific going into manufacturing or getting someone other than Bair to manufacture for it. The evidence also indicates that Pacific was apparently Bair's principal customer and that he had purchased machines and borrowed money in reliance upon the prospect of continued business with Pacific. Bair testified that when controversy arose in 1967 he had attempted to get a firm contractual commitment from Pacific but that he was unsuccessful. Various negotiations took place between the parties. These negotiations failed with the results we have earlier mentioned.

On this conflicting evidence the court could well have concluded that no confidential relationship existed between the parties because Bair insisted upon ownership of the prints of the product; that the right of Bair to manufacture the identical product for others was left open because of the failure of the parties to agree upon paragraph 4 of the 1960 agreement which would have placed limited restrictions upon Bair's right to manufacture the product for himself or others; that Pacific was unwilling to agree that Bair could manufacture its products for any definite period and that the manufacturing arrangement was terminable at will; that Bair made substantial investments in reliance upon the prospect that he would have Pacific's business for a considerable period of time and that Bair was as much dependent upon Pacific as Pacific was upon Bair; that Pacific intended to go into the manufacturing business for itself and "get rid of Bair" with resultant financial loss to Bair; and that with minor exceptions the tooling belonged to Bair.

We cannot say that the judgment of the trial court was clearly wrong.

AFFIRMED.

LARRY A. HADENFELDT EL AL., APPELLANTS AND CROSS-APPELLEES, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT.
239 N. W. 2d 499

Filed March 11, 1976. No. 40236.

1. **Insurance.** The liability of an insurer to pay in excess of the face of the policy accrues when the insurer, having exclusive control of settlement, in bad faith refuses to compromise a claim for an amount within the policy limit.
2. ———. An insurer is obligated to use due care and reasonable diligence to ascertain the facts surrounding a claim and obtain competent legal advice concerning the claim.
3. **Discovery: Trial.** In the absence of a showing of good cause the trial court may refuse to compel the production of documents for inspection by the adverse party.
4. **Instructions.** Instructions to the jury should be considered as a whole and if they fairly submit the case, they are not erroneous.

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

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, and Brian K. Ridenour, for appellants.

Ray C. Simmons, for appellee.

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

BOSLAUGH, J.

This is an action by Larry A. Hadenfeldt and Allen Hadenfeldt to recover the amount of judgments in excess of the limits of an automobile liability insurance policy issued to the plaintiffs by the defendant, State Farm Mutual Automobile Insurance Company. The jury returned a verdict for the defendant and the plaintiffs have appealed. They contend they were entitled to judgment as a matter of law.

In determining whether the evidence in this case is sufficient to sustain the judgment the evidence must be

considered in the light most favorable to the defendant, every controverted fact must be resolved in its favor, and it is entitled to the benefit of every reasonable inference that may be drawn therefrom.

The controversy involved in this case arises out of an accident that occurred on November 13, 1970, involving an automobile owned by the plaintiffs and being operated by Larry A. Hadenfeldt. The Hadenfeldt automobile collided with the rear of an automobile operated by Vernon Hunzeker which in turn collided with an automobile proceeding in the opposite direction and being operated by Mrs. Betty Maser. Mrs. Maser sustained very severe injuries as a result of the accident and recovered a judgment against the plaintiffs in the amount of $72,500. George Maser, Betty's husband, later obtained a consent judgment against the plaintiffs in the amount of $17,500 on his cause of action for expenses and loss of services.

At the time the accident occurred the defendant had issued an automobile liability insurance policy to the plaintiffs with limits of $50,000 for bodily injury to each person in each accident. After receiving notice of the accident, the defendant commenced an investigation of the accident. By December 9, 1970, the defendant's claim representatives had concluded that Larry Hadenfeldt had caused the accident and there was no defense against liability for the Maser claims.

The Masers employed Kenneth Cobb to represent them, and on January 22, 1971, Cobb wrote to the defendant stating he had been employed by the Masers.

The defendant's claim representatives contacted Cobb in February, March, April, and May of 1971. In a conversation with one of the defendant's claim representatives on March 31, 1971, Cobb made demands of $150,000 and $100,000, but stated if the policy limit was $50,000 he would convince his client to accept that amount plus another $30,000 from the Hadenfeldts making a total of $80,000. Cobb also stated he expected

Mrs. Maser to have permanent disability of over 50 percent.

On May 5, 1971, Cobb wrote to the defendant stating as follows: "If you want to make an offer of the coverage carried, I will talk to my client and see if she is willing to settle this matter. Please advise."

Sometime prior to June 10, 1971, the defendant offered $20,000 to settle the Maser claims. On June 10, 1971, the defendant offered Cobb $30,000 in settlement of the Maser claims. This offer was refused and Mrs. Maser's petition was filed June 22, 1971. The petition prayed for damages in the amount of $150,000.

The defendant employed Patrick W. Healey to defend the Maser action. On July 6, 1971, the defendant wrote to the plaintiffs notifying them the action had been commenced, that the amount claimed exceeded the policy limits, and that the plaintiffs were entitled to employ separate counsel at their expense to represent them concerning the excess liability. The plaintiffs talked with other counsel but decided to allow the case to be handled by the lawyers selected and employed by the defendant.

While the case was pending Healey corresponded with the plaintiffs and discussed various aspects of the case with them including the issue concerning the family purpose doctrine. He talked with them in person and by telephone on several occasions.

On February 11, 1972, Cobb wrote to Healey stating the Masers would accept $100,000 in settlement prior to trial. On February 16, 1972, Healey wrote to the plaintiffs and enclosed a copy of the February 11 letter from Cobb. Healey's letter discussed the "serious and multiple injuries" sustained by Mrs. Maser describing them in detail. The letter further stated that medical and hospital expenses were now in excess of $6,000, that Mrs. Maser had earned between $3,000 and $4,000 income per year before the accident, had not worked since, and had no plans to return to work in the near future.

An important issue in the Maser case so far as Allen

Hadenfeldt was concerned was whether the family purpose doctrine was applicable. Larry Hadenfeldt was a student, 19 years of age. Allen Hadenfeldt, Larry's father, was a farmer living near Cairo, Nebraska. Allen owned 480 acres of land, farmed another 160 acres, and raised both cattle and hogs.

By agreement of the parties, the issue relating to the family purpose doctrine was tried to the court separately on March 30, 1972, in advance of the jury trial. The trial court, however, took the matter under advisement and did not announce its finding in favor of the plaintiff until April 4, 1972, the first full day of the trial.

On April 3, 1972, before jury selection began, both counsel dictated statements into the record, in chambers, concerning settlement negotiations. Cobb stated the Masers would accept $90,000 payable $60,000 then, and $5,000 per year for 6 years plus costs. Healey stated he would discuss the offer with the plaintiffs who would be in Lincoln the next day. Healey further stated Cobb had never given any indication that settlement within the limits of the coverage would be considered by the Masers. Healey communicated the $90,000 settlement offer to the plaintiffs but they did not want to consider it or discuss it.

On April 4, 1972, a conference was held in Healey's office after the trial was over for that day. The plaintiffs were present together with two claim representatives of the defendant. There was an extensive discussion of settlement negotiations. Healey advised the plaintiffs that the verdict might be more than $50,000 or less than $50,000. A plan was formulated to offer $40,000 to Cobb that night when a deposition was to be taken. If that offer was refused, the defendant would offer $50,000, the full limit of the coverage on the following morning.

The $40,000 offer was refused so on the morning of April 5, 1972, Healey offered $50,000 in full settlement of both claims. This offer was also rejected but a counter-

offer to settle both claims for $65,000, payable $50,000 then and $5,000 per year for 3 years, was submitted by Cobb. This negotiation was made a matter of record in chambers.

When Healey returned to the counsel table he communicated the $65,000 offer to the plaintiffs. The offer was discussed more fully at a conference at Healey's office during the noon hour. The plaintiffs were present together with several other members of the family. Healey said it appeared the claim could not be settled within the limits of the coverage and explained that he could give no assurance the verdict would be for less than $50,000. The plaintiffs decided they did not want to accept the $65,000 offer and did not want to submit any counter-offer.

The trial proceeded and there was no further negotiation between the parties. The verdict in the amount of $72,500 for Mrs. Maser was returned on April 7, 1972. The action by George Maser was filed April 14, 1972.

The petition in this case alleged the defendant failed to negotiate and settle the Maser claims within the limits of the coverage when the opportunity was available to do so; failed to advise the plaintiffs of the nature and extent of the injuries and damages suffered by the Masers; and failed to advise the plaintiffs of the nature and extent of their potential liability.

The rules which are applicable to cases of this nature were considered at length in Olson v. Union Fire Ins. Co., 174 Neb. 375, 118 N. W. 2d 318. In that case we stated: "The liability of an insurer to pay in excess of the face of the policy accrues when the insurer, having exclusive control of settlement, in bad faith refuses to compromise a claim for an amount within the policy limit. The weight of authority is to the effect that when the insurer has the exclusive right to settle a claim within the limits of its liability, it has an option to compromise but no obligation to do so. In the event the insurer elects to resist a claim of liability, or to effect a

settlement thereof on such terms as it can get, there arises an implied agreement that it will exercise due care and good faith where the rights of an insured are concerned.

"The amount of liability fixed by the insurance policy, upon which the premium is paid, determines the limit of the contractual liability and duty of the insurer. An insurer may settle a claim within its limit of liability as it chooses since the insured cannot be injured by a settlement to be wholly paid by the insurer. The exclusive power to settle a claim within the limits of its liability is therefore ceded to the insurer for its sole benefit. While an insured may compromise his possible liability over and above the limits of the insurance policy, he has no duty even to attempt to do so. He may rely upon the policy, the promise to indemnify in a fixed amount, and the duty of the insurer to defend and to use its discretionary authority to settle in good faith. It is clear that the insurance company is not liable to plaintiff for refusal to settle his claim unless the refusal was in bad faith."

The Olson case involved a question of gross negligence under the guest statute. The insurer refused an offer to settle the case for the policy limits, $10,000, because it thought there was a good defense on the issue of liability. The plaintiff later recovered a judgment of $50,000. We held the insurer was not liable for the excess because, although mistaken as to the question of liability, it had not acted in bad faith.

The only evidence in this case as to any opportunity for the defendant to settle the Maser claims within the limits of the policy was some testimony by Cobb that during May or June 1971, he offered to accept $50,000 in full settlement of both claims. There was no other evidence of any opportunity for the defendant to settle the claims within the policy limits. The defendant's evidence was that such an offer was not made at any time.

The letter of May 5, 1971, was at most a solicitation

of an offer of settlement to be submitted to the Masers. The evidence is in dispute as to whether on May 5, 1971, Cobb knew what the policy limits were. The verdict resolved all factual issues in favor of the defendant.

The plaintiffs' allegation that the defendant failed to negotiate and settle the Maser claims within the limits of the coverage when the opportunity was available to do so is not sustained by the record. The defendant insurer refused no offer to settle the claims within the policy limits and had no opportunity to settle the claims within the policy limits. Furthermore, while the trial was in progress, the insurer offered to pay the full limits of the policy but its offer was rejected.

The record further shows the defendant advised the plaintiffs promptly that the Maser claims exceeded the limits of the coverage of the policy; that the injuries to Mrs. Maser were very severe; and that the verdict in her case might exceed the policy limits.

The plaintiffs produced three expert witnesses who testified that on the basis of information which was available to the defendant in May 1971, the Maser claims had a value of between $60,000 and $100,000. If the defendant had refused an offer to settle the claims within the limits of the coverage in May 1971, this evidence would have been very important. The record, however, establishes that the best settlement offer that was ever made was the $65,000 offer during the trial.

It is a fair statement from the evidence that Healey expected the verdict in the Maser case to be around $50,000. He advised the plaintiffs that the verdict might exceed $50,000 or be less than $50,000. This was his best judgment and it could not be a basis for a finding of bad faith. The treating physician had estimated Mrs. Maser's permanent disability at 15 percent and had testified that he had urged her to go back to work. A case of clear liability involving similar injuries in which the disability was 30 percent had been tried in

Lancaster County 4 months earlier and had resulted in a verdict for $51,000.

After considering the offer to settle the Maser claims for $65,000, Allen Hadenfeldt decided they might just as well "gamble with the jury." The plaintiffs understood the situation and elected to take their chances on the verdict. Their contention that they were entitled to judgment as a matter of law is without merit.

The petition alleged both negligence and bad faith as separate theories of recovery. At the close of the plaintiffs' evidence the trial court sustained a demurrer to the cause of action based on negligence. This ruling was correct.

While an insurer is obligated to use due care and reasonable diligence to ascertain the facts surrounding a claim and obtain competent legal advice concerning the claim, the ground for recovery in this state in this type of case is bad faith. Olson v. Union Fire Ins. Co., *supra.* The evidence in this case showed the defendant used due care and diligence. The record did not establish negligence on the part of the defendant in the investigation or handling of the claims.

The plaintiffs made several unsuccessful attempts to compel the defendant to produce its manuals for field claims adjusters and claims superintendents for handling bodily injury claims. Such a motion requires a showing of good cause. § 25-1267.39, R. R. S. 1943.

The trial court properly held the defendant in this case was required to use the diligence, skill, and care ordinarily employed by persons in the insurance industry. There was no issue that could be determined upon the basis of company standards or rules prescribed by the defendant. See Lorenzen v. Continental Baking Co., 180 Neb. 23, 141 N. W. 2d 163. The manuals were not relevant to any issue in the case and there was no showing of good cause for their production.

The plaintiffs also complain that instruction No. 7 was erroneous and conflicted with instruction No. 11.

Instruction No. 7 was as follows: "INSTRUCTION NO. 7.

" 'Good faith' implies honesty, fair dealing and full revelation.

" 'Bad faith' implies dishonesty, fraud and concealment. To constitute bad faith, there must be something more than a mere showing of inadvertence or honest mistake of judgment.

"Good or bad faith is a state of mind. Of necessity it must be determined from proof of conduct, except as the owner of the mind discloses its operations. The Defendant being a corporation, could act only through agents, whose state of mind is that of the Defendant.

"Patrick Healey was the agent of the Defendant, State Farm Mutual Insurance Company, and any and all acts or failures to act on his part is imputed to and the responsibility of the Defendant, State Farm Mutual Insurance Company."

Instruction No. 11 was as follows: "INSTRUCTION NO. 11.

"The Bad Faith that must be proven by an insured in order to recover judgment against his insurance company for its alleged bad faith failure to settle a case within the policy limits or to take into account the potential liability of the insured for an excess judgment does not require proof of an actual dishonest intent, concealment, or deliberate disregard of the insured's welfare. Rather, Bad Faith is demonstrated by the insurance company's unwarranted rejection of an offer to settle within the policy limits, or a complete and total failure to take into account the potential liability of its insured for an excess judgment, or an insurer's failure to timely and adequately inform its insured of the insurer's adverse interest, of settlement, demands and offers, and of the potential value of the case."

Instruction No. 7 appears to have been based upon the following statement in Olson v. Union Fire Ins. Co., *supra:* "The general rules as to the liability of the insurer are

stated in Davy v. Public National Ins. Co., 181 Cal. App. 2d 387, in the following apt language: 'Good faith implies honesty, fair dealing and full revelation. * * * Bad faith implies dishonesty, fraud and concealment. * * * Neither mistaken judgment nor unreasonable judgment is the equivalent of bad faith. * * * As a consequence, liability upon the part of the insurer for refusal to accept an offer of settlement may not be predicated upon its failure to correctly predict the outcome of the action it is defending.' As one court aptly stated: 'The gift of prophecy has never been bestowed on ordinary mortals, * * *.' Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 S. W. 2d 777."

Instruction No. 7 was in the nature of an abstract definition of good faith and bad faith. Instruction No. 11 was a definition of bad faith as it applied in the case under consideration. The trial court did not instruct the jury that the plaintiffs were required to prove dishonesty, fraud, or concealment in order to recover.

The trial court further instructed the jury that the defendant had assumed a fiduciary position toward the plaintiffs and was obligated to act for their benefit as to matters within the scope of that relation; and that the defense attorney retained by the defendant owed the same obligation of good faith to the plaintiffs as if he had been retained by them personally. Considered as a whole the instructions were not erroneous.

The judgment of the District Court is affirmed.

AFFIRMED.

EDWARD FRANK ROZMAN COMPANY, APPELLEE, V. JAMES H. KEILLOR, APPELLANT.

239 N. W. 2d 779

Filed March 11, 1976. No. 40268.

Appeal and Error: Notice: Time. On appeal from a county or

municipal court to the District Court, notice of appeal and bond must be filed within 10 days after the rendition of judgment and this period cannot be prolonged by filing a motion for new trial.

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

William M. Homan, for appellant.

Edward J. McCarthy, for appellee.

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

NEWTON, J.

Plaintiff obtained judgment in the municipal court of the city of Omaha, Nebraska, for architectural services. Defendant filed a motion for new trial in the municipal court which was overruled 5 to 6 months after entry of judgment. Defendant then filed an appeal bond and notice of appeal to the District Court. The appeal was dismissed as untimely. We affirm the judgment of the District Court.

Sections 25-1142 and 25-1143, R. R. S. 1943, providing for procedure in the District Court, provide for the filing of motions for new trial.

Section 25-1912, R. R. S. 1943, provides an appeal may be taken to the Supreme Court within 1 month from the rendition of judgment or the overruling of a motion for a new trial.

Section 24-528, R. S. Supp., 1974, provides: "All provisions in the codes of criminal and civil procedure governing actions and proceedings in the district court not in conflict with statutes specifically governing procedure in county courts and related to matters for which no specific provisions have been made for county courts shall govern and apply to all actions and proceedings in the county court."

Section 24-529, R. S. Supp., 1974, applies the same rule to municipal courts and applies county court procedure

to municipal courts. Defendant contends that the latter statute makes the District Court procedure relating to motions for new trial and appeals applicable in the municipal courts.

Defendant overlooks the provisions in these statutes to the effect that District Court procedures are applicable in municipal courts only when "not in conflict with statutes specifically governing procedure in municipal courts and related to matters for which no specific provisions have been made for municipal court * * *."

Section 24-542, R. S. Supp., 1974, provides that one appealing from a county court (or municipal court) "shall, within ten days from the rendition of judgment, file a notice of appeal." Section 24-543, R. S. Supp., 1974, provides that the appealing party "shall, within ten days from the rendition of judgment," post bond. These statutes clearly set out the method and time for an appeal. There is no provision for the filing of a motion for new trial and to apply the District Court procedure in this regard would conflict with the specific provisions of the statutes mentioned. Furthermore, section 49-802 (1), R. R. S. 1943, provides that in construing statutes: "When the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed."

Plaintiff's request for attorneys' fees fails to show compliance with either section 25-1801, R. S. Supp., 1974, or Rule 8 b 3, of this court and is disallowed.

The judgment of the District Court is affirmed.

AFFIRMED.

NATIONAL BANK OF COMMERCE TRUST AND SAVINGS ASSOCIATION, LINCOLN, NEBRASKA, A CORPORATION, APPELLEE, V. DANIEL L. SHULL ET AL., APPELLANTS.
239 N. W. 2d 505

Filed March 11, 1976. No. 40271.

1. **Abatement and Revival: Pleadings.** When the pendency of a prior suit is pleaded in abatement, the case must be the same, or it will not be sustained. There must be the same parties or such as represent the same interest; the same rights must be asserted and the same relief prayed for. This relief must be founded on the same facts, and the essential basis of the relief must be the same in both actions.
2. ———: ———. As a general rule, where a judgment in a prior suit would be a bar to a judgment in the second suit brought in the same or another court of concurrent jurisdiction, the plea in abatement should be sustained.
3. ———: ———. A plea in abatement is a dilatory and technical plea. It is not, as a rule, favored by the courts. Generally, it will not be sustained unless the party interposing it can clearly show he is within the reason for its enforcement.

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

Friedman & Berry, for appellants.

Mattson, Ricketts, Davies, Stewart & Calkins, for appellee.

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

SPENCER, J.

Appellants-defendants, Daniel L. Shull and Joan C. Shull, appeal from the overruling of their plea in abatement and the entry of a decree of foreclosure. We affirm.

On December 18, 1968, defendants Shull executed a note and mortgage to National Bank of Commerce Trust & Savings Association (NBC) on certain realty. The note provided for monthly payments of $263.57. On August 19, 1974, the Shulls borrowed $57,000 on an

unsecured promissory note from NBC to purchase securities on margin from Dain, Kalman & Quail, Inc. Defendants refused to pay the $57,000 note, alleging violations of the Securities Exchange Commission Act of 1934. In December of 1974, NBC applied the balance of the Shull checking account at the bank, in the amount of $6,832.50, toward the payment of the $57,000 promissory note. The bank then sued Shulls for the balance due. That litigation is still pending.

In March of 1975, NBC filed this foreclosure action. Shulls answered, and filed a plea in abatement. Shulls claimed part of the sum seized by the bank from their checking account should have been applied to the mortgage note rather than to the allegedly void notes of August 19, 1974. Their plea requested the abatement of the foreclosure action pending the resolution of NBC's action on the $57,000 note. The trial court overruled the plea and rendered a decree of foreclosure.

Subsequent to the execution of the note and mortgage, the Shulls conveyed title to the real estate involved in this foreclosure to a William McDonald. The tenant in possession of the real estate, Judy L. Wright, was made a party in the foreclosure. The action on the allegedly void note involved only NBC and the Shulls. It is a separate and distinct transaction from the note and security involved herein.

There is no merit to defendants' contention. Our law is well settled. In Richardson v. Opelt (1900), 60 Neb. 180, 82 N. W. 377, this court held: "When the pendency of a prior suit is pleaded in abatement, the case must be the same, or it will not be sustained. There must be the same parties or such as represent the same interest; the same rights must be asserted and the same relief prayed for. This relief must be founded on the same facts, and the essential basis of the relief must be the same in both actions. As a general rule, where a judgment in a prior suit would be a bar to a judgment in the second suit brought in the same or another court of

concurrent jurisdiction, the plea of other suit pending will be held good."

Defendants, to avoid the effect of the above rule, cite Kehr v. Kehr (1962), 173 Neb. 532, 114 N. W. 2d 26, 6 A. L. R. 3d 463, in which we held: "It is the general rule that the commencement of a second suit for the same cause of action cannot be pleaded in abatement of the first suit."

Kehr involved a totally different state of facts. There, a plaintiff wife filed suit to partition jointly owned farm land. Subsequently she filed for a limited divorce from bed and board in which she prayed for a determination of the property rights of the parties. Thereafter, the husband filed a plea in abatement in the partition action which the trial court sustained on the ground that full justice between the parties could be completely accomplished in the divorce action since it involved all the property rights of the parties, including the farm land. There, the identical land was involved in both suits and it was the prior and not the subsequent suit that was abated.

In Kehr, on the wife's appeal, we affirmed the judgment of the trial court, stating: "Plaintiff contends that the filing of a plea in abatement to avoid a multiplicity of suits should be directed at the second suit filed and not to the first one as in the present case. It is the general rule that the commencement of another suit for the same cause of action cannot be pleaded in abatement of the original suit. * * * There is, however, a recognized exception to the general rule where the subsequent suit embraces more as to the subject matter than the first suit as in the case at bar. The suit for divorce from bed and board contains issues in addition to its prayer for a division of the property. In such a case the court may with propriety dismiss the prior suit and permit the plaintiff to proceed in the second suit."

Kehr, however, has no applicability here. The two

suits do not involve the same cause of action. The mortgage being foreclosed in the present action bears no relation to the unsecured notes involved in the previous case. The causes of action are different; the essential basis for relief in the two suits is not the same; and different parties are involved.

Courts generally have held the tests for determining the identity of causes of action in two suits are whether the same full and adequate relief can be obtained in the first action as in the one sought to be abated. This court applied the test stated above in Richardson v. Opelt, *supra*. As a general rule, where a judgment in the prior suit would be a bar to a judgment in the second suit brought in the same or another court of concurrent jurisdiction, the plea in abatement should be sustained. That is not the present situation.

The trial court was correct in overruling defendants' plea in abatement and in entering a decree of foreclosure. A plea in abatement is a dilatory and technical plea. It is not, as a rule, favored by the courts. Generally, it will not be sustained unless the party interposing it can clearly show he is within the reason for its enforcement.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DELBERT GUYOTT, ALSO KNOWN AS DALE, APPELLANT.
239 N. W. 2d 781

Filed March 11, 1976. No. 40302.

1. **Criminal Law: Controlled Substances: Words and Phrases.** Section 28-4,115 (13), R. S. Supp., 1974, provides that deliver or delivery shall mean the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.
2. **Criminal Law: Controlled Substances: Trial.** To sustain a conviction under section 28-4,125 (1) (a), R. S. Supp., 1974,

it is not necessary for the State to show actual physical transfer of a controlled substance from the defendant.

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

Walter J. Matejka, for appellant.

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

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

WHITE, C. J.

The defendant was indicted for violation of section 28-4,125 (1)(a), R. S. Supp., 1974, which makes it "unlawful for any person knowingly or intentionally * * * (t)o manufacture, distribute, deliver, or dispense, a controlled substance." The defendant pled not guilty. The case was tried to a jury, and the defendant was found guilty. The District Court sentenced the defendant to a period of 1 to 3 years imprisonment in the Nebraska Penal and Correctional Complex and ordered him to pay the costs of prosecution. The defendant appeals. We affirm the judgment and sentence of the District Court.

As error it is alleged that the verdict was not supported by sufficient evidence. The evidence showed the following. Officer Cramer, an undercover officer for the Omaha Metro Area Narcotics squad, secured a position as a bouncer at an Omaha hotel lounge. The only person who knew he was with the police was the lounge's manager. The defendant was introduced to Cramer by the manager, who advised Cramer that the defendant had some "speed." Cramer and the defendant then stepped out into the hotel lobby. Cramer testified that the defendant told him that the narcotics Cramer wanted were in a wastebasket in the girls' restroom in the hotel. Cramer testified that the defendant told him there were 400 "hits" of "speed" in the restroom and that

Cramer could have them for $22 per 100 "hits." Cramer went to the restroom indicated and found, in a brown paper bag, in the wastebasket, approximately 400 tablets of suspected amphetamines wrapped in four plastic bags. After retrieving the paper bag, Cramer returned upstairs and gave the defendant $88.

An essential element for a conviction under section 28-4,125(1)(a), R. S. Supp., 1974, is that there be delivery of a controlled substance. The defendant argues that the evidence failed to show a delivery because the defendant did not actually physically transfer the controlled substance to Officer Cramer, but merely directed him to its exact location.

Section 28-4,115 (13), R. S. Supp., 1974, defines delivery of a controlled substance as follows: "Deliver or delivery shall mean the actual, *constructive*, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." (Emphasis supplied.)

To sustain a conviction under section 28-4,125(1)(a), R. S. Supp., 1974, it is not necessary for the State to show actual physical transfer of a controlled substance from the defendant. The statutory definition of delivery clearly encompasses more than actual, direct physical transfers. It includes constructive and indirect transfer as well. The evidence in this case was sufficient to show that the defendant constructively delivered a controlled substance to Officer Cramer.

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

AFFIRMED.

BOBBIE BROOKS, INCORPORATED, APPELLANT, V. MAURICE HYATT, APPELLEE.
239 N. W. 2d 782

Filed March 18, 1976. No. 40185.

1. **Evidence: Trial: Records.** Section 25-12,109, R. S. Supp., 1974, provided: A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.
2. ———: ———: ———. The purpose of section 25-12,109, R. S. Supp., 1974, was to permit admission of systematically entered records without the necessity of identifying, locating, and producing as witnesses the individuals who made entries in the records in the regular course of the business.
3. ———: ———: ———. The Uniform Business Records As Evidence Act was intended to bring the realities of business and professional practice into the courtroom and the act should not be interpreted narrowly to destroy its obvious usefulness.

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

Timothy J. McReynolds of White, Lipp, Simon & Powers, for appellant.

John S. Sampson, for appellee.

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

WHITE, C. J.

This is a contract action brought by the plaintiff, Bobbie Brooks, Incorporated, against the defendant, Maurice Hyatt. The District Court directed a verdict for the defendant, and the plaintiff appeals that decision. We reverse the decision of the District Court.

In 1962, the defendant became a sales representative

for Stacy Ames, Inc. (hereinafter referred to as Stacy Ames), a subsidiary corporation of Bobbie Brooks, Inc. Pursuant to a written agreement, the defendant's duties were to promote various lines of women's apparel which was distributed by Stacy Ames. Samples of such apparel were regularly shipped to the defendant for advertising purposes. The defendant was to attempt to sell the samples, and then either pay for the samples which were sold or return the samples which were not sold. Stacy Ames maintained records by means of computer on the samples sent to the defendant and on the payments made or samples returned by the defendant. Upon the termination of the defendant's employment with Stacy Ames in 1969, the computer records of Stacy Ames reflected that the defendant owed a sum of $6,753.26 for unreturned and unpaid samples. By 1968, Stacy Ames had become a division of Bobbie Brooks, Inc. Bobbie Brooks, Inc., brings this action to collect the $6,753.26 allegedly owed by the defendant.

At trial, the only evidence of the debt which the plaintiff could produce was exhibit 3, the computer record of the defendant's dealings with Stacy Ames. In attempting to lay a foundation for the introduction of exhibit 3, the plaintiff called as a witness the sample control director of Bobbie Brooks, Inc., Mr. Segal, who testified that he is the custodian of all salesmen's records, including the records of Stacy Ames' transactions with the defendant.

Segal testified that until 1970, Stacy Ames handled its own salesmen. In 1970, the Stacy Ames division turned over its records to Segal in the regular course of business. At that time, Segal spoke to the records' custodian of Stacy Ames concerning the salesmen's records. Segal testified from personal knowledge as to the method of preparation of the business records of Bobbie Brooks, Inc. He also testified that, prior to 1970 when the record-keeping was centralized, all subsidiaries and divisions of Bobbie Brooks, Inc., used the same system

of preparing business records. In addition, Segal testified that he observed Stacy Ames' record-keeping procedures in 1967 and 1968, and that they were similar to the procedures used by Bobbie Brooks, Inc. Segal also stated that he had expertise in the field of computer programming, and that by studying computer output, which is what exhibit 3 is, he could determine the method of preparation of the input. By this method, Segal stated that he could determine that Stacy Ames used the same method of preparing business records as did Bobbie Brooks, Inc. Segal also testified that the entries on exhibit 3 were made within 1 week of the events recorded.

The District Court sustained the defendant's objection to the admissibility of exhibit 3. The District Court held that exhibit 3 was inadmissible because Mr. Segal was not the custodian of the records at the time they were originally made. The plaintiff's sole contention on appeal is that the District Court was in error when it refused to admit exhibit 3 into evidence. We agree.

The Uniform Business Records As Evidence Act, as adopted by Nebraska, provided: "A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission." § 25-12,109, R. S. Supp., 1974. The purpose of this statute was to permit admission of systematically entered records without the necessity of identifying, locating, and producing as witnesses the individuals who made entries in the records in the regular course of the business. See Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170. It should be noted that the statute gave the trial judge discretion in determining when a sufficient foundation had been

established to justify the admission of the record into evidence. However, this discretion was not without limits.

In Transport Indemnity Co. v. Seib, 178 Neb. 253, 132 N. W. 2d 871, this court held that computer records fell within the meaning of the statute and were admissible into evidence. The court stated: "The statute was intended to bring the realities of business and professional practice into the courtroom and the statute should not be interpreted narrowly to destroy its obvious usefulness."

The crucial issue in this case is whether the testimony of Segal, who is the present custodian of the records but was not the custodian at the time the records were originally made, is sufficient to ensure in the words of the statute, that "the sources of information, method, and time of preparation were such as to justify its admission."

No Nebraska cases have dealt with this issue. In other jurisdictions faced with this question, the business records have been admitted into evidence on the testimony of merely the present custodian. In Rossomanno v. LaClede Cab Co. (Mo.), 328 S. W. 2d 677, the Supreme Court of Missouri held that a doctor's medical records were admissible, even though the witness who testified concerning the records was not the custodian of the records at the time they were made. The witness, however, was the present custodian of the records. The court said: "If plaintiff's position is correct, a new employee, even a permanent custodian, would be incompetent to qualify for admission in evidence any records ante-dating his employment regardless of how many years he continued to work because he could never acquire the necessary personal knowledge. * * * We cannot escape the conclusion that a witness may be competent to identify a business record and testify to the mode of its preparation, even though he was not employed in the 'business' at the time the act, condition

or event occurred or was recorded. The testimony of the witnesses to the 'mode of preparation' need not be based on personal knowledge." See, also, Webber v. McCormick, 63 N. J. Super. 409, 164 A. 2d 813 (1960); 30 Am. Jur. 2d, Evidence, § 950, p. 76.

What limited authority there is on a subject agrees that the witness need not be the custodian of the records at the time they were made. To hold otherwise would fail to recognize the "realities of business," and would exclude a great amount of reliable evidence concerning the activities of large business organizations.

In the case at hand, there was sufficient testimony by Segal to ensure that the "sources of information, method, and time of preparation were such as to justify its admission." Segal testified as to the mode of preparation of the Bobbie Brooks, Inc., records. He based his knowledge of the mode of preparation on: (1) The fact that all subsidiaries and divisions of Bobbie Brooks, Inc., used the same business records system; (2) he personally observed Stacy Ames record procedures in 1967 and 1968; (3) the output of the computer from which he could derive its system of input; and (4) the information transferred to him in a normal course of business by the previous custodian. Thus, Segal possessed sufficient knowledge to testify as to the method of preparation of exhibit 3. Segal testified as to exhibit 3's identity, as to the method of its preparation, and that the events contained in the record were recorded within 1 week of their occurrence in the regular course of business. His testimony laid a sufficient foundation for the introduction into evidence of exhibit 3.

The judgment of the District Court is reversed and the cause remanded for a new trial in accordance with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

CLINTON, J., dissenting.

I do not believe that the trial judge abused his discretion in determining that insufficient foundation was

laid for admission of the computer printouts. The statute gives the trial court discretion in this matter and the foundation presented was at best marginal.

SPENCER, J., joins in this dissent.

ESTHER M. LAUX, APPELLANT, V. RAYMOND ROBINSON ET AL., APPELLEES.
239 N. W. 2d 786

Filed March 18, 1976. No. 40233.

1. **Instructions: Trial.** It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence.
2. **Verdicts: Trial: Motions, Rules, and Orders.** A motion for directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
3. **Motor Vehicles: Highways.** One entering a highway from a private road must yield the right-of-way to all vehicles approaching on such highway.
4. ———: ———. A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way.
5. **Motor Vehicles: Highways: Negligence.** If the driver of an automobile entering a highway from a private road looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence.
6. **Motor Vehicles: Highways.** The duty to look for approaching vehicles implies the duty to see that which is in plain sight.
7. ———: ———. An automobile driver is required to see only those approaching vehicles which relative to speed and distance are within the radius which denotes the limit of danger.
8. **Motor Vehicles: Highways: Negligence.** One having the right-of-way may not on that account proceed in disregard of the surrounding circumstances and potential dangers. One having

a right-of-way is not thereby relieved from the duty of exercising ordinary care to avoid accidents.

9. **Motor Vehicles: Negligence.** There is no presumption or inference as to the negligence of a driver of an automobile arising from the mere fact that it collided with another vehicle.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

John C. Mitchell and Larry R. Demerath of Mitchell & Beatty, for appellant.

Robert D. Mullin of Boland, Mullin & Walsh, for appellees.

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

NEWTON, J.

This is an automobile accident case wherein plaintiff seeks to recover for personal injuries. Defendants denied negligence and alleged contributory negligence more than slight. Jury verdict and judgment were for the defendants. We affirm the judgment of the District Court.

The accident occurred in the "T" intersection formed by 84th Street and Park Drive in Omaha, Nebraska. Eighty-fourth Street runs north and south and Park Drive extends to the east. To the west was a tract being prepared for commercial building purposes. Defendants were hauling dirt to this tract. Eighty-fourth Street is a four-lane highway which narrows to a two-lane highway about 150 feet south of the intersection. Plaintiff was traveling south. Defendants' truck entered the "T" intersection from the west.

Plaintiff urges that the court should have found defendants guilty of negligence as a matter of law; should not have submitted the issue of contributory negligence to the jury; and should have directed a verdict for plaintiff. She is also critical of certain instructions. "It is the duty of the trial court to instruct the jury upon the

issues presented by the pleadings and supported by the evidence." Heavican v. Holbrook, 187 Neb. 814, 194 N. W. 2d 208.

"A motion for directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Hansen v. Hasenkamp, 192 Neb. 530, 223 N. W. 2d 44.

In accordance with these rules, was the case properly submitted to the jury? The evidence was conflicting in some respects but there was evidence to sustain the submission of the case to the jury and the verdict rendered. Plaintiff stated that she saw the defendants' truck as it was entering the highway and "Just coming down on the curb"; and that she was then about a block away and was going 40 miles per hour just before the accident. The front end of her automobile was badly damaged when she struck the truck just behind the cab.

The defendant-driver of the truck testified that on approaching the highway he stopped and looked to the north, did not see any automobile coming, and entered the highway. He then looked to the south as he was going to cross the south-bound lane and make a left turn. When the front end of the truck was in the highway, he heard a horn and again looked to the north. At that time he saw the plaintiff's automobile about 250 feet away, thought he had time to cross, and attemped to speed up to get out of the way. He also stated that before the impact plaintiff shifted from the west outside lane to the passing lane and that the collision occurred in that lane. The impact pushed the truck up on two wheels and almost turned it over. Pictures show that after the accident plaintiff's automobile was facing east across the two traffic lanes. There were two short skid marks which the truck driver

stated were there before the accident and which do not appear to be connected with the tires on plaintiff's car where it came to rest after sliding around.

Was the defendant-driver guilty of negligence as a matter of law? Section 39-638, R. R. S. 1943, requires one entering a highway from a private road to "yield the right-of-way to all vehicles approaching on such highway." We have said: "A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way. * * *

"If the driver of an automobile entering a highway from a private road looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence. * * *

"The duty to look for approaching vehicles implies the duty to see that which is in plain sight." Kohrt v. Hammond, 160 Neb. 347, 70 N. W. 2d 102.

It is generally held that these rules are not absolute. We have repeatedly held that an automobile driver is required to see only those approaching vehicles which relative to speed and distance are within the radius which denotes the limit of danger. See White v. Kluge, 189 Neb. 742, 204 N. W. 2d 789. This rule is applicable to one entering from a private road; were it not, a driver could never enter a highway lest there be another vehicle approaching a mile or more away. See 3 Blashfield, Automobile Law and Practice (3d Ed.), § 120.12, p. 543.

The evidence shows that the defendant-driver stopped, looked, and failed to see plaintiff's automobile. He then proceeded slowly to enter the highway. Was plaintiff then within the radius denoting the limit of danger? Defendant-driver stated she was 250 feet away when he again looked after entering the highway. Plaintiff stated she was then a block away. Certainly at the

time defendant-driver stopped, looked, and failed to see her, she must necessarily have been a substantial distance farther away. Whether or not she was then within the radius of danger could well be a jury question in regard to which reasonable minds might differ. Furthermore, her right-of-way was not absolute. One must yield the right-of-way when necessary to avoid an accident. "One having the right-of-way may not on that account proceed in disregard of the surrounding circumstances and potential dangers. One having a right-of-way is not thereby relieved from the duty of exercising ordinary care to avoid accidents." Malcom v. Dox, 169 Neb. 539, 100 N. W. 2d 538.

"There is no presumption or inference as to the negligence of a driver of an automobile arising from the mere fact that it collided with another vehicle." Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578.

In view of the evidence the jury might well have, and apparently did, conclude that the defendant-driver did not act imprudently in entering and crossing the highway and that the proximate cause of the accident was the speed and lack of control of plaintiff's automobile.

The instructions given and refused by the court have been examined and found to be free from error. We find no misconduct on the part of defendants' counsel or errors in the admission of evidence.

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

AFFIRMED.

CRETE STATE BANK, CRETE, NEBRASKA, A CORPORATION, APPELLANT, V. LAUHOFF GRAIN COMPANY, AN ILLINOIS CORPORATION, ET AL., APPELLEES.
239 N. W. 2d 789

Filed March 18, 1976. No. 40244.

1. **Security Agreements: Contracts.** Section 9-402, U.C.C., pro-

vides that a security agreement will suffice as a financing statement if it meets the requirements for a financing statement. It is evident that one instrument may qualify for both purposes and it follows that a financing statement may also constitute a security agreement if it qualifies as such.

2. ———: ———. To constitute a security agreement there must be a written instrument, signed by the debtor, evidencing that such an agreement existed.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Dredla & Dredla and Charles M. Palleson, Jr., of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Gerald J. Hallstead, for appellee Lauhoff Grain Co.

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

Daniel E. Wherry, for appellee United States of America.

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

NEWTON, J.

Norman Hellbusch entered into contracts with Crete Mills on April 14, June 16, October 9, and November 4, 1971. There remains due on these contracts $3,653.69 which sum is claimed by plaintiff and by the State of Nebraska.

Plaintiff holds the promissory note of Norman Hellbusch on which is due $16,780.13. The note is dated August 2, 1971. The State of Nebraska has filed tax liens on which is due the principal sum of $4,164.64 on February 23, 1972, and May 8, 1972. Judgment was entered for the State of Nebraska and plaintiff has appealed. We affirm the judgment of the District Court.

Plaintiff claims it had a perfected security interest in the Crete Mills' contracts to secure indebtedness due the bank. On April 6, 1970, it filed a financing statement covering "all contracts." A second financing state-

ment was filed on July 28, 1971, covering "All of our contracts and accounts receivable presently owned or hereafter acquired" and proceeds. The statements were signed by both parties. Neither statement specifies any amount. They are short form financing statements which do not themselves purport to create security interests.

Section 9-204, U.C.C., provides that a security interest cannot attach until the debtor has rights in the collateral, or in a contract right until the contract has been made, but "a security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement." Section 9-105 (h), U.C.C., states that a security agreement means an agreement which creates or provides for a security interest. Section 9-106, U.C.C., defines a contract right as any right to payment under a contract not yet earned by performance.

There had been dealings between the debtor and plaintiff over a considerable period. Earlier contracts had been assigned to plaintiff and financing statements filed. These earlier contracts had been completed and the proceeds paid to plaintiff. Thereafter debtor entered into four other contracts with Crete Mills. These contracts were fully performed by the debtor and the balance due on them is the subject of this suit. These later contracts were not assigned to plaintiff nor was a separate security agreement entered into in regard to them. Plaintiff simply filed the financing statements of April 6, 1970, and July 28, 1971. The root question appears to be whether the financing statements were sufficient to constitute security agreements required by section 9-203, U.C.C. That section provides that a security interest in collateral not in the possession of the secured party is not enforceable unless the debtor has signed a security agreement containing a description of the collateral. Section 9-402, U.C.C., provides that a security agreement will suffice as a financing statement if it meets the re-

quirements for a financing statement. It is evident that one instrument may qualify for both purposes and it follows that a financing statement may also constitute a security agreement if it qualifies as such.

Here we have only a promissory note in standard form and the financing statements. There is no other instrument involved. The cases appear to be unanimous in the requirement that to constitute a security agreement there must be a written instrument, signed by the debtor, evidencing that such an agreement existed. There is some variation as to the nature of such instruments. In American Card Co. v. H.M.H. Co., 97 R. I. 59, 196 A. 2d 150, the Rhode Island court held: "The financing statement which the claimants filed clearly fails to qualify also as a security agreement because nowhere in the form is there any evidence of an agreement by the debtor to grant claimants a security interest." See, also, Scott v. Stocker, 380 F. 2d 123 (10th Cir., 1967).

In Mid-Eastern Electronics, Inc. v. First Nat. Bank of So. Md., 380 F. 2d 355 (4th Cir., 1967), it was held that a: "Bank which asserted security interest in debtor's personalty for payment of certain notes and which had filed financing statement but which could proffer no writing signed by debtor giving terms of security agreement obtained no enforceable security interest * * *."

In Shelton v. Erwin, 472 F. 2d 1118 (8th Cir., 1973), it was held: "A 'security agreement' within the Uniform Commercial Code must contain some language actually conveying a security interest. * * * Title application and subsequent certificate of title showing seller of automobile as lien holder were at best financing statements and, as such, were sufficient to perfect a security interest if one existed, but not to create one." See, also, Mitchell v. Shepherd Mall State Bank, 458 F. 2d 700 (10th Cir., 1972); M. Rutkin Elect. Sup. Co., Inc. v. Burdette Elect., Inc., 98 N. J. Super. 378, 237 A. 2d 500; Safe Deposit Bank & Trust Co. v. Berman, 393 F. 2d

401 (1st Cir., 1968); Central Arkansas Milk Producers Assn. v. Arnold, 239 Ark. 799, 394 S. W. 2d 126.

There are a number of cases which accept as security agreements instruments not strictly intended as such. In In re Numeric Corp., 485 F. 2d 1328 (1st Cir., 1973), it was held that although a standard form financing statement by itself cannot be considered a security agreement, an adequate agreement can be found when a financing statement is considered together with other documents. It was ruled that a resolution of a board of directors of the debtor corporation clearly indicated the existence of a security interest and together with the financing statement constituted a security agreement.

In Nunnemaker Transp. Co. v. United California Bank, 456 F. 2d 28 (9th Cir., 1972), a letter containing a signed statement of the debtor verifying the existence of a security interest was deemed sufficient.

In Evans v. Everett, 279 N. C. 352, 183 S. E. 2d 109, a financing statement was found to also qualify as a security agreement since it clearly manifested an intent to create a security interest.

As noted above, the present case reveals only the existence of a promissory note and standard form financing statements. Neither the financing statements nor the note manifest an intent to create or provide for a security interest. We are therefore of the opinion that the statutory requirement for a security agreement has not been complied with and in consequence plaintiff did not acquire a security interest in the contracts entered into between the debtor and Crete Mills.

The judgment of the District Court is affirmed.

AFFIRMED.

HUGH CAMPBELL, APPELLANT, V. FRANCIS J. KIRBY ET AL., APPELLEES.

239 N. W. 2d 792

Filed March 18, 1976. No. 40246.

1. **Equity.** Equity aids the vigilant, not those who slumber on their rights.
2. **Equity: Time.** Equitable conduct requires that a person should make timely assertion of his rights against another known to be acting in ignorance of his claim.
3. **Equity: Time: Laches.** Although ordinarily one has an undoubted right to bring an action within the statutory period, courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute when not to do so would work injustice in the particular case.
4. **Equity: Laches.** What constitutes laches is to be determined in the light of the circumstances of the particular case.
5. **Trusts: Words and Phrases.** Although the term has been broadly defined as a trust which is raised or created by the act or construction of law, in its more restricted sense and contradistinguished from constructive trusts a resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance.
6. ———: ———. Resulting trusts are also called "presumptive" trusts, and are frequently defined in terms of or in connection with the character of the transaction out of which they most frequently arise, namely, where one person pays the consideration for a purchase and the title is taken in the name of another.
7. **Contracts.** At any time before breach, the parties to an executory agreement may change its terms by subsequent agreement without a new consideration.
8. **Trusts.** If the trustee of a resulting trust in breach of trust transfers trust property to a bona fide purchaser, the transferee takes the property free of the resulting trust; but if the transferee is not a bona fide purchaser, he does not hold it free of the resulting trust.
9. **Property: Trusts: Conveyances.** When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

10. **Trusts: Evidence.** In order to establish a trust by parol evidence, the proof must be clear, unequivocal, and convincing.

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

E. Dean Hascall of Hascall & Jungers and J. Patrick Green, for appellant.

Vincent J. Kirby of Kirby, Duggan & McConnell, for appellees.

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

SPENCER, J.

This action involves the question of a resulting trust, a constructive trust, and whether or not the rights of the plaintiff-appellant, Hugh Campbell, were barred by the statute of limitations. The trial court determined plaintiff's rights were barred by the statute of limitations and laches, and that plaintiff failed to prove a resulting trust. It reserved jurisdiction for the purpose of rendering a money judgment in favor of plaintiff and against defendants Francis J. Kirby and Phyllis R. Kirby in the sum of $23,087, and dismissed the action as to defendants Vincent J. Kirby and Bernadine Kirby, his wife. We reverse.

In 1967, Francis J. and Phyllis R. Kirby entered into a purchase agreement with Clifford W. and Lois F. Bergfield for the purchase of certain ranch property located in Dawes county, hereinafter described as the Bergfield ranch. Francis J. Kirby, hereinafter referred to as Frank, had paid $10,000 for an option on the property, and $10,000 in earnest money. The agreement required a further payment of $20,000 on or before November 1, 1967, and the assumption of an existing mortgage on the property. Frank, who lacked funds to pay the $20,000, arranged with plaintiff, Hugh Campbell, for the money. Frank was to write a check for $20,000 which would be honored by the Bank of Bellevue of

which Campbell was president. The consideration for the advance was an agreement to share the anticipated profit on a proposed resale of the ranch.

The Bergfields refused to accept Frank's check and attempted to rescind the purchase agreement. Litigation ensued between the Kirbys and the Bergfields. Campbell then agreed with Frank he would furnish a cashier's check for $20,000 which would be deposited with the clerk of the Dawes County District Court pending the litigation. The evidence would indicate this agreement was premised on the consideration that Campbell would receive a one-half interest in the ranch when title was conveyed. In addition to the $20,000, Campbell also deposited a cashier's check in the amount of $3,087 to cover additional expenses incurred in the transaction. The litigation was resolved by this court in Kirby v. Bergfield (1970), 186 Neb. 242, 182 N. W. 2d 205. The mandate issued January 14, 1971. This court affirmed a District Court judgment granting specific performance to the Kirbys. Title to the ranch was transferred from the Bergfields to the Kirbys in March 1971. Campbell's cashier check for $20,000 was deposited March 16, 1971, upon the closing of the transaction with the Bergfields.

During the pendency of the Bergfield litigation, on advice of counsel handling the litigation, no conveyance was made to Campbell. A blank deed signed by the Kirbys but never further executed was left with the attorney.

In April 1971, Frank took over the management of the ranch. Between April 16 and June 11, 1971, Campbell contributed an additional $2,950 at the request of Frank toward operating expenses. Frank concedes that after that date he never advised Campbell that further amounts were needed to preserve the security, or made any demand on him for additional funds. Campbell's testimony is that Frank told him he would be able to handle any further amounts needed from income. Frank received income from the sale of wheat, cash rent, and

from the government for certain conservation practices.

Prior to June 1, 1971, Vincent J. Kirby, Frank's brother, hereinafter called Vince, made certain advances to Frank in connection with an oil venture which proved unprofitable. At the demand of Vince, who was an attorney, Frank and his wife executed a purchase agreement to the ranch to Vince as security for advances made and to be made. Dated June 1, this agreement was not acknowledged until November 5, 1971. At the time of its delivery no present consideration passed from Vince to Frank.

Vince testified he was familiar with the original profit-sharing arrangement made between Frank and Campbell, but was never informed that Campbell was to receive a deed to one-half of the property. Frank, however, testified Vince was fully informed as to the transaction between him and Campbell, and agreed to make a settlement with Campbell. Campbell learned of the transfer of the property to Vince in January of 1972. He employed counsel in an attempt to force a settlement. The present action was filed on June 8, 1973.

We first consider the question as to whether the statute of limitations bars Campbell's claim. The plaintiff's petition prayed for specific performance of an oral contract to convey an interest in real estate, or, alternatively, damages for breach of contract and for an accounting. The case was ultimately tried on the theory of repudiation of a resulting trust. If a resulting trust existed, it could not have come into being until Frank Kirby, the trustee, had a trust res. Frank's interest was confirmed at least when the mandate issued from this court on January 14, 1971, in the Bergfield litigation. Previous to that time, Frank had no more than a purchase agreement. The deed to the property was not issued until March 1971, when the cashier checks deposited with the clerk of the District Court were cashed. This action was filed June 8, 1973, or approximately 2 years and 3 months after the cashier checks were cashed and

Frank actually received a deed to the property. June 8, 1973, was well within the permissible period for bringing this type of action. The District Court erred in holding the statute of limitations had run.

The District Court also held Campbell was guilty of laches. If applicable, the ancient maxim is: "Equity aids the vigilant, not those who slumber on their rights." This manner of stating the principle is somewhat misleading, since it disregards the element of the effect of the delay. Laches does not result from a mere lapse of time but from the fact that during the lapse of time changed circumstances inequitably work to the disadvantage or prejudice of another if the claim is allowed to be enforced. Equitable conduct requires that a person should make timely assertion of his rights against another known to be acting in ignorance of his claim. Although ordinarily one has an undoubted right to bring an action within the statutory period, courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute when not to do so would work injustice in the particular case. Criswell v. Criswell (1917), 101 Neb. 349, 163 N. W. 302, L. R. A. 1917E 1103. What constitutes laches is to be determined in the light of the circumstances of the particular case. Rutt v. Frank (1971), 186 Neb. 842, 186 N. W. 2d 911.

While Campbell had not received a deed, he did understand that some type of deed was in the hands of the attorney who handled the Bergfield litigation. Although he delayed enforcing his right to the delivery of an instrument evidencing his interest in the land, we cannot say the delay was of such a nature as to constitute laches. Campbell did not learn of the transfer to Vince until 9 months after the transfer of the title to Frank. He immediately employed counsel to enforce his rights. The record would indicate that his attorney was in touch with both Frank and Vince thereafter. On the record, the defense of laches is not sustainable.

We do not feel the year and one-half which elapsed before action was finally brought is a sufficient delay to justify the dismissal of the action on the ground of laches.

The important question is whether or not Frank Kirby held an undivided one-half interest in the property as a resulting trustee for Hugh Campbell's benefit. We so find. From an analysis of the evidence and the attendant circumstances, we are convinced that a resulting trust was created. We said in Reetz v. Olson (1945), 146 Neb. 621, 20 N. W. 2d 687: " 'Although the term has been broadly defined as a trust which is raised or created by the act or construction of law, in its more restricted sense and contradistinguished from constructive trusts a resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance * * *. Such trusts are also called "presumptive" trusts, and are frequently defined in terms of or in connection with the character of the transaction out of which they most frequently arise, namely, where one person pays the consideration for a purchase and the title is taken in the name of another, * * *.' "

The type of trust involved in Reetz was a purchase money resulting trust. The presumption of a purchase money trust arises in favor of a person from whom the consideration comes for a conveyance of property to another. Since men in their affairs seldom give consideration to receive nothing, the intent to make a trust is presumed. This presumption is rebuttable by proof of a contrary intention of a person supplying the consideration. 76 Am. Jur. 2d, Trusts, § 206, p. 436.

In Woodward v. Woodward (1911), 89 Neb. 142, 131 N. W. 188, this court held: "Where, upon a purchase of real estate, the legal title is taken in the name of a woman, while the consideration or part of it is paid by

her (former) husband, but not by way of a gift or a loan to her, a resulting trust immediately arises from the transaction, unless it would be a fraud to enforce that trust, and the wife will hold the title in trust for her (former) husband to the extent that he paid the purchase price of the property."

The original agreement between Campbell and Frank involved what might be termed a quick sale transaction. The purchase agreement was already in the name of the Kirbys. Frank was buying the property with the expectation of making a quick sale and an immediate profit. His original agreement with Campbell for the payment of the $20,000 contemplated his taking title, making a quick sale, and dividing the profit between the two of them.

The important agreement herein, however, is not the original one but rather the subsequent agreement made when litigation and its attendant delay was inevitable. Frank admits: "Hugh Campbell * * * would receive 50 per cent of the interest in the ranch and option and that my wife and I would retain that amount." When the cashier's check was deposited with the clerk of the Dawes County District Court and the action for specific performance was filed, a new agreement was made whereby Campbell was to receive a deed to one-half the property. This revision of the agreement between the parties was a lawful one, since at any time before breach, the parties to an executory agreement may change its terms by subsequent agreement without a new consideration. See Selig v. Wunderlich Contracting Co. (1955), 160 Neb. 215, 69 N. W. 2d 861, in which we so held. However, Campbell additionally deposited another cashier's check for $3,087 to defray expenses incident to the delay and the litigation.

Holding the Frank Kirbys held an undivided one-half interest of the property as resulting trustees for Campbell's benefit does not determine the lawsuit. The effect of the transfer of the entire interest in the property

to Vince must now be examined. Restatement, Trusts 2d, § 408, p. 330, states: "If the trustee of a resulting trust in breach of trust transfers trust property to a bona fide purchaser, the transferee takes the property free of the resulting trust; but if the transferee is not a bona fide purchaser, he does not hold it free of the resulting trust."

Vince Kirby was not a bona fide purchaser. Vince was familiar with the transaction and the previous litigation. Frank testified he told Vince of his commitment to Campbell. He testified: "Well, I explained to Vince Kirby that Hugh Campbell had involved himself with me in the purchase of the ranch, and Vince Kirby advised me that he would * * * contact Hugh Campbell, and, well, square things away." Frank further testified that the reason for Campbell not having any previous evidence of ownership was due in part to the necessity of having only one owner shown during the District Court trial. He also testified no conveyance was made after the trial because they were not satisfied with the District Court's accounting procedures and their attorney advised another appeal to the Supreme Court and again advised him not to involve Campbell.

Frank Kirby testified he advised his brother Vince of his commitment to Mr. Campbell for a one-half interest in the ranch at the time of the transfer of his interest to Vince. Vince testified he never knew of Campbell's claim to a one-half interest in the title until after the transfer. Vince does admit that Frank told him about the advancement of the money, but he construed Frank's testimony to be only that Campbell was to have a one-half interest in the profit from a quick sale. It is difficult to understand how a quick sale could be made when the sale contract was in litigation. Frank's testimony was not that equivocal. While Vince denies Frank told him Campbell was to have a one-half interest in the ranch, he had sufficient information to put him on notice of Campbell's claim. The transfer to him was originally

made as a security interest to secure previous advancements on another transaction. On the record we find that Vince as a transferee was not a bona fide purchaser.

The imposition of a trust on a transferee fits in with the rationale of a constructive trust. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Cardozo, J., in Beatty v. Guggenheim Exploration Co. (1919), 225 N. Y. 380, 122 N. E. 378. We hold Vince Kirby acquired the property under such circumstances that he may not in good conscience retain the beneficial interest covered by the resulting trust for Hugh Campbell.

Vince Kirby argues in order to establish a trust by parol evidence, the proof must be clear, unequivocal, and convincing. Holbein v. Holbein (1948)), 149 Neb. 281, 30 N. W. 2d 899. As suggested heretofore, the evidence is adequate to support a resulting trust in favor of Hugh Campbell. Vince Kirby, in taking a conveyance of the title when he is presumed to have knowledge of the equity of Hugh Campbell, holds title as a constructive trustee for Hugh Campbell to an undivided one-half interest in that property.

Bernadine Kirby is a party defendant in her capacity as the wife of Vince. She has no interest in this litigation beyond her inchoate interest as his spouse. The record does not indicate that she had any knowledge of or took any part in the transactions leading up to this litigation.

We reverse the judgment and remand the cause for a full accounting of the management of the ranch to the time of the hearing. We direct that Vince and Bernadine Kirby be required to convey an undivided one-half interest in the property to Hugh Campbell, subject to all encumbrances of record previous to June 1971. This conveyance shall also be subject to the requirement, if there are insufficient funds after a full accounting, that

Hugh Campbell pay one-half of the expenses necessarily incurred in the preservation of said property. All costs are taxed to the defendants Kirby.

REVERSED AND REMANDED.

SUSAN E. EMERY, A MINOR, BY AND THROUGH BETTY HIETFELD AND HOWARD E. TRACY, HER GUARDIANS, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A FOREIGN CORPORATION, APPELLEE.

SHARON L. EMERY, A MINOR, BY AND THROUGH BETTY HIETFELD AND HOWARD E. TRACY, HER GUARDIANS, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A FOREIGN CORPORATION, APPELLEE.

239 N. W. 2d 798

Filed March 18, 1976. Nos. 40282, 40283.

1. **Motor Vehicles: Insurance: Contracts.** An "uninsured motor vehicle" within the meaning of section 60-509.01, R. R. S. 1943, includes one which does not have accident liability insurance affording the coverage for personal injury and death in the limits of liability specified by section 60-509, R. R. S. 1943.
2. ———: ———: ———. A motor vehicle which is covered by liability insurance for personal injury and death in the limits specified by section 60-509, R. R. S. 1943, does not become an uninsured motor vehicle when, because of multiple claims made, that insurance is insufficient to satisfy the legal liability of the insured to each individual claimant to the limits specified for individual claims under section 60-509, R. R. S. 1943.

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

Knapp, State, Yeagley & Mues, for appellants.

Ray C. Simmons, for appellee.

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

CLINTON, J.

The question in these cases is whether the defendant

insurer is liable to the plaintiffs under the uninsured motorist coverage of an automobile liability policy issued to their mother in whose automobile they were passengers when it collided with another vehicle. This question in turn must be answered by determining whether or not the other motorist (the tort-feasor) was uninsured within the meaning of section 60-509.01, R. R. S. 1943. The other motorist did, in fact, have liability coverage in the minimum amounts then required by section 60-509, R. R. S. 1943 (Reissue 1968), i.e., $10,000 for injury or death of any one person in an accident and $20,000 for injuries or death of two or more persons in any one accident. In the accident in question, five persons were injured. The tort-feasor's insurance was prorated among the five injured persons and the judgments in favor of the plaintiffs in these two cases were only partially satisfied, each receiving substantially less than $10,000. The plaintiffs thereafter brought this action against defendant insurer to require it to pay the difference between the amounts each had received from the tort-feasor's insurer and the $10,000 per person minimum coverage contained in the uninsured motorist coverage it had issued to plaintiffs' mother. The plaintiffs asserted that the spirit and policy of section 60-509.01, R. R. S. 1943, required that each injured person's judgment be satisfied to at least the extent of $10,000.

The District Court rendered summary judgment for the defendant insurer. We affirm.

Plaintiffs cite and rely principally upon Porter v. Empire Fire & Marine Ins. Co., 12 Ariz. App. 2, 467 P. 2d 77, 106 Ariz. 274, 475 P. 2d 258, 106 Ariz. 345, 476 P. 2d 155, and the holdings of this court in Bose v. American Family Mut. Ins. Co., 186 Neb. 209, 181 N. W. 2d 839; Protective Fire & Cas. Co. v. Woten, 186 Neb. 212, 181 N. W. 2d 835; and Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133. The defendant relies upon a rather lengthy list of authorities, including the following: Brake v. MFA Mut. Ins. Co. (Mo. App.), 525

S. W. 2d 109; Liberty Mut. Ins. Co. v. Clay (Fla. App.), 299 S. 2d 95; Travelers Ins. Co. v. Bouzer, 39 Cal App. 3d 992, 114 Cal. Rptr. 651; Kemp v. Fidelity & Casualty Co. of New York (Tex. Civ. App.), 504 S. W. 2d 633; Lund v. Mission Ins. Co. (Ore.), 528 P. 2d 78; Golphin v. Home Indemnity Co. (Fla. App.), 284 S. 2d 442; Villarreal v. Texas Farmers Ins. Co. (Tex. Civ. App.), 510 S. W. 2d 633; Lund v. State Farm Mut. Auto. Ins. Co., 342 F. Supp. 917; Simmons v. Hartford Accident & Indemnity Co. (Okla.), 543 P. 2d 1384.

Porter v. Empire Fire & Marine Ins. Co., *supra,* supports the plaintiffs' position. The cases listed above, cited by the defendant as well as others which it cites which we do not list, support the defendant's position. Bose v. American Family Mut. Ins. Co., *supra;* Protective Fire & Cas. Co. v. Woten, *supra;* and Stephens v. Allied Mut. Ins. Co., *supra,* are not directly on point and more will be said about these cases later.

Section 60-509.01, R. R. S. 1943, provides in part: "No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in section 60-509, . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom."

Section 60-509, R. R. S. 1943, is part of the original Motor Vehicle Safety Responsibility Act and the provisions thereof providing the limits for bodily injury or death as of the time of the occurrence were as follows: "Provided, every such policy . . . is subject, if the accident has resulted in bodily injury or death, to a limit

. . . of not less than ten thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident." § 60-509, R. R. S. 1943 (Reissue 1968). The section has since been amended to provide for limits of $15,000 and $30,000.

Both sides of the present controversy seem to argue on the assumption that the statute does not define "uninsured motor vehicle" and that therefore reference must be made to the definition of that term contained in the policy. Plaintiffs then look to the statute and say in effect that the definition contained in the insurance policy does not conform to the spirit of the statute which is to insure that every injured party's judgment is satisfied to at least the extent of $10,000. The defendant says that the policy defines "uninsured motor vehicle" and the tort-feasor had insurance as defined in the policy, i.e., "in at least the amount specified by the financial responsibility law," and therefore the plaintiffs have no claim under the policy insuring their mother's vehicle. This court cannot escape blame for the assertion that the statute does not define uninsured motor vehicle and our later discussion will clarify that matter.

Although the statute does not define "uninsured motor vehicle" formally, it nonetheless does so by very clear implication. We hold that, insofar as applicable under the facts of this case, an uninsured motor vehicle is one which does not have in force at the time of the accident liability insurance affording the coverage and limits specified by section 60-509, R. R. S. 1943, for personal injury and death. We point out, however, that the statutory requirements for uninsured motorist coverage include other situations not at issue here, to wit, "hit-and-run motor vehicles," § 60-509.01, R. R. S. 1943; and motor vehicles where the insurer "within one year following the date of loss is in receivership or has been

judicially or administratively found to be insolvent," § 60-509.02, R. R. S. 1943.

It is true that in Stephens v. Allied Mut. Ins. Co., *supra,* we said our statute "does not define the term 'uninsured motorist.' Therefore the terms of the policy in this respect are controlling." We then went on to say that the policy definition which includes situations where there was insurance " 'but the company writing the same denies coverage,' " included cases where the insurer became insolvent. The reason for our holding was that insolvency was the equivalent of a denial of coverage within the meaning of that term of the policy. We were there construing the policy provisions. Stephens has no application here. It should be plain to everyone that while an insurer is free to expand the definition of "uninsured motor vehicle" in order to afford more coverage than the statute requires, it is not free to diminish the statutory definition to afford less coverage than the statute contemplates.

In Bose v. American Family Mut. Ins. Co., *supra,* the insured had two policies and each contained, as required by statute, uninsured motor vehicle coverage. The question in that case was whether the insured could recover under both policies where his judgment was more than $10,000. We held that he could. That case has no application here.

Protective Fire & Cas. Co. v. Woten, *supra,* involved a situation where the policy by its terms attempted to "escape" uninsured motorist coverage merely because another insurer under its uninsured motorist coverage had already paid the $10,000 limit to the claimant. We held such a provision conflicted with the statutory requirements. That case has no application here.

In Porter v. Empire Fire & Marine Ins. Co., *supra,* the Arizona court simply rewrote the statute.

If we were to accept the plaintiffs' position, we would have to rewrite section 60-509, R. R. S. 1943 (Reissue 1968), to read, by adding the words in italics, as follows:

"Provided every such policy . . . if the accident has resulted in bodily injury or death, to a limit . . . of not less than ten thousand dollars because of bodily injury to or death *for each person injured or killed in any one accident.*" We would also have to eliminate from the statute the following words: "subject to said limit for one person, to a limit of not less than twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident."

Although we liberally construe such statutes to accomplish the indicated legislative purpose, we are not free to rewrite the statutes to provide a meaning or purpose they do not contain. See Brake v. MFA Mut. Ins. Co., *supra,* for a more complete development of the rationale as applicable to this case.

We hold that a motor vehicle which is covered by liability insurance for personal injury and death in the limits specified by section 60-509, R. R. S. 1943, does not become an uninsured motor vehicle when, because of multiple claims made, that insurance is insufficient to satisfy the legal liability of the insured to each individual claimant to the limits specified for individual claims under section 60-509, R. R. S. 1943.

Perhaps it should be public policy that every person injured and having a claim against an uninsured motorist should be entitled to recover at least a certain minimum amount, not in excess of the judgment he obtains. This, however, is a matter of public policy which must be determined by the Legislature and not by this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH MCDONALD, APPELLANT.
240 N. W. 2d 8

Filed March 25, 1976. No. 40179.

1. **Criminal Law: Arrest: Probable Cause.** Probable cause justifying an arrest without a warrant exists if the facts and circumstances within the knowledge of the arresting officers, and of which they had reasonably trustworthy information, are sufficient to warrant a prudent man in believing that a felony has been committed and that the person arrested committed it.
2. **Criminal Law: Trial: Confessions.** To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.
3. ———: ———: ———. The determination of whether a statement was voluntarily made necessarily turns on the consideration of the totality of the circumstances in any particular case.
4. **Criminal Law: Trial: Confessions: Evidence: Constitutional Law.** The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will.
5. **Criminal Law: Indictments and Informations: Instructions: Homicide.** Where an information charges a defendant with a killing committed in the perpetration of a robbery, it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of manslaughter, even though such an instruction is requested.

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

Paul E. Watts, J. Joseph McQuillan, Gerald E. Moran, and Robert C. Sigler, 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.

MCCOWN, J.

The defendant, Joseph McDonald, was charged with

killing Lyle Duane Ford in the perpetration of a robbery. That offense is first degree murder under section 28-401, R. S. Supp., 1974. He was found guilty by a jury and sentenced to life imprisonment.

At approximately 3 a.m., on the morning of July 4, 1974, a police officer observed an automobile on fire in a trailer court at 19th and Read Streets in Omaha, Nebraska, and immediately placed a fire alarm. The Omaha fire department arrived some 5 minutes after the alarm was received, broke out all the windows of the car, and extinguished the flames. Following routine procedure, they opened the hood and the trunk of the burned car. The body of Lyle Ford was found in the trunk. There was a wound behind the left ear and streaks of blood on the neck and face.

Two officers of the Omaha police department began an immediate investigation by canvassing the area for witnesses. Several people residing in the trailer court provided information. Three witnesses had seen and heard two boys arguing with a man in the immediate area of the burned car sometime before the fire. One witness said the boys appeared to be trying to get money from the man. One witness said that one of the boys had on a light T-shirt. Another said that one of the boys had on a gold T-shirt and had long blonde hair, and the other boy was of "slighter" stature, possibly younger, and wore dark clothing. Another witness also said one boy had long blonde hair and was wearing a gold T-shirt. The manager of the trailer court advised one of the officers that a younger brother of an occupant of one of the trailers had been involved in another fire recently. The officers then went to the trailer occupied by the defendant's brother, Tim McDonald, and talked with him. Tim said that Joe McDonald, the defendant, had been at the trailer at about 10:30 p.m. At that time, he had on a gold T-shirt and he had long blonde hair. The police officers also learned from witnesses that the defendant had been with a boy named

Robert Johnson earlier in the evening, and that Johnson was of slighter stature and lived in the trailer court. This led the officers to the Johnson trailer. The officers knocked on the door and were admitted by Robert Johnson's mother. The officers asked if the defendant and Robert Johnson were there. She stated that they were in the living room sleeping. She let the officers in and they observed the defendant sleeping on the floor and Johnson sleeping on a couch. The officers awoke the boys and told them they wanted to talk to them. The boys got up and dressed. The defendant, who had long blonde hair, put on a yellow T-shirt and a pair of trousers. The officers noticed what appeared to be blood on the T-shirt and trousers. Johnson's physical appearance and clothing also matched the descriptions given to the officers. The officers then arrested both boys at approximately 6 a.m. and took them to the police station.

The medical evidence was that the victim was still alive at the time of the fire, and that he died from asphyxiation. The doctor also testified that it was possible that the victim could have died from the head wound but the fire intervened and killed him before that happened.

The evidence was conflicting as to the cause of the fire. The prosecution presented evidence tending to show that the fire had been set. The defense introduced evidence tending to show that the fire was accidental and caused by dropping a match or cigarette on the carpet, or by a short in the cigarette lighter.

At the time of the crime, the defendant, Joseph McDonald, was 16 years old, and Robert Johnson was 15 years old. Both of them testified at trial, Johnson as a prosecution witness, and the defendant on his own behalf.

In general outline, the testimony of the two boys substantially agreed. On July 3, 1974, the two boys were part of a group of girls and boys who spent the evening

drinking beer and riding around the city. They returned to the trailer park sometime after midnight. At approximately 1:45 a.m., the girls left in the car in which the group had been riding. At that time the boys were at least partially intoxicated.

The boys saw the victim, Lyle Ford, in his car in the trailer park even before the girls left. He appeared to be drunk and was having trouble lighting a cigarette. After the defendant had an additional beer, he and Johnson had a brief argument with the victim and attempted to get some money from him on the pretext that he had backed into the car of the defendant's brother, but they were unsuccessful.

From this point on the testimony of the two boys, McDonald and Johnson, is in substantial agreement as to what they did together but is sharply divergent and conflicting as to which one suggested or performed certain acts. The boys went to the Johnson trailer, got a shotgun, broke it down, took the shotgun barrel, and went back to the victim's car. The victim was standing behind his car and the trunk was open.

Johnson testified that the defendant hit the victim on the head with the gun barrel, the victim fell into the trunk, and Johnson helped put the rest of the victim's body into the trunk. He testified that the defendant suggested robbing the victim, and that the defendant took the victim's wallet before they closed the trunk lid. He also testified that the defendant deliberately set the car on fire afterward. The defendant testified that Johnson hit the victim and the defendant helped put the victim's body into the trunk. The defendant testified that he did not know Johnson was going to rob the victim until afterward when Johnson gave him $20 from the victim's billfold, and then threw the billfold away. The defendant also testified that Johnson got into the car afterward and used the cigarette lighter to light a cigarette. The defendant did not see Johnson set the car

on fire, but testified that he, the defendant, did not set it on fire.

When the boys left the victim's car, they returned to the Johnson trailer, put the shotgun back together, and left it there. They then went to another trailer to get a crowbar with which to open the trunk, but the woman would not let them in. As they were returning to the Johnson trailer, they could see the victim's car burning. They went into the Johnson trailer, watched the activity around the fire for awhile, and then went to sleep. The shotgun, the victim's wallet, and money taken from defendant's person were all received in evidence.

The jury found the defendant guilty and he was sentenced to life imprisonment.

The defendant first contends that there was no probable cause for his warrantless arrest, and that all evidence obtained thereafter was the fruit of an unlawful and unconstitutional arrest and should have been suppressed.

In Nebraska, as in most other states, a police officer may arrest without a warrant when it appears that a felony has been committed and there are reasonable grounds to believe that the person arrested is guilty of the offense. State v. Russ, 193 Neb. 308, 226 N. W. 2d 775. As this court said in State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595: "Probable cause justifying an arrest without warrant exists if the facts and circumstances known to the arresting officer warrant a prudent man in believing the offense has been committed and that the defendant committed it." See, also, Beck v. Ohio, 379 U. S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142. As the Supreme Court phrased it, the test of probable cause for a warrantless arrest is "* * * whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

The rule of probable cause is a practical rather than a technical concept. In the case at bar, the arresting officers knew that a crime, or crimes, had been committed. The officers had seen the body of the victim and had also examined the burned car and the surrounding area. They had talked to numerous witnesses and knew that the victim had been arguing with two boys about money shortly before the victim's car burned. They had reasonably accurate physical descriptions of the two boys, as well as descriptions of their clothing. After some 2 or 3 hours of investigation, they found two boys asleep in a trailer near the scene of the crime who fit the physical descriptions. When the boys were awakened, they put on clothing matching the descriptions given to the officers. The defendant's clothing appeared to have blood on it and the officers knew about the cut and the blood on the head of the victim. The facts and circumstances known to the officers at the moment of arrest were clearly sufficient to constitute probable cause justifying the arrest.

The defendant next contends that the statements obtained from the defendant on the evening of July 4, 1974, and the morning of July 5, 1974, were involuntary, and were made without a knowing and intelligent waiver of the privilege against self-incrimination.

This issue requires an examination of the occurrences following the arrest of the defendant. The defendant arrived at the police station at about 6:30 a.m. on July 4, 1974. One of the arresting officers attempted to interrogate the defendant and advised him of his Miranda rights. The defendant understood the rights questions and answered them affirmatively until the officer's inquiry as to whether he would make a statement to him without a lawyer and he said "no." At that time the officer ceased the interrogation.

At about 9:30 a.m., the defendant was brought into an interrogation room with two officers and a representative of the county attorney's office present. The

officers knew that defendant was 16 years old and that he had been drinking the night before. They were also of the opinion that he was somewhat subpar mentally. The defendant was sobbing, generally incoherent, and complaining of chest pains. The officers determined that the defendant was in no condition to give a statement then and one of the officers remained with him in an effort to calm him down.

At approximately 10:15 a.m., the defendant's father was called by telephone and stated that he would come down to the station. At about 11:30 a.m., the officer who had remained with the defendant reported that he thought the defendant could be interrogated. The officers returned to the interrogation room, and informed the defendant of his Miranda rights. The defendant answered "yes" to all the rights advisory form questions, and signed the waiver form. The defendant's father had not yet arrived and although the defendant was calmer than before, he was still in some physical distress. A comparatively short statement was given and taped. The statement charged Johnson with striking and robbing the victim, and was essentially the same as the defendant's later testimony at trial, which has already been set out. At the time of the 11:30 a.m., statement, there is no evidence that the defendant had been allowed to call an attorney or that anyone had attempted to call an attorney on his behalf. The defendant's father did not arrive until shortly after the 11:30 a.m., statement had been taken.

The defendant's father advised him to tell the officers what happened, as far as he knew. He also persuaded him to go to the hospital because of the chest pains he was complaining of. The defendant was taken to the hospital. He was examined and X-rayed. The diagnosis was acute anxiety. Ten milligrams of valium were prescribed and administered at 2:20 p.m., with a notation of good relief by 3 p.m. He was released from the hospital at 3:20 p.m., and returned to jail.

There is no specific evidence of what the defendant did thereafter until approximately 10 p.m., that night. Neither the defendant nor his father apparently made any attempt to contact a lawyer. Dispositional hearings in three separate juvenile proceedings against the defendant had previously been set for hearing on the next day, July 5, 1974, and the defendant was represented by retained counsel in those matters.

At 8 p.m., on July 4, 1974, police officers interrogated Robert Johnson and taped a statement from him. Thereafter Officer London was assigned to conduct an interview with the defendant and run a polygraph test on him. The defendant was taken to the polygraph examination room at approximately 10 p.m., and advised of his rights. The defendant signed a waiver on the rights advisory form. Officer London obtained an oral statement which was not taped or transcribed. The officer's testimony indicates that the defendant's statement obtained at this time differed from the statement taken from him that morning in that the defendant said that he and Johnson talked about getting beer out of the car trunk of the victim, and that the defendant rather than Johnson hit the victim with the shotgun barrel and took the billfold. The defendant also conceded it was possible he had started the fire. This interview ended at approximately midnight.

On the morning of July 5, 1974, at approximately 8 a.m., the defendant was again interrogated after once more being advised of his rights and signing the waiver on the rights advisory form. This statement was taped. The defendant stated at one point that he could not remember whether he hit the victim or Johnson did. He stated that "the deal was to get the beer out of his trunk." He also said that Johnson had taken the billfold from the victim, and that the only way the fire could have started was when Johnson lit his cigarette. In later questioning, the defendant, when asked

who actually hit the victim, said "I don't know. I think I did. I don't know for sure if I did or not."

The hearing on the motion to suppress established, in addition to the facts previously noted, that the defendant had an I.Q. of 83, and was classified as low-average or borderline retarded. Following the hearing on the motion to suppress all three statements, the trial court found that the statement taken at 11:30 a.m., July 4, 1974, was involuntarily made. The trial court found that the defendant had not been afforded his right to counsel as to that statement, and that his mental and physical condition at the time of the statement were such that he did not voluntarily, intelligently, and understandingly waive his constitutional rights in making it. Although the statement was suppressed, the defendant later introduced it in evidence at the trial as a deliberate choice of strategy.

The trial court concluded that from noon until 10 p.m., on July 4, 1974, every opportunity was present for the defendant and his father to have contacted an attorney, and that the defendant already had an attorney representing him in connection with three juvenile matters which were scheduled for hearing the next day. The court also determined that the defendant had been through Miranda rights interrogations before in connection with those juvenile matters and had exercised his rights in varying fashion on each of those occasions. The court found that the defendant understood the questions here and knew and understood what was going on. The court determined that the defendant's physical condition at 10 p.m., July 4 and the morning of July 5, 1974, did not interfere with his ability to comprehend questions and give responsive answers. The court therefore found that the defendant voluntarily, understandingly, and intelligently waived his constitutional rights at the time he made his statement at 10 o'clock on the evening of July 4 and on the following morning. The court therefore permitted those statements to be admit-

ted in evidence, subject to the jury's ultimate determination as to whether or not they were made freely, voluntarily, and intelligently, and whether the requisite Miranda warnings had been given.

Although Miranda might be construed to bar any further questioning of a defendant after he had said he wanted a lawyer until such time as an attorney is present, that conclusion does not necessarily follow. In Michigan v. Mosley, 423 U. S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313, the Supreme Court determined that under Miranda, the invocation of the privilege against self-incrimination was not a "per se proscription of indefinite duration." The Supreme Court said: "We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.' "

In the case at bar the defendant contends that where the first statement was ruled involuntary, the later statements must necessarily be suppressed also. We disagree where a 10-hour time interval intervened between the two statements, during which the defendant or his father, or both, had time and opportunity to consult with counsel but did not do so. Where the defendant already had counsel retained in the juvenile matters set for the next morning, the failure to exercise the right and opportunity to consult with counsel after requesting it, ought not to invalidate all statements made thereafter. We believe the evidence sufficiently establishes the insulation of the first statement from those which followed to comply with Miranda.

In cases such as this the basic issue is whether or not the totality of the circumstances demonstrates the voluntariness or involuntariness of the statements. In Schneckloth v. Bustamonte, 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854, the Supreme Court said: "This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty.

The Due Process Clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect."

The record of the interrogations, reinforced by the tape of the third statement, is devoid of any indication of coercion unless it can be said that custodial surroundings in themselves constitute coercion. While the defendant's age and mentality are appropriate factors to consider in weighing the totality of the circumstances, so is the defendant's previous experience with police interrogation in custodial surroundings. If the defendant's contentions were to be accepted, it would be practically impossible for a 16-year-old boy with an I.Q. of 83 to waive his constitutional rights or to make a voluntary statement which would be admissible at trial. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. Brady v. United States, 397 U. S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747; State v. McDonald, 187 Neb. 752, 194 N. W. 2d 183. The determination of whether a statement was voluntarily made necessarily turns on the consideration of the totality of the circumstances in any particular case. Schneckloth v. Bustamonte, *supra.*

The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. State v. Russell, 194 Neb. 64, 230 N. W. 2d 196. In the case before us, the totality of the circumstances supports the conclusion of the trial court that the defendant's statements on the evening of July 4 and the morning of July 5, 1974, were given voluntarily, knowingly, and intelligently, and were not constitutionally defective. See State v. Russell, *supra.* A finding of the trial court that a statement of an accused is voluntary will not ordinarily be set aside on ap-

peal unless the finding is clearly erroneous. State v. Medina, 189 Neb. 765, 204 N. W. 2d 785.

The defendant also contends that the trial court erred in refusing to instruct the jury that manslaughter was a lesser included offense in a charge of felony murder. The defendant argues that under his theory of the case and his testimony that he had no knowledge that Johnson intended to rob the victim, the refusal to instruct upon a lesser included offense after request constituted error.

In answer to the same contention in a felony murder case, this court said: " 'An information charging defendant with a homicide committed in the perpetration of or attempt to perpetrate a robbery, * * * charges only murder in the first degree, and it is error for the trial court to instruct the jury that they may find defendant guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter.' " State v. Montgomery, 191 Neb. 470, 215 N. W. 2d 881.

The defendant contends that the Montgomery case acknowledges that there might be a set of facts under which an instruction on lesser included offenses might be appropriate. However, the exceptional situation referred to in that case was one in which there was a time lag between an assault, clearly complete, which results in death, and the robbery; where the robbery was clearly an afterthought, and the assault itself was not the direct means of perpetrating the robbery. Those circumstances simply do not appear here. All that must be proved on a felony murder charge is that a death occurred in the perpetration of one of the specific felonies listed in section 28-401, R. S. Supp., 1974. If those facts are not proven, the defendant is not guilty. Second degree murder or manslaughter are included within a regular charge of first degree murder because the mental state of the defendant determines the degree of the crime. In a felony murder case, the proof of a particu-

lar mental state is not required as to the killing. See Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151. Where an information charges a defendant with a killing committed in the perpetration of a robbery, it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of manslaughter, even though such an instruction is requested.

The defendant contends in his brief that the defendant was denied due process because there was no compliance with the provisions of juvenile statutes applicable to taking juveniles into custody. The issue was not raised in the motion for a new trial nor presented to the trial court. Under such circumstances it will not be considered here.

The judgment is affirmed.

AFFIRMED.

JUDY WORTMAN, APPELLANT, V. NORTHWESTERN BELL TELEPHONE COMPANY, A CORPORATION, APPELLEE.
240 N. W. 2d 15

Filed March 25, 1976. No. 40186.

1. **Damages: Pleadings: Trial.** Loss of past earnings is an item of special damage and must be specifically pleaded and proved. Impairment of earning capacity is an item of general damage and proof may be had under general allegations of injury and damage.
2. **Damages: Pleadings.** It is unnecessary to plead or establish an actual loss of earnings to recover for loss of earning capacity.
3. **Damages: Trial: Evidence.** Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded for a new trial.

Norman Denenberg, for appellant.

Joseph K. Muesey of Fraser, Stryker, Veach, Vaughn & Muesey, for appellee.

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

WHITE, C. J.

This is an action for damages arising out of personal injuries sustained in a motor vehicle collision. The plaintiff appeals from a jury verdict of $1,000. We reverse the judgment of the District Court and remand for a new trial.

On February 7, 1973, the plaintiff, Judy Wortman, while driving an automobile, stopped for a stop sign and was struck from behind by the defendant's truck. The District Court determined that, as a matter of law, the defendant's negligence was the sole and proximate cause of the accident. The only remaining question for the jury was that of damages. In its instructions to the jury, the District Court refused to give an instruction relating to the plaintiff's right to recover damages for the loss of earning capacity. The plaintiff's sole contention on appeal is that the District Court erred in refusing to give this instruction. We agree with the plaintiff.

In Baylor v. Tyrrell, 177 Neb. 812, 131 N. W. 2d 393, we dealt with the propriety of submitting an instruction on loss of earning capacity. In that case we said: "* * * impairment of earning capacity is an item of general damage and proof may be had under general allegations of injury and damage. Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891; Carlile v. Bentley, 81 Neb. 715, 116 N. W. 772; Wilson v. Sorge, 256 Minn. 125, 97 N. W. 2d 477; Klingbeil v. Truesdell, 256 Minn. 360, 98 N. W. 2d 134. * * *

"The proper distinction between the two elements of damage and the factors involved in the *proof of loss of earning capacity is well stated* in a case cited by the defendant, Klingbeil v. Truesdell, *supra,* wherein it said:

'The apparent difficulties encountered in proving diminution of earning capacity have now been largely solved by our decision in Wilson v. Sorge, 256 Minn. 125, 132, 97 N. W. 2d 477, 483, where we noted that impairment of earning capacity is an item of general damages. "It permits recovery for a loss or diminution of the power to earn in the future and is *based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry.* It is within the province of the jury to weigh all these elements and, guided by experience and common sense, to arrive at the proper monetary *value of plaintiff's loss without recourse to his past earnings.*" ' (Emphasis supplied.) See, also, Riddel v. Lyon, supra; Hrabak v. Hummel, supra; Zaikaner v. Small, 256 Minn. 275, 98 N. W. 2d 247; Lieberman v. Korsh, 264 Minn. 234, 119 N. W. 2d 180.

"It being *unnecessary to plead or establish an actual loss of earnings to recover for loss of earning capacity,* we briefly allude to the evidence as to its sufficiency. Besides the general weakness, fatigue, discomfort, and pain the plaintiff has suffered, there is ample evidence in the record as to plaintiff's age, life expectancy, health, habits of work that have been interfered with, his talents, skill, training, experience, and industry. * * *

"We therefore hold that loss of earning capacity was properly submitted, that *loss of earnings was not necessary to be pleaded or proved, and that the proof was sufficient as to the required factors establishing loss of earning capacity.*" (Emphasis supplied.)

In reviewing the record in this case, it is clear that there was ample evidence concerning the factors named in Baylor v. Tyrrell, *supra.* The evidence in the case at bar provided ample proof of plaintiff's age, life expectancy, health, both before and after the accident, habits, occupation, talent, skills, experience, training, and industry. All these are the elements to be considered in determining loss of earning capacity. She testified

how she could no longer do the work she had done previously; how she turned down full-time waitress work; and how her ability to do her housework and recreation had been impaired. Both doctors agreed that her disability was permanent at about 15 to 20 percent of her back, or body as a whole. There was no reason for the court to fail to instruct on loss of future earnings, particularly after the plaintiff had detailed evidence of all the necessary elements bearing on the issue. There was evidence of the hours she worked and the wages she earned from 1970 to 1974. In 1974 she worked over 200 hours less than she had worked in 1972 before the accident. Her background and work experience from age 16 through age 33 was established. Thus, it is clear that the plaintiff produced evidence relating to all the factors necessary to prove loss of earning capacity and that the plaintiff was entitled to have the issue of loss of earning capacity submitted to the jury.

The defendant argues that the plaintiff was not entitled to an instruction on loss of earning capacity because there was no medical testimony connecting Mrs. Wortman's injury to her inability to work as many hours. We know of no Nebraska cases that categorically require medical expert testimony relating medically established physical disability to an actual loss of future earning capacity. The factors enunciated in Baylor v. Tyrrell, *supra,* are susceptible to lay testimony. As we have pointed out, impairment of earning capacity is an item of general damage and proof may be had under allegations of injury and damage. In Siciunas v. Checker Cab Co., Inc., 191 Neb. 766, 217 N. W. 2d 824, a closely similar case, the same contention was made that the plaintiff "had minimal permanent disability as the result of the accident." The trial court submitted the issue of future loss of earnings under the doctrine of Baylor v. Tyrrell, *supra,* and the court based its decision upon a review of the lay testimony demonstrating that her disability had materially impaired her capacity to

perform tasks incident to the occupation in which she was engaged. In the case of Schwab v. Allou Corp., 177 Neb. 342, 128 N. W. 2d 835, relied upon by the defendant, there was medical testimony, as here, as to a percentage of permanent physical disability, and the court in holding that the issue of future loss of earnings should not have been submitted simply held that on the facts the plaintiff did not prove any permanent loss of earning power in her profession as a teacher, although she did show permanent injury. See Schwab v. Allou Corp., *supra*, at p. 355. The case does not hold that medical testimony is necessary to establish the future loss of earning power.

Moreover, in this case, there was medical testimony that the plaintiff had sustained a partial *permanent* disability to her back. In addition, there was testimony from several witnesses as to the effect of the injury on the plaintiff; that she could neither sit nor stand for long periods of time, nor could she engage in any strenuous physical activity. Mrs. Wortman testified that due to the pain in her back, she was unable to work as much as she did in the past. Taken together, the medical testimony concerning the injury's effect on the plaintiff, and the plaintiff's own testimony as to the injury's effect on her work, are clearly sufficient to require the submitting of an instruction to the jury on loss of earning capacity.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

ALLEN WARD ET AL., APPELLEES, V. NEBRASKA ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC., A COOPERATIVE CORPORATION, APPELLANT.
240 N. W. 2d 18

Filed March 25, 1976. No. 40211.

1. **Eminent Domain: Trial: Evidence.** The questioning of a wit-

ness in a condemnation proceeding concerning the possibility of locating a transmission line at an alternative site is not proper, but does not necessarily constitute prejudicial error, particularly where objections to questions are immediately sustained before the witness answers.

2. **Trial: Jury.** The validity of an objection to the taking of notes by jurors depends on the subsequent use of those notes resulting in prejudice to the objector.
3. **Eminent Domain: Damages.** The measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement.
4. **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.
5. **Damages: Evidence: Verdicts.** A verdict may be set aside as excessive only where it is so clearly exorbitant as to indicate that it was a result of passion, prejudice, or mistake or that it is clear that the jury disregarded the evidence or controlling rules of law.
6. **Fees: Attorneys at Law.** A trial court's award of attorney's fees will not be reversed on appeal unless an abuse of discretion is shown.

Appeal from the District Court for Cherry County: HENRY F. REIMER, Judge. Affirmed.

Kenneth M. Olds of Olds & Swarts, for appellant.

Bill Quigley of Quigley, Dill & Quigley, for appellees.

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

BRODKEY, J.

Nebraska Electric Generation and Transmission Cooperative, Inc., an electric cooperative corporation organized under the laws of the State of Nebraska, with the power of eminent domain granted under section 76-704, R. R. S. 1943, appeals to this court from a jury award of $20,000 in a trial held in the District Court for Cherry County, in a condemnation proceeding. The

action was instituted by the appellant against the landowners, Allen Ward and his wife Mae T. Ward, to obtain a perpetual easement for the purpose of erecting and maintaining a 115,000-volt transmission line across certain real estate owned by the Wards near Valentine, Nebraska. We affirm.

At the outset, we wish to point out that in its petition for condemnation filed in the county court of Cherry County, and also in its pleading on appeal in District Court, appellant alleges: "Petitioner does not seek by these proceedings to take or condemn any land of the defendant, *except that actually displaced by the poles of said transmission line* and makes no claim of ownership of any of said real estate which is overhung by the cross arms, wires or other apparatus; that said petitioner seeks only the right to construct, operate and maintain said transmission line in the manner hereinbefore described, including without limiting the generality of said terms the right of ingress and egress within the easement area over the lands described herein as may be necessary in the course of the construction, maintenance and operation of the said line and removal of the same at the will of the petitioner, or its successor." (Emphasis supplied.) The foregoing language would appear to be susceptible to the interpretation that in addition to condemning an easement, appellant was also condemning the land itself on which the pole or structure of the transmission line rests. We do not believe this is so. Nowhere in the pleadings nor in the testimony is there any reference whatsoever to the amount of the area displaced by the poles and structures, nor is there any legal description of that property. The case was tried strictly on the theory that only an easement was involved in the condemnation procedure. Also, the court, in instructing the jury as to the proper way of determining "just compensation" to the Wards, instructed only with reference to the taking of an easement, stating that the measure of damage was the difference as of

August 31, 1973, between the fair and reasonable market value of the ranch lands owned by the Wards before the easement was taken and a fair and reasonable market value of the ranch lands of the Wards after that easement was taken. Ordinarily, this court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties. Durfee v. Keiffer, 168 Neb. 272, 95 N. W. 2d 618 (1959); Schimonitz v. Midwest Electric Membership Corp., 182 Neb. 810, 157 N. W. 2d 548 (1968). We shall, therefore, dispose of this case on the theory that all appellant asked for and received in the condemnation proceeding was a transmission line easement over the Wards' property, and that no taking of the property itself is involved.

The legal description of the property involved and of the easement area was stipulated between the parties and appears in evidence as exhibits 1 and 1A. The easement extends for 5,108 feet and encompasses an area of 50 feet on each side of the centerline. There have been 5 2-pole structures, 3 3-pole structures, and 9 anchors placed on the Wards' property. The area covered by the easement itself is 11½ acres.

The appraisers appointed by the county judge pursuant to section 76-706, R. R. S. 1943, set the damages sustained by the Wards at $16,000. Appellant Electric Company then appealed to the District Court for Cherry County, where, as provided by statute, the Wards appear and are designated in the pleadings as the plaintiffs, and the Nebraska Electric Generation and Transmission Cooperative, Inc., as the defendant. Trial was had to a jury, which awarded damages to the Wards in the amount of $20,000. Since the jury's verdict exceeded the appraisers' award by more than 15 percent, the trial judge also allowed an attorney's fee for appellees' counsel of $1,600, and also an expert witness' fee of $125, for appellees' appraiser, under section 76-720, R. R. S. 1943.

In its brief on appeal, appellant makes the following assignments of error: (1) The court erred in not grant-

ing a mistrial to appellant; (2) damages allowed to the property owners were excessive; and (3) attorney's fees allowed by the court were excessive. We shall discuss these assignments in the order they are made.

Appellant's first contention that the court erred in not granting its motion for a mistrial is based upon the following events. Prior to the impaneling of the jury, counsel for appellant stated to the court that there had been some indication that certain testimony relative to rerouting or relocation of the transmission line, which counsel felt was improper to present to the jury as not being in issue, might be adduced at the trial. He added that if such occurred, he would move for a mistrial. Nothing further was stated at that time, and no action was taken by the court or counsel. The record reveals, however, that during the course of redirect examination of Allen Ward, the landowner, by his counsel, the following exchange occurred: "Q. (By Mr. Quigley) Did you, Mr. Ward, did you want the power line where it is? MR. OLDS. I object to that as highly improper and not a part of the issues in this case. THE COURT: The objection is sustained. Q. (By Mr. Quigley) Were you consulted by the defendant as to the location of the — the present location of the power line prior to the time of the condemnation? MR. OLDS: Same objection— THE COURT: The objection is sustained. MR. OLDS: (Continuing) Your Honor, and I ask that the jury be dismissed for the purpose of making an objection." The jury was then excused, and counsel then moved for a mistrial on the ground that the questions propounded were improper and prejudicial. The court at that time overruled the motion for a mistrial stating: "There was no, even an attempt, to answer, and the objections to the line of questioning were sustained immediately upon the objection being made, and it is the belief of the Court that no information got to the jury that would prejudice this jury. You may well want an instruction on that particular matter, and the Court will consider giving an

instruction, but the motion for mistrial is overruled. You may bring the jury back in."

Subsequently, the court apparently noticed a juror by the name of O'Kief, who later became foreman of the jury, taking notes. The court informed the jury that note taking was not permitted and confiscated the notes. Among other information appearing in the notes was a statement, "Condemned without consultation of land owner." Counsel argues that the notation referred to makes it obvious that counsel for the landowners did get across to the jury that the property had been condemned without consultation of landowners, and that this was also prejudicial to appellant.

We have held that evidence concerning the location of a transmission line and the possibility of locating elsewhere is not proper evidence in condemnation proceedings. Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209 (1959). The questions asked of witness Ward by his counsel on this subject were unquestionably improper, particularly after the statement of counsel of appellant to the court prior to the impaneling of the jury. However, we believe in this case no prejudice resulted, as the court immediately sustained objections to the questions and the witness was not permitted to answer. The court at that time also informed counsel for appellant that he would consider instructing the jury on that matter if counsel wanted an instruction. Counsel did not avail himself of the offer. The court properly overruled the motion of appellant's counsel for a mistrial.

With reference to the taking of notes by jurors, the Nebraska cases tend to indicate that this practice has never been actually prohibited, although it has been frowned upon, and may, in some cases, constitute prejudicial error. We have recently held that the validity of an objection to the taking of such notes by jurors would seem to be based upon the subsequent use of such notes. Bakhit v. Thomsen, 193 Neb. 133, 225 N. W. 2d 860

(1975). There is no showing in the record whether any of the jurors ever saw the notes in question, or whether juror O'Kief ever communicated the information contained in his notes to any of the other jurors, or whether his notation "Condemned without consultation of land owner" did, in fact, prejudicially influence his own conclusions and the resulting verdict. In this connection, we note that the jury returned its verdict on April 8, 1975, and that appellant's motion for a new trial was argued and overruled on May 23, 1975. Appellant's counsel had over 6 weeks before argument for a new trial to obtain evidence regarding the above matters in order to demonstrate any resulting prejudice. In the absence of a showing of such prejudice, the trial court properly ruled against it on that assignment as set out in its motion for new trial.

We next consider appellant's claim that the damages awarded by the jury in the sum of $20,000 were excessive. The measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement. Fulmer v. State, 178 Neb. 664, 134 N. W. 2d 798 (1965); Roush v. Nebraska Public Power Dist., 189 Neb. 785, 205 N. W. 2d 519 (1973). See, also, NJI No. 13.06. 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, 193 Neb. 826, 229 N. W. 2d 203 (1975); Johnson v. Nebraska Public Power Dist., 187 Neb. 421, 191 N. W. 2d 594 (1971). A verdict may be set aside as excessive only where it is so clearly exorbitant as to indicate that it was a result of passion, prejudice, or mistake or that it is clear that the jury disregarded the evidence or controlling rules of law. Schimonitz v. Midwest Electric Membership Corp., *supra*; Garska v. Harris, 172 Neb. 339, 109 N. W. 2d 529 (1961).

There is a disparity in the testimony as to the size of the property owned by the Wards at the time of the condemnation of the easement. Mr. Ward testified that it was from 460 to 470 acres in size originally and that he had sold off 16 acres before the condemnation, and 4 acres after the condemnation. Willard Burney, who testified for the appellant, testified that the Ward property was 480 acres in size of which 12 acres had been sold prior to condemnation leaving 468 acres remaining. The actual acreage involved in the easement itself is 11½ acres. The remainder of the Ward property, whatever its correct size, is mostly pastureland; but also includes some rough timberland and about 6 acres devoted to buildings. The principal use of the land is for ranching, rather than farming. Two creeks cut across the land adding to its value for residential purposes; and, in fact, there has been in recent years a movement of residents in Valentine to acquire acreages for residential purposes close to the City of Valentine. Prior to the condemnation the Wards had actually sold a number of lots from their property for residential purposes. It was, and is, the intention of the Wards to continue to develop the property for residential purposes; and even a witness for appellant testified that 40 acres of the tract had residential potential. The expert witness for the landowners indicated that about 40 acres of the tract were prime sites for that purpose, and Ward, himself, testified that 9 lots were suitable for acreages. There was evidence that the value of some of the prospective residential areas was substantially reduced by the transmission line, which is quite close to a number of the residential lots. Ray Ballard, the expert witness who testified for the Wards, stated that the value and salability of the lots had been reduced, and that he thought the residential potential of 30 acres had been destroyed.

As is frequently true in cases of this kind, there was a wide disparity as to the difference in value of the land

before and after the taking. Allen Ward, the owner, testified that the property was worth $115,000 before the taking and $70,000 after the condemnation, and that his damages were, therefore, $45,000. The expert witness, Ray Ballard, a local licensed real estate broker with experience in the appraisal of property, testified that the value of the property before the taking was $116,800 and after the taking $84,450, and that the damage to the Wards' property was $32,350. Willard Burney, the appraiser witness for the appellant, with considerable experience in that field, testified that the value of the property before the taking was $75,000, and after the taking $70,200, with the damage to the Wards being $4,800. It is to be noted that the verdict of the jury for $20,000 was less than ½ of Mr. Ward's estimate of damages and was within the range of values established by both appellees' and appellant's witnesses.

In Little v. Loup River Public Power Dist., 150 Neb 864, 36 N. W. 2d 261 (1949), this court was faced with a similar situation of conflicting evidence of damages. We quote from the opinion of the court in that case: "Appellant claims that the verdict is excessive. The rule is that the amount of damages sustained by a landowner for right-of-way condemned across his land is a question of a local nature proper to be determined by a jury of the county, and this court ordinarily will not interfere with the verdict if it is based on the evidence in the case. * * * There was material disagreement of the witnesses as to the market value of the land, both before and after the appropriation of the right-of-way. The qualification of each witness to testify was established. * * * There was no evidence produced to discredit any witness. The testimony was conflicting. It was pertinent to the issue and it was for the jury to say what conclusion should be drawn therefrom. It would be arbitrary and without justification for this court to substitute its judgment for that of the jury. When the evidence is conflicting, the verdict of a jury will not be

set aside unless it is shown to be clearly wrong. * * * The jury are the judges of the credibility of witnesses and the weight of their testimony. * * * In Remmenga v. Selk, ante p. 401, 34 N. W. 2d 757, it is said: 'In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.' It cannot be said that the verdict in this case is excessive.

"It is said by appellant that the verdict was the result of passion and prejudice, but it fails to indicate anything in the record of the case tending to support this charge. It will not be presumed that passion and prejudice influenced the minds of the jurors. It must be made to appear from the record before the verdict will be disturbed by this court."

In the instant case, the jury was permitted to visit and inspect the property. We have held that the fact the jury had the opportunity to visit the property is of significance in determining whether the verdict was excessive. Johnson v. Nebraska Public Power Dist., *supra*. We are unable to say in this case that the verdict of the jury was clearly wrong and that the damages awarded were excessive.

Although counsel for appellant raised no objection at the time of the hearing for the allowance of attorney's fees to counsel for the landowners, he now contends that the award of $1,600 was excessive. It is true that counsel for the landowners submitted no itemized statement of services in connection with his request for a fee, showing with specificity the time spent on various phases of the litigation and his charges therefor, but he did advise the court that he had spent approximately 20 hours in preparation for the trial and was engaged in the trial itself for 2 days. The trial judge did not explain the basis on which he arrived at the $1,600

figure, but we cannot say the award was excessive. Counsel did succeed in raising the amount of the award of the appraisers from $16,000 to a final award by the jury of $20,000. In Schimonitz v. Midwest Electric Membership Corp., *supra,* the award in the county court was $5,795.50 and the verdict of the jury was $9,840 or an increase of $4,044.50. The opinion in that case does not indicate the time involved for preparation, but there was a trial of 2 days duration. The court determined that a reasonable fee was $1,500. We realize that we cannot determine the amount of attorney's fees to be awarded by color matching of cases, nevertheless, that case is persuasive, and we conclude that the award of $1,600 in this case was not inappropriate. See, also, Hughes Farms, Inc. v. Tri-State Generation & Transmission Assn., Inc., 182 Neb. 791, 157 N. W. 2d 384 (1968); Johnson v. Nebraska Public Power Dist., *supra.*

Having determined that all appellant's assignments of error are without merit, we affirm the judgment of the District Court.

AFFIRMED.

LYNN SWASSING, APPELLANT, V. C. J. BAUM ET AL., APPELLEES.

RONALD W. SWASSING, APPELLANT, V. C. J. BAUM ET AL., APPELLEES.

240 N. W. 2d 24

Filed March 25, 1976. Nos. 40215, 40216.

1. **Words and Phrases.** A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.
2. ———. In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself.

3. **Limitations of Actions: Malpractice: Physicians and Surgeons.** The Legislature, by enacting section 25-222, R. S. Supp., 1974, did not intend that the various aspects of the whole professional relationship should be separated and a 2-year statute of limitations be applicable to those acts performed directly by the doctor or head of the professional unit, and a 4-year statute of limitations be applicable to acts performed, during the course of the professional relationship, by employees of the professional unit upon specific direction of the professional master.
4. **Limitations of Actions.** The special statute of limitations controls over a general one because the special statute is the one that expresses the legislative will, providing the acts complained of come within the meaning therein expressed.

Appeals from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

David J. Johnson, Ronald H. Stave, and Emil F. Sodoro, for appellants.

John R. Douglas of Cassem, Tierney, Adams & Gotsch and Frederick M. Deutsch, for appellees.

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

WHITE, C. J.

This case involves appeals from the sustaining of demurrers and the dismissal by the District Court of the plaintiffs' petitions. We affirm the judgment of the District Court.

On August 6, 1974, petitions were filed by the plaintiffs in the District Court for Douglas County, Nebraska. The defendant, Dr. Baum, and his employee, Mrs. Van De Vegt, were named as codefendants. The petitions alleged the following facts. In June or July 1966, plaintiff Lynn Swassing came to Dr. Baum for testing and examination to determine if she was pregnant. Dr. Baum ordered Mrs. Van De Vegt to do a blood typing test on Mrs. Swassing. This was done. Dr. Baum advised Mrs. Swassing that she had type A-positive blood.

Previously, Mrs. Swassing did not know her blood type. It was determined that she was pregnant and in October 1966 with Dr. Baum attending, a normal, healthy, female child was born to her.

In May or June 1968, Mrs. Swassing returned to Dr. Baum and again he determined that she was pregnant. No blood typing test was performed at this time. In January 1969, with Dr. Baum attending, Mrs. Swassing gave birth to her second child, this time a normal, healthy male child.

In October or November 1970, Mrs. Swassing again presented herself to Dr. Baum for examination. This time Dr. Baum ordered a new blood typing test performed. The results from this test showed that Mrs. Swassing had AB-negative blood, and not A-positive blood as the 1966 test had indicated. A second test in December 1970, reaffirmed that Mrs. Swassing had AB-negative blood. It was then determined that Mr. Swassing had A-positive blood, and that the combination of the two types created an RH factor in the blood of the child Mrs. Swassing was then pregnant with. That child, Richard Swassing, was born in March 1971 with serious and permanent injuries. It was alleged that had not Mrs. Swassing's blood been erroneously typed in 1966 by Dr. Baum's employee, Mrs. Van De Vegt, the injuries to Richard Swassing could have been averted. It was further alleged that as a direct and proximate result of that negligence it is now impossible for Mrs. Swassing to bear normal, healthy children in the future. Damages were sought.

The plaintiffs sought to recover from Dr. Baum on the theory that he is liable for the negligent acts of Mrs. Van De Vegt, as her employer, under the doctrine of respondeat superior. Dr. Baum demurred to the plaintiffs' petitions on the grounds that they alleged an act of professional negligence which had occurred in 1966, and which was discovered in October or November 1970, or March 1971, when Richard Swassing was born, at the

latest; that plaintiffs' actions were not filed until August 1974, and consequently the causes of action were barred by the Nebraska statute of limitations governing actions for professional negligence. § 25-222, R. S. Supp., 1974. Dr. Baum further demurred on the ground that insofar as plaintiffs sought to recover damages for mental anguish, their petitions failed to state a cause of action. The District Court, after a hearing on the motions, held that section 25-222, R. S. Supp., 1974, applied to the plaintiffs' causes of action and that they were barred. The demurrers were sustained and plaintiffs' petitions were dismissed with prejudice. Both plaintiffs have appealed and the cases have been consolidated here.

Section 25-222, R. S. Supp., 1974, provides as follows: "Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; Provided, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; and provided further, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action."

It is apparent that a direct action against Dr. Baum could not be maintained by plaintiffs. Therefore, instead of proceeding directly against Dr. Baum for professional negligence, the plaintiffs attempt to reach him indirectly with a respondeat superior theory, hoping

thus to avoid the statutory bar of section 25-222, R. S. Supp., 1974. The plaintiffs' theory is as follows: Mrs. Van De Vegt was an employee and agent of Dr. Baum. Her alleged negligence in making an erroneous blood type of Mrs. Swassing, it is contended, was not professional negligence, but ordinary negligence, governed by a 4-year statute of limitations. Their actions, based upon this negligence, were therefore timely brought, the actions being filed in August 1974, and the negligence being discovered in October 1970 at the earliest.

Boiled down, the question presented is whether Mrs. Van De Vegt, at the time of the alleged negligence, was performing professional services. If she was, then any negligence occurring during such performance would constitute professional negligence. If this be the case, the plaintiffs' causes of action against Mrs. Van De Vegt would be barred by the professional negligence statute of limitations, section 25-222, R. S. Supp., 1974, and likewise their causes of action against Dr. Baum on a respondeat superior theory would fail.

The plaintiffs contend that a question of fact is presented as to whether Mrs. Van De Vegt was engaging in professional services at the time and under the circumstances alleged in their petitions. But the cases are here on demurrers, and for that purpose the facts as alleged by the plaintiffs must be taken to be undisputed and, therefore, the question presented is whether these undisputed facts, if proved, constitute "professional services" under the applicable rule of law. This, of course, presents a question of law to be determined by the court. As we shall see in the following discussion in this opinion, the facts alleged in the petitions constitute, as a matter of law, a rendition of professional services, because the performance of the blood test was an essential and integral part of the rendition of professional services by Dr. Baum to Mrs. Swassing.

The plaintiffs also contend that evidence on Mrs. Van De Vegt's status at the time in question, e.g., registered

nurse, medical technician, et cetera, must be presented for a proper determination of whether she was performing professional services. In Marx v. Hartford Accident & Indemnity Co., 183 Neb. 12, 157 N. W. 2d 870 (1968), this court wrote: "A 'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. * * * In determining whether a particular act is of a professional nature or a 'professional service' *we must look not to the title or character of the party performing the act, but to the act itself.*" (Emphasis supplied.) It is thus irrelevant, in determining whether Mrs. Van De Vegt was performing a professional service at the time of the alleged negligence, to show what the title of her position with Dr. Baum was, or what her status was denominated. The court must look to the nature of the act itself and the circumstances under which it was performed.

The 1966 blood typing test on Mrs. Swassing, was performed by Mrs. Van De Vegt at the specific direction of Dr. Baum. Mrs. Van De Vegt was an employee within Dr. Baum's professional unit. The results of the blood test provided Dr. Baum with vital and necessary information in his examination and diagnosis of Mrs. Swassing. The performance of the blood test was an essential and integral part of the rendition of professional services by Dr. Baum to Mrs. Swassing. When Mrs. Swassing presented herself to Dr. Baum in 1966 for examination and diagnosis, a professional relationship, in this case, doctor-patient, was created. This professional relationship was the stimulus for the performance of the blood typing test on Mrs. Swassing, and the test and the interpretation of its results all occurred during the course of the professional relationship.

In Stacey v. Pantano, 177 Neb. 694, 131 N. W. 2d 163 (1964), the plaintiff attempted to separate the actions

of a physician in fraudulently concealing the cause and nature of a patients condition from a claim for damages for earlier negligence in diagnosis and treatment. All the statements and acts complained of occurred during the physician-patient relationship. The plaintiff in that case sued on a theory of fraud, fraud being governed by a 4-year statute of limitations. The defendant physician maintained that the 2-year statute of limitations for malpractice, section 25-208, R. R. S. 1943, applied and that the action was consequently barred. The District Court dismissed the action and this court affirmed. We stated: "We do not think that the advise and the statements of a physician as to the nature and cause of a patient's condition, as a part of the necessities of treating and consulting with the patients, are separable. *They are essentials to the performance of the physician's whole duty to the patient.* We do not think that the Legislature, when it enacted the special limitation statute of 2 years on malpractice intended to separate certain portions of the whole physician-patient relationship and apply a confusing standard of 2 and 4 years to different portions of that relationship, or to require the courts to make such a nebulous and difficult fact separation and determination." (Emphasis supplied.)

Similarly, we do not believe that the Legislature in adopting the special statute of limitations for professional negligence, section 25-222, R. S. Supp., 1974, intended that the various aspects of the whole professional relationship should be separated and a 2-year statute of limitations be applicable to those acts performed directly by the head of the professional unit, and a 4-year statute of limitations be applicable to acts performed, during the course of the professional relationship, by employees of the professional unit upon specific direction of the professional master to be used in and constituting a necessary, essential, and integral part in the rendition of professional services to a client, for

which the head of the professional unit is liable under the doctrine of respondeat superior.

Actions based upon professional negligence often turn upon minute and precise factual distinctions. The purpose of section 25-222, R. S. Supp., 1974, was to insure that actions based upon professional negligence would be brought shortly after the alleged negligence occurred or was discovered so that the professional could have a fair chance to defend on the merits and not find his defenses eroded by the lapse of time.

We hold, therefore, that at the time of the allegedly negligent blood typing, Mrs. Van De Vegt was performing professional services and any negligence on her part constituted professional negligence within the meaning of section 25-222, R. S. Supp., 1974. The special statute of limitations controls over a general one "* * * because the special statute is the one that expresses the legislative will providing the acts complained of come within the meaning therein expressed." Stacey v. Pantano, *supra*. Since the actions against Mrs. Van De Vegt are barred, the causes of action against Dr. Baum based on the theory of respondeat superior, are also barred. The District Court was correct in sustaining the demurrers of defendant Baum and dismissing the plaintiffs' petitions.

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

AFFIRMED.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., A CORPORATION, APPELLEE, V. HAWKEYE-SECURITY INSURANCE COMPANY, APPELLANT.

240 N. W. 2d 28

Filed March 25, 1976. No. 40242.

1. **Insurance: Contracts.** In the resolution of a controversy con-

cerning the meaning of an insurance contract and the coverage therein, the contract must be viewed as a whole.

2. ———: ———. An insurance contract must be construed so as to give effect to the intent of the parties at the time the contract was made.
3. ———: ———. Insurance companies have the same right as individuals to limit their liability.
4. **Pleadings: Notice.** An answer is a pleading, the purpose of which is to notify the court and the plaintiff of the defense relied upon so that the latter may be prepared to meet it.

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

William P. Mueller and C. Kenneth Spady of McGinley, Lane, Mueller, Shanahan, McQuillan & Gale, for appellant.

Wright & Simmons, for appellee.

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

WHITE, C. J.

This is an action to recover on a comprehensive liability insurance policy issued by the defendant, Hawkeye-Security Insurance Company, to Gilbert O. Huston, a judgment debtor of the plaintiff, Kansas-Nebraska Natural Gas Company, Inc. (hereinafter referred to as the gas company). The District Court found for the gas company, and the defendant appeals. We reverse and dismiss.

On *December 15, 1959,* Gilbert O. Huston, an excavator, was digging a sewer trench in Scottsbluff, Nebraska, when he struck and damaged one of the gas company's natural gas pipelines with his back-hoe. Huston refilled the trench and covered the pipeline without notifying the gas company of the damage. On November 30, 1965, Huston purchased a comprehensive general liability insurance policy from the defendant, Hawkeye-Security Insurance Company. This policy did not pro-

vide coverage for completed operations, that is, accidents occurring after an excavation was completed.

On *January 28, 1966,* over 6 years later, a fire occurred at the residence of Harvey Duy which resulted in the death of Stephen Duy, personal injury to others, and damage to the Duy house. The fire was caused by gas which leaked from the gas company's pipeline. The leak was apparently caused by the damage done to the pipeline by Huston 6 years earlier. The Duys brought three negligence actions against the gas company. On May 2, 1969, the gas company entered into a settlement agreement with the Duys, agreeing to pay them $20,000 in return for a release from all liability resulting from the fire.

The gas company then brought an action against Huston and certain other parties who were involved in the trenching operations for indemnification for the money paid to the Duys, and for the accompanying legal expenses. Huston requested that the Hawkeye-Security Insurance Company defend him under the liability insurance policy, but the defendant refused on the basis that there was no coverage. The gas company then entered into an agreement with Huston and the other defendants in that action, in which the parties agreed to enter into a stipulation whereby a judgment would be entered against Huston alone. However, the gas company agreed not to enforce the judgment against Huston and in return, Huston assigned all his rights under the Hawkeye-Security Insurance Company's policy. The defendants in that action, including Huston, also agreed to pay the gas company $12,000. The stipulation was filed and judgment was entered on March 22, 1973, against Huston for $35,031.12, plus $4,748.50 in costs and attorneys' fees.

The gas company then brought this action against the defendant, Hawkeye-Security Insurance Company, on May 17, 1973, alleging that coverage existed under the policy issued by the defendant to Huston. The de-

fendant denied that coverage existed, but the District Court entered a judgment in favor of the gas company for $23,031.12 and interest, plus total court costs of $2,278.40. The defendant appeals that decision, arguing that there was no coverage for completed operations. We agree with the defendant's contention and reverse the decision of the District Court.

The gas company claims that the policy provides for completed operations coverage. The contention is that an endorsement in the comprehensive liability policy is ambiguous. It therefore follows, under the reasoning of the gas company, that if the endorsement can be interpreted to provide completed operations coverage then it should be construed against the insurer. A highly complex analysis of the rhetoric and language of the endorsement is used to support this position. As we see it, the gas company's interpretation of the endorsement is strained and fails to relate to an interpretation of the insurance contract when viewed as a whole. In the resolution of a controversy concerning the meaning of an insurance contract and the coverage therein, the contract must be viewed as a whole. See Kent v. Dairyland Mut. Ins. Co., 177 Neb. 709, 131 N. W. 2d 146 (1964). An insurance contract must be construed so as to give effect to the intent of the parties at the time the contract was made. See, Kent v. Dairyland Mut. Ins. Co., *supra*; Morton v. Travelers Indemnity Co., 171 Neb. 433, 106 N. W. 2d 710. We feel, from reading the insurance contract as a whole, and considered in the context of the undisputed facts, that both Huston and the insurer did not intend to provide completed operations coverage for Huston, covering negligent accidents occurring before the issuance of the policy and ripening into a damage claim many years after the excavation operation was completed.

On the declarations page there are listed five types of hazards which could be covered and the premiums paid for each coverage. One of the hazards was entitled

"Products (Including Completed Operations)" and was set out clearly on the page. Under that heading were typed the words "NOT COVERED" in large capitalized letters. With this provision on the declarations page, it is hard to imagine that Huston failed to understand he did not have completed operations coverage. If Huston had wished to have completed operations coverage so that he would have liability protection for damage occurring after he completed the work on a job site, he could have done so by paying an additional premium. This payment would have been indicated on the declarations page. Instead, there are the words "NOT COVERED," and no premium is charged.

The gas company argues that Huston had no reason to expect completed operations coverage to be treated under the heading of "Products Hazard," when the insured did not deal with any products. This argument has no merit. On the declarations page, the words "(Including Completed Operations)" are set out clearly after the hazard entitled "Products." This provision is not buried in the fine print sections, but is a basic provision in the policy declaration of coverage. Other courts have found that no coverage existed under similar policies, and this appears to be the majority position. See, Kansas City Insulation Co. v. American Mut. Liability Ins. Co., 405 F. 2d 53 (8th Cir., 1968); Neumann v. Wisconsin Natural Gas Co., 27 Wis. 2d 410, 134 N. W. 2d 474 (1965).

In addition, the policy issued by the defendant on endorsement CL 515B, states as follows: "It is agreed that the policy does not apply to the Products Hazard as defined therein. It is further understood and agreed that the word 'operations' as used in the *Products Hazard* includes any act or omission in connection with operations performed by or on behalf of the named insured on the premises or elsewhere, *whether or not goods or products are involved in such operations.*" (Emphasis supplied.) These two easily understood sen-

tences incontestably demonstrate that the intent of the parties was that a product need not be actually involved in completed operations coverage. In Neumann v. Wisconsin Natural Gas Co., *supra,* where the policy provisions defined operations almost precisely the same as in the present policy, the court stated: "The 'operations' definition of the subject policy contemplates an insured who is engaged in operations that are something *more than the handling of goods.* We think there is nothing ambiguous about the policy provisions in this respect. * * * The insurance contract covered liability for injuries or damages arising out of accidents that occurred before the operations of the excavating contractor had been completed on November 3d; that since this accident did not occur until November 18th, *the operations had been completed and there was no coverage. Coverage, limited as it always must be, results from contract and the parties simply did not contract to cover this risk.*" (Emphasis supplied.)

It can be clearly seen that the insurance policy in this case plainly specified that completed operations coverage was not purchased. There is no ambiguity in the language of the policy and "insurance companies have the same right as individuals to limit their liability." See Lonsdale v. Union Ins. Co., 167 Neb. 56, 91 N. W. 2d 245.

The plaintiff attempts to avoid the defendant's argument by contending that the defense there was no completed operations coverage cannot be raised by the defendant because the defendant did not plead such a defense in its answer. It is true that affirmative defenses must be pleaded in order to be considered. See Wiltrout v. Showers, 82 Neb. 777, 118 N. W. 1080. Generally, exclusions in insurance policies are treated as affirmative defenses, and therefore must be specifically pleaded. See, 44 Am. Jur. 2d, Insurance, § 1947, p. 886; 19 Couch on Insurance (2d Ed.), § 76:197, p. 130. The

crucial question is whether the section of the policy which provided for no coverage for completed operations is an exclusion, and as a result must be specifically pleaded. We believe that it is not an exclusion.

An exclusion is the act of expelling from a place or a position previously occupied. See Webster's Dictionary (3d Ed., Unabr.). In an insurance policy, an exclusion is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed. If the declaration which lists completed operations as not covered was eliminated from the policy, there would still be no coverage since there is no other provision under which coverage existed. The declarations page lists all the risks covered. When the declarations page lists something as "NOT COVERED," this is not an exclusion. Rather than an exclusion, the declarations provisions are simply part of the basic insuring agreement. Huston merely decided not to add completed operations coverage to his protection.

Our decision is consistent with the purpose of pleading as determined by this court. In Marshall v. Rowe, 126 Neb. 817, 254 N. W. 480, this court stated: "According to the weight of authority, an answer is a pleading, the purpose of which is to notify the court and the plaintiff of the defense relied upon so that the latter may be prepared to meet it." In its answer, the defendant stated that "its policy of insurance did not and does not provide coverage for Huston." This general denial should have directed the gas company's attention to the declarations page to determine what coverage existed. There is nothing in the record to support a finding of prejudice or surprise, or that the plaintiff was unaware of the precise issue involved. No factual dispute is at issue in the case, and the question of law as to the construction of the insurance contract was clearly the precise issue from the beginning in the controversy. There is no merit to this contention.

The judgment of the District Court is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

JOHN D. COLLINS, APPELLANT, V. HERMAN NUT & SUPPLY COMPANY ET AL., APPELLEES.
240 N. W. 2d 32

Filed March 25, 1976. No. 40251.

1. **Negligence.** Negligence and the duty to use care do not exist in the abstract, but must be measured against a particular set of facts and circumstances.
2. **Negligence: Inviter and Invitee: Property.** Individuals who come upon premises for the purpose of making a delivery of merchandise or goods or for the purpose of picking up goods from the premises are generally held to be invitees.
3. ———: ———: ———. The duty of a storekeeper to an invitee is to use reasonable care to keep the premises reasonably safe for the use of the invitee, but he is not the insurer against accident.
4. ———: ———: ———. Generally, the liability of an owner or occupant of the premises is predicated on proof of his superior knowledge, actual or constructive, of dangers to which an invitee is subjected and of which the invitee is unaware.

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

David J. Cullan of Cullan & Cullan, for appellant.

Keith Howard of Pilcher, Howard & Dustin, for appellee Herman Nut & Supply Co.

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

WHITE, C. J.

This case is a suit for personal injuries suffered by the plaintiff as the result of a fall which occurred while the plaintiff was delivering raw materials to the business

premises of the defendant, Herman Nut & Supply Company. The plaintiff alleged that the defendant was negligent in several respects and sought damages of $30,000. The defendant denied any negligence on its part and alleged contributory negligence and assumption of risk. After the plaintiff had presented his evidence, the defendant moved for an order dismissing the petition or, alternatively, for a directed verdict. The court sustained the motion. A motion for a new trial was subsequently filed by the plaintiff and was overruled. This appeal followed. We affirm the judgment of the District Court.

The plaintiff was an employee of All-American Transport, Inc., a common carrier of freight. The defendant is the operator of a processing plant located in Omaha, Nebraska, for which All-American had a shipment. The plaintiff was the driver of the delivery truck. During the 3 days preceding January 23, 1973, the date of the plaintiff's accident, almost 8 inches of snow had fallen in the Omaha area. When he arrived at the defendant's establishment, the plaintiff parked his truck on the street in front of the defendant's building. The plaintiff testified that there was snow on the street where he had parked and on the sidewalk in front of the defendant's building. This sidewalk had not been shoveled. The snow was from 3 to 4 inches deep. The plaintiff testified that the snow came over the top of his boots.

The defendant's building faced west onto Thirty-third Street. It had three entrances. The south entrance led into the defendant's office. The north and middle entrances led to portions of the building used for storage. The plaintiff went to the south entrance, to the office, and asked the defendant's employees where they wanted the shipment he was hauling unloaded. He was told to unload it at various places in the building and to use the north and middle entrances.

To reach the areas where he was to put the shipment the plaintiff would pass through either the north or

the middle exterior doors. About 15 to 20 feet from the north exterior door was an interior door which the plaintiff also had to pass through in order to deposit some of the shipment. The floor between the exterior doors and the interior door was linoleum. The plaintiff testified that there was no water on this floor when he arrived.

The shipment consisted of large burlap sacks of raw peanuts and smaller boxes of sunflower seeds. The sacks weighed around 100 to 110 pounds and were about 3 to 4 feet high. The plaintiff would take one of these sacks from the truck, hoist it onto his shoulder, and carry it into the defendant's building, and unload it where shown. Prior to entering the building, the defendant would stomp his feet in the doorways to knock the snow off of his feet. After he had made several trips, one of the defendant's employees placed some matting inside the middle exterior door.

The plaintiff had made between 5 and 10 trips before he fell. He fell at a spot approximately 10 feet from the north door inside the building, and about 3 to 4 feet from the interior door. At the time he fell he was carrying one of the large sacks on his shoulder. The plaintiff suffered severe injuries to his back and testified that he has been able to work only 1 day since his fall.

The plaintiff's fall was due to the slippery conditions created when water, formed by melting snow which came from his boots, accumulated along the path he was following while unloading the shipment.

It was alleged that the defendant was negligent in failing to remove snow from the sidewalk outside the premises; in allowing water to accumulate along the path the plaintiff took while he was making his deliveries; and in failing to supply matting or other protective material along the plaintiff's path.

"In testing the sufficiency of the evidence for determining the propriety of a directed verdict, the plain-

tiff is entitled to have all controverted facts resolved in her favor, and she is entitled to have the benefit of every inference that can reasonably be drawn from the evidence. Pupkes v. Wilson, 165 Neb. 852, 87 N. W. 2d 566. Where the facts adduced to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury. * * * Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405." Crawford v. Soennichsen, 175 Neb. 87, 120 N. W. 2d 578 (1963).

In order to determine whether the District Court was correct in sustaining the defendant's motion, we must review the plaintiff's evidence and determine whether the defendant violated any duty owed to the plaintiff, for if there is no duty owed, there can be no negligence. "It is elementary that negligence and the duty to use care does not exist in the abstract, but must be measured against a particular set of facts and circumstances." Crawford v. Soennichsen, *supra*.

Initially, we point out that there can be no liability based upon the defendant's failure to shovel the snow from its sidewalks. See Mackey v. Midwest Supply Co., 186 Neb. 834, 186 N. W. 2d 916.

This case is similar to the situation in Jeffries v. Safeway Stores, Inc., 176 Neb. 347, 125 N. W. 2d 914 (1964). In that case the plaintiff fell on the floor of the defendant's store in Omaha and was injured. A product called Zorball which had been placed on the sidewalk in front of the defendant's store and which had been tracked into the store by customers and employees using the front door was blamed for the fall. A verdict and judgment were rendered for the plaintiff in the District Court. On appeal we reversed and ordered a dismissal. We stated: "It is established by the plaintiff's evidence that snow had fallen on the morning of the accident. Customers had frequented the store since it was opened at 8:30 a.m. It is evident that

customers, and possibly employees as well, had tracked snow, dirt, and Zorball near the entrance to the door. That this was a likely occurrence was known to all. For the purpose of this case we accept the statement of the plaintiff that she slipped on tracked-in Zorball and was injured. It is not negligence per se on the part of a storekeeper if customers track in snow, mud, moisture, or Zorball. To impose such a liability upon a storekeeper would require constant sweeping and mopping in bad weather behind each customer as he enters the store. It would in effect require the storekeeper to insure the safety of every customer who enters the store."

Deliverymen are generally held to be invitees. "Individuals who come upon premises for the purpose of making a delivery of merchandise or goods or for the purpose of picking up goods from the premises are generally held to be invitees." 62 Am. Jur. 2d, Premises Liability, § 110, p. 377. In Jeffries v. Safeway Stores, Inc., *supra,* we held: "The duty of a storekeeper to an invitee is to use reasonable care to keep the premises reasonably safe for the use of the invitee, but he is not an insurer against accident." In Crawford v. Soennichsen, *supra,* we noted: "Generally, the liability of an owner or occupant of the premises is predicated on proof of his superior knowledge, actual or constructive, of dangers to which invitee is subjected and of which invitee is unaware."

With these applicable principles in mind, we will review the evidence presented by the plaintiff.

The plaintiff does not allege in this case that the defendant *created* a dangerous situation to which he was subjected. The situation which caused the plaintiff's fall and injuries was created by the plaintiff himself, during the performance of his work, while on the defendant's premises. The water on the defendant's floor was formed by melting snow which the plaintiff had tracked in from outside. The plaintiff seeks to recover against the defendant on the ground that the defendant

failed to take actions to remedy the dangerous situation which he himself had created on the defendant's premises.

The defendant owed the plaintiff, an invitee, a duty to keep his premises reasonably safe for the plaintiff's use. Having reviewed the plaintiff's evidence, it is apparent, as a matter of law, that this duty was not violated. The plaintiff testified that there was no water on the defendant's floor when he arrived, either at the spot where he fell, or anyplace else. While the plaintiff testified that the floor in the office section of the building was highly waxed, there was no evidence concerning the condition of the floor in the warehouse portion of the building, other than it was linoleum. One of the defendant's employees also placed some matting at one of the exterior doors for the plaintiff to wipe his feet on.

There was no evidence which would indicate that the defendant had superior knowledge of the situation and that the plaintiff was unaware of it. Crawford v. Soennichsen, *supra*. While, conceivably, the plaintiff may have had his attention focused on the heavy sack he was carrying during each trip in, he had nothing to distract him from observing the water on the floor on the return trips which followed the same paths in reverse. There was no evidence to indicate that the water was on the floor for an unreasonable length of time. There was no water there when the plaintiff arrived, and the plaintiff's fall occurred before he had completed the unloading of the shipment. The plaintiff testified that he experienced no difficulty prior to the actual fall, and further testified that he had made between 5 and 10 trips through the north door before he fell. Nothing in the plaintiff's evidence could lead a reasonable man to conclude that the defendant's knowledge of the situation was superior to that of the plaintiff, or that the water on the floor was not open and obvious and that the plaintiff could reasonably have been unaware of this.

Beyond the defendant's duty to keep the premises reasonably safe for the plaintiff, a duty which was sat-

isfied, no additional duty was owed the plaintiff. The defendant is not an insurer of the safety of all those who come upon his premises. The defendant was under no duty to continually mop up behind the plaintiff during his presence on the premises. Jeffries v. Safeway Stores, Inc., *supra*. Nor was the defendant under a duty to line the entire length of the path which the plaintiff followed, while unloading the shipment in the warehouse portion of the building, with matting or carpeting. Since the defendant breached no duty in these respects, there is no merit to plaintiff's contention.

The District Court was correct in granting the defendant's motion.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CALVIN J. CLOUSE, APPELLANT.
240 N. W. 2d 36

Filed March 25, 1976. No. 40320.

1. **Criminal Law: Searches and Seizures.** Miranda rules are not applicable to a consent search.
2. **Trial: Witnesses.** The scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion.

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

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

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

McCOWN, J.

The defendant was found guilty by a jury on a charge of burglary and sentenced to 2 to 4 years imprisonment.

On the night of November 23, 1974, a used furniture and antique store in Lincoln, Nebraska, was broken into and a small amount of cash and some special display coins were taken. In the course of police investigation, a tire iron was taken from defendant's automobile and later identified as the instrument used in the break-in. Other evidence established that defendant possessed and disposed of the identifiable coins taken in the burglary. The evidence was sufficient to sustain the jury verdict and no issue as to the sufficiency of the evidence is raised.

The defendant first contends that the tire iron should not have been admitted in evidence on the ground that it was obtained through an illegal search.

At the time of the defendant's arrest, the arresting officers, without giving full Miranda warnings, asked if they could search the defendant's car. The defendant consented and gave them the keys. The officers testified that they told the defendant he did not have to allow the search. In the trunk of the car they found a tire iron and a crowbar. They took the crowbar and the defendant to the police station. At the police station the defendant was given full Miranda warnings and signed a consent to search form. The officers then went back to the defendant's house and took the tire iron out of the car trunk. The tire iron had traces of a material on it which matched putty samples taken from the back door of the store. Pry marks on the door matched those which might have been made with the tire iron.

The basis of defendant's complaint is that he was not given the full Miranda warnings before he gave his consent to the first search. This court has already held that the Miranda rules are not applicable to consent searches. See State v. Forney, 182 Neb. 802, 157 N. W.

2d 403. The United States Supreme Court thereafter reached the same conclusion. See Schneckloth v. Bustamonte, 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854. Those cases are determinative of the issue here.

Defendant next contends that he was denied a speedy trial. He was arrested November 25, 1974. The information was filed in the District Court January 8, 1975. Defendant filed a motion to suppress evidence on January 17, 1975, which was heard on February 21, 1975. The District Court required briefs to be filed by February 28, and announced an intention to rule on the motion and commence trial on or about March 3, 1975. On March 4, 1975, the defendant filed a demand for immediate trial, and on March 5, 1975, he filed a motion to withdraw the motion to suppress. The demand and motion were heard on March 7, 1975, and overruled. By that time there were not enough consecutive open jury days left in March for the expected length of this trial. Trial was therefore set for the April term and held on April 8, 1975.

Under section 29-1207, R. S. Supp., 1974, defendants are required to be brought to trial within 6 months from the date the information is filed. Delay resulting from pretrial motions to suppress evidence are specifically excluded in computing the 6-month period. In this case, trial was held within 3 months from the date the information was filed. After exclusion of the delay relating to the motion to suppress, approximately 40 days passed between the filing of the information and the actual trial. The trial occurred within approximately 5 months from the time of arrest. Under any logical analysis of the facts there was about 1 month's delay after the earliest possible date the case might reasonably have been tried. There is no showing of any prejudice from any delay. The facts establish beyond question that the defendant was not denied either his constitutional or statutory right to a speedy trial.

Finally, the defendant asserts that the trial court

erred in impeding the right of defense counsel to ask leading questions on cross-examination of the chief witness for the prosecution. The assignment of error does not correctly reflect the facts. In the recross-examination of the witness the trial court sustained an objection by the prosecution to one question on the ground that that the question was argumentative, leading, and suggestive, and beyond the scope of direct examination. After some discussion, a rephrased question was asked and answered without objection. A subsequent question by defense counsel was objected to as being too broad and ambiguous and calling for a conclusion. At that point a discussion between the court and counsel out of the presence of the jury fully outlined the court's views as to what was permissible and impermissible impeachment evidence, and the proper method of eliciting it. The court gave defendant's counsel an opportunity to make an offer of proof if he wished to do so, but counsel declined, stated that the discussion had covered the material, and made no objection of any kind. There was never any ruling on the pending objection by the prosecution.

When trial was resumed before the jury, the defense counsel stated that he was finished with the witness and had no further questions. Counsel's failure to take any affirmative action at the time could properly be said to have waived any objections, even if the record reflected previous objection. In any event, the record here fails to reveal any valid basis for objection. The scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion. State v. Lytle, 194 Neb. 353, 231 N. W. 2d 681. There was no abuse of discretion here.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MAX A. NIEMANN, APPELLANT.
240 N. W. 2d 38

Filed March 25, 1976. No. 40368.

Post Conviction. Generally, a post conviction proceeding cannot be used as a procedure to secure a review for a defendant dissatisfied with his sentence.

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

Richard T. Vanderheiden of Phares, Torpin & Vanderheiden, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

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

WHITE, C. J.

The defendant was originally charged with first degree murder and pled guilty to a reduced charge of second degree murder. The District Court sentenced the defendant to an indefinite term of 20 years to life imprisonment in the Nebraska Penal and Correctional Complex. No appeal was taken. On November 22, 1971, the defendant sought relief under the Post Conviction Act by filing a motion to vacate and set aside. After a hearing, the defendant's request for post conviction relief was denied. No appeal from this decision was taken. On May 19, 1975, the defendant sought post conviction relief a second time, alleging that the sentence imposed upon him was illegal. After a hearing, the court denied the defendant's application for relief. This appeal follows. We affirm the judgment and sentence of the District Court.

"After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sen-

tence may be dismissed by the District Court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief." State v. Fincher, 191 Neb. 446, 216 N. W. 2d 172 (1974). See, also, State v. Haskett, 194 Neb. 523, 233 N. W. 2d 782 (1975). A post conviction proceeding cannot be used as a procedure to secure a review for a defendant dissatisfied with his sentence. State v. Huffman, 186 Neb. 809, 186 N. W. 2d 715 (1971).

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WENDELL HENRY, APPELLANT.
240 N. W. 2d 39

Filed March 25, 1976. No. 40448.

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

T. Clement Gaughan and George R. Sornberger, for appellant.

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

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

NEWTON, J,

The defendant entered a plea of guilty to a charge of shooting with intent to kill, wound, or maim. The victim was his wife. He appeals the sentence of 6 to 12 years as excessive.

The defendant was 31 years of age at the time of the offense and was separated from his wife and three

children. His past history discloses an unstable temperament and a tendency toward violence, verging on the psychotic. He had one prior felony conviction for which he had been placed on probation. The crime committed is a violent one with a maximum penalty of 50 years and might well have resulted in first degree homicide.

Under the circumstances it does not appear that there was an abuse of discretion. The judgment of the District Court is affirmed.

AFFIRMED.

L. ROBERT KIMBALL CONSULTING ENGINEERS, INC., APPELLEE, V. KELLY P. RYAN, APPELLANT.
240 N. W. 2d 40

Filed April 1, 1976. No. 40108.

Trial: Judgments. Where an action at law is tried to the court without a jury, the findings of the court have the same effect as a jury verdict, and will not be disturbed on appeal unless clearly wrong.

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

Robert F. Martin, for appellant.

Donald C. Hosford, Jr., of Frost, Meyers & Hosford, for appellee.

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

CLINTON, J.

Plaintiff brought this action against the defendant to recover on two separately alleged, but not separately numbered, causes of action for surveying services. The first cause alleged that the plaintiff was orally engaged by the defendant to survey part of the southeast quarter

of Section 2, Township 18 North, Range 11 East of the 6th P.M., Washington County, and to develop a subdivision plat to be known as "66 Heights." The second cause alleged that the plaintiff was orally engaged by the defendant to make an electronic survey of part of the northeast quarter of Section 7, Township 18 North, Range 12 East of the 6th P.M., Washington County, for purposes of determining boundaries of certain land owned by the defendant. During trial the court permitted amendment of the second cause by adding by interlineation after the word electronic, the words "and/or conventional methods." Each cause alleged that the work requested was done. The plaintiff further alleged that on the first cause there was owing $1,106.35 and on the second the sum of $2,745.25, all of which the defendant had refused to pay although demand had been made.

The case was heard by the District Judge, a jury having been waived. The trial judge found against the plaintiff on the first cause of action, finding, we infer from the record of the trial, that the work had not been completed and that the work which was done was valueless for the purposes of the contract. He found on the second cause that the plaintiff "did make an electronic land survey" and that there was owing thereon $2,644, together with interest of $577.71. In connection with the second cause the court found that the plaintiff "did not make a survey by conventional field methods" and for that reason deducted $101.25 from the amount prayed for on that cause. Judgment was entered accordingly.

The defendant perfects his appeal to this court and makes 14 assignments of error. Ten of these are overlapping or redundant and may be consolidated to one, namely, (1) the decision of the trial judge is contrary to or not supported by the evidence and that the plaintiff failed in its burden of proof. Only three of the remaining assignments are argued and these are: (2) The court erred in permitting the amendment of the petition during the trial; (3) the amendment stated a

new and different contract which is barred by the 4-year statute of limitations; and (4) the petition did not state a cause of action. We treat each assignment in the order listed.

We have read the record. The evidence was sharply conflicting as to the nature of the contract and whether the services were properly performed. No useful purpose would be served in summarizing what seems an unnecessarily voluminous record. The governing principle is: Where an action at law is tried to the court without a jury, the findings of the court have the same effect as a jury verdict, and will not be disturbed on appeal unless clearly wrong. Siefford v. Housing Authority, 192 Neb. 643, 223 N. W. 2d 816. The first assignment is without merit.

As to assignments (2) and (3), the court found that the plaintiff performed an electronic survey and that it did not perform a conventional field survey. Any error committed in permitting the amendment was therefore harmless. The record shows that the last of the work was performed in October of 1969, and that the petition was filed and service obtained in 1971. The 4-year statute of limitations had not run.

As to the fourth assignment, the allegations of the petition were sufficient in the absence of a general demurrer or a motion to make more definite and certain. The defendant proceeded to trial without taking either of these steps. He cannot complain now.

AFFIRMED.

KARL J. LUTHER, ADMINISTRATOR OF THE ESTATE OF MICHAEL E. LUTHER, APPELLANT, V. TIMOTHY W. PAWLING ET AL., APPELLEES.
240 N. W. 2d 42

Filed April 1, 1976. No. 40160.

1. **Motor Vehicles: Negligence.** A benefit removing an occupant

riding in the motor vehicle of another from the provisions of the guest statute must be a tangible and substantial one to the owner and a motivating influence for his furnishing the transportation.

2. **Motor Vehicles: Negligence: Words and Phrases.** Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others.
3. **Motor Vehicles: Negligence.** 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 in the determination of gross negligence.
4. ———: ———. Negligence that is purely momentary in nature generally does not constitute gross negligence.
5. **Trial: Negligence.** Negligence is never presumed. The mere happening of an accident does not create a presumption or authorize an inference of negligence.

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

Thomas B. Thomsen of Sidner, Svoboda, Schilke, Wiseman & Thomsen, for appellant.

Clinton J. Gatz, Jr., of Jewell, Otte, Gatz, Collins & Domina, for appellees.

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

WHITE, C. J.

This is an action for the wrongful death of Michael E. Luther, a minor, brought by the decedent's father as administrator of his estate, against Timothy W. Pawling, the driver of the car in which Mike was a passenger, and Duane E. Pawling, the owner of the car and the father of Tim W. Pawling. The District Court sustained the defendants' motion for a summary judgment. We affirm the judgment of the District Court.

The pertinent facts follow: On August 15, 1972, the day of the accident, Mike Luther, his sister, Debbie, Tim Pawling, and his three younger sisters were all working in the bean fields of Mr. Krohn, a neighbor. The Pawlings and the Luthers were first cousins to each other. Tim and Mike had worked in the bean fields before, and it appears that Krohn had contacted Mrs. Pawling to see if the children wanted to work for him, and that subsequently they did. When Krohn paid the children for their work, he gave one check to the Luthers and one check to the Pawlings.

There are some discrepancies in the evidence as to how Tim and Mike got to the bean fields in the days preceding the accident, but none on any of the material facts pertinent to the issues presented in this case. Mike furnished his own transportation to the Pawling house. From there, either Tim, or Tim and Mike by turns, drove to Krohn's bean fields. In any event, on the day of the accident, Tim drove, with Mike, Mike's sister, and the three Pawling girls in the car. On the return trip from Krohn's farm, while traveling on a gravel road, the accident occurred. It occurred at a culvert with cement walls that, in effect, formed a cement bridge. *This bridge was narrower than the gravel road leading up to the bridge.* The car hit the cement side and ended up in a ditch.

None of the survivors of the accident remember anything about the accident itself. Debbie Luther, the sister of the decedent, testified in a deposition that at some time prior to the accident, the car swerved to the shoulder of the road. Debbie then noticed that according to the speedometer the car was traveling at 60 miles per hour. At another point later, Debbie saw Tim, the driver, reaching with one hand under the seat for a missing cupcake. Debbie testified that she saw Tim act in this manner for several seconds, but she did not know if Tim kept his eyes on the road. Debbie did not remember how much time elapsed between Tim's reaching down

for the cupcake and the accident. Debbie remembers nothing of the accident itself.

The issue arises in this case from the sustaining of the defendants' motion for a summary judgment. It is incumbent upon the defendants to demonstrate from the record that there was no genuine issue as to any material fact, and that under the applicable law they were entitled to judgment in their favor. Berg v. Rasmuss, 176 Neb. 340, 125 N. W. 2d 905; Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643.

First, the plaintiff contends that there is a genuine issue of fact as to the decedent's status as a "guest" within the meaning of the guest statute, section 39-6,191, R. R. S. 1943. For our purposes, this statute requires that in order for a guest in a motor vehicle to recover against his host for injuries suffered in a motor vehicle accident, he must prove that the host was grossly negligent.

The law in this state concerning what is a "guest" is clear. The burden is on the plaintiff to prove that he is not a guest. See Lincoln v. Knudsen, 163 Neb. 390, 79 N. W. 2d 716. In determining that an occupant of an automobile was a guest, the court in Carter v. Chicago, B. & Q. R. R. Co., 170 Neb. 438, 103 N. W. 2d 152, said: " 'The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident.' * * * 'A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity.' * * * 'A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions

of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation.' "

In a very recent case, Zoimen v. Landsman, 192 Neb. 561, 223 N. W. 2d 49, where the evidence showed that on three occasions the plaintiff *gave* the defendant $2 in connection with picking him up at the airport after his weekend trips to Chicago, this court stated the rule more particularly applicable to the facts in this case as follows: " 'A benefit removing an occupant riding in the motor vehicle of another from the provisions of the guest statute must be a *tangible and substantial* one to the owner and a *motivating influence* for his furnishing the transportation. A remote, vague, incidental, or speculative benefit is not sufficient to have that effect. *This is the basis of the rule that the sharing of the cost of operating the car or other expenses of the trip, when the acceptance of the occupant for conveyance is not motivated by or conditioned on such contribution, is incidental, an exchange of social amenities, and does not transform the occupant into a passenger for compensation.*' "

In the case here, the decedent Mike was clearly a guest of the defendant, Tim Pawling. The defendant Tim and the decedent were first cousins and, as the plaintiff concedes were "good friends." There is no evidence that there was any prior arrangement or agreement concerning the transportation. See Zoimen v. Landsman, *supra.* The evidence conclusively negates the passage of any compensation or thing of value between Tim and Mike with relation to the trip that they were on or any other transportation in the working arrangement for Krohn. They were simply traveling to work together. There is no evidence to indicate that Tim and Mike were on a joint business venture such that Tim would not have gone to work without Mike. Rather, the undisputed facts show that they were both working for the same employer, Krohn, and Tim merely offered Mike a ride to work because they were good friends. Even if Tim and

Mike did take turns driving, and there is some evidence to this effect, this does not mean that Mike was not a guest. It is clear that any possible exchange in driving between the two boys was a gratuitous matter, resulting from hospitality and friendship between the boys, and was purely incidental in character. It appears clearly that it was not the defendant Tim's motivating influence in providing transportation for the plaintiff's decedent, Mike. This case is much stronger than Zoimen v. Landsman, *supra,* where there was an exchange of money between the parties, but the evidence showed that it was a pure gratuity on the guest's part and did not result from any prior arrangement or agreement for transportation compensation. We come to the conclusion that the trial court's determination of this issue was correct.

We turn now to the further contention, apparently anticipated by the plaintiff, that there was a genuine issue of fact concerning Tim's gross negligence. Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Brugh v. Peterson, 183 Neb. 190, 159 N. W. 2d 321; Callen v. Knopp, 180 Neb. 421, 143 N. W. 2d 266. Negligence that is purely momentary in nature generally does not constitute gross negligence. See Brugh v. Peterson, *supra,* at p. 194. In our past decisions we have commented upon the difficulty of color-matching cases in this area. However, beyond what we have said above about the principles governing the determination of gross negligence, we have held to be significant the presence or imminence of danger that is visible to, known by, or made known to a driver, together with the *persistence* in negligence apparently heedless of the consequences. These factors should be

given material, if not controlling, significance. Thorpe v. Zwonechek, 177 Neb. 504, 129 N. W. 2d 483; Gummere v. Mudd, 139 Neb. 370, 297 N. W. 622; Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593.

There is no evidence of great or excessive negligence in this case. In fact, there is no evidence at all as to what actually caused the accident. Nobody in the car remembers anything about the accident. The decedent's sister, Debbie Luther, remembers that at several times prior to the accident, Tim was driving in such a manner that it might be argued he was momentarily negligent. However, there is absolutely no evidence as to how Tim was driving when the accident occurred. The last thing Debbie remembered was Tim reaching for a cupcake. Debbie had no idea if this was several seconds or several minutes before the accident occurred. Gross negligence on the part of the driver must be proved by the plaintiff. In Wees v. Creighton Memorial St. Joseph's Hospital, 194 Neb. 295, 231 N. W. 2d 570, this court said: "In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. * * * The burden of proving a cause of action is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture. * * * Negligence is never presumed. The mere happening of an accident does not create a presumption or authorize an inference of negligence." See, also, Bowers v. Maire, 179 Neb. 239, 137 N. W. 2d 796; Wolstenholm v. Kaliff, 176 Neb. 358, 126 N. W. 2d 178.

The mere happening or occurring of a one-car accident with a bridge or culvert abutment does not, as a matter of law, justify an inference of gross negligence under our decisions. It is conceded by the parties that the evidence with relation to the accident has been fully explored in this record leading to the motion for a summary judgment. Resolving all inferences in favor of the

plaintiff, as we are required to do, we cannot infer gross negligence from suspicion or conjecture arising from the fact that it was a one-car accident in collision with the bridge, nor from the actions of the defendant driver at some unknown time prior to the accident and not shown to relate to any lack of control or lookout that could be the proximate cause of the accident. We further point out, that even if the accident occurred when the defendant driver reached for the cupcake, not inferable from the record, this would not constitute gross negligence but would rather be mere momentary distraction of attention. See, Brugh v. Peterson, *supra*; Boismier v. Maragues, 176 Neb. 547, 126 N. W. 2d 844.

The judgment of the District Court in entering summary judgment for the defendants is correct and is affirmed.

AFFIRMED.

DENNIS RAWLINGS, APPELLANT, V. ABBIE ANDERSEN, APPELLEE.

240 N. W. 2d 568

Filed April 1, 1976. No. 40189.

1. **Trial: Instructions.** A party may not complain that correct instructions are not sufficiently specific when no request is made for more specific instructions.
2. **Trial: Evidence: Time: Statutes.** This court will not, unless justice requires it, reverse a decision of the trial court refusing to apply legislative changes in rules of evidence, which changes were not law at the time of trial only because the effective date of the legislative act had not been reached.
3. **Trial: Evidence: Damages.** In an action where permanent, personal injury is claimed, the defendant may show as affecting damages that the plaintiff was a person of intemperate habits.
4. **Trial: Evidence: Witnesses.** A witness may testify as to the posted speed limit at a particular location if appropriate foundation is laid.
5. **Trial: Evidence: Discovery.** Under the provisions of section

27-612, R. S. Supp., 1975, a precondition to the production of and use by an adverse party of a witness' prior written statement is that the statement has been used by the witness to refresh his recollection.

6. **Trial: Pleadings: Time.** The courts may, in the furtherance of justice, either before or after judgment, permit the amendment of a pleading by conforming the pleading to the facts proved. § 25-852, R. R. S. 1943.

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

Warren C. Schrempp, Thomas G. McQuade, and Richard E. Shugrue of Schrempp, Dinsmore & McQuade, for appellant.

Eugene P. Welch of Gross, Welch, Vinardi, Kauffman & Day, for appellee.

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

CLINTON, J.

Plaintiff, Dennis Rawlings, appeals to this court from a verdict of the jury and judgment entered thereon in favor of the defendant, Abbie Andersen, in an action to recover damages for injuries sustained in a collision between his motorcycle and the defendant's Volkswagen automobile. The collision occurred at the intersection of Center and 40th Streets in the City of Omaha at about 4:15 p.m., on August 7, 1972. At the time of the collision the plaintiff was traveling east on Center Street. The defendant was coming from the east on Center Street and was about to make or was in the process of making a left-hand turn onto 40th Street. Center Street, at the accident scene, has four traffic lanes, two for eastbound and two for westbound traffic. West of 40th Street there is a cement median dividing the eastbound and westbound lanes. There is no cement median immediately east of 40th Street, but a median and left-turn lane are painted on the street's surface.

The trial court submitted to the jury: (1) Determination of the defendant's negligence based upon evidence of failure to maintain a proper lookout, failure to have her vehicle under proper control, and failure to yield the right-of-way to the defendant; and (2) plaintiff's contributory negligence based upon evidence of failure to maintain a proper lookout, failure to have his motorcycle under proper control, and excessive speed under the circumstances. The jury rendered a general verdict for the defendant.

On appeal to this court the plaintiff makes the following assignments of error: (1) The court erred in giving the jury instructions in conflict with the physical facts of the case, since those facts are sufficiently clear to eliminate the question of point of impact and to justify a finding that the defendant was, as a matter of law, executing a left turn at the time of the collision and was in the plaintiff's line of travel. (2) The court erred in refusing to allow a police division traffic investigator to testify as to the point of impact of the two vehicles. (3) The court erred in permitting testimony from the plaintiff's physician that 17 months prior to the accident the plaintiff had told his doctor that he was at that time consuming daily "a fifth of booze." (4) The court erred in permitting a witness to testify to the speed limit on Center Street at the point where the collision occurred. (5) The court erred in its refusal to require a witness at the taking of a pretrial discovery deposition to produce a statement used by the witness to refresh her recollection. (6) The court erred in refusing the plaintiff's request made at the end of trial to amend his petition to allege the defendant at the time of impact was on the wrong side of the street and in not giving an instruction with reference thereto.

We treat the assignments in the order we have listed them. At an instruction conference, counsel for the plaintiff, in response to a question from the court, said: "Just that we except to all Instructions in conflict with

the physical facts of the case, which in this case we deem are sufficiently clear to eliminate the question of point of impact, and sufficiently clear and persuasive as to justify a finding that the defendant was, as a matter of fact, executing a left turn at the time of the collision and was in the plaintiff's line of travel." The following then occurred: "THE COURT: There is nothing in the Instructions where I have made any comment on that. The Court is confused with your objections here. If you can point out the Instructions that are incorrect, we will make the corrections, or at least consider your objections to the specific Instructions, but you haven't done so. MR. SCHREMPP: I can't point out a specific Instruction. THE COURT: That's just your general theory? MR. SCHREMPP: Right. THE COURT: The record will so note. If it is an objection, it is overruled." The plaintiff submitted no requested instruction on the point discussed.

The plaintiff's position apparently is that the physical evidence is so conclusive the court should have instructed the jury on its own motion that the collision occurred south of the centerline of Center Street. The evidence was clearly sufficient to permit the jury to so find and nothing in the instructions given would have prevented the jury from coming to such a conclusion. However, such a determination by the jury would not have been determinative of the litigation for the jury could also have found that the defendant was not negligent in making a left-hand turn at the time and place she did, and that the collision was caused by the plaintiff's contributory negligence more than slight. The plaintiff, to support his argument, relies upon the opinions of this court in Elwood v. Schlank, 126 Neb. 213, 252 N. W. 828: Miller v. Arends, 191 Neb. 494, 215 N. W. 2d 891; and the dissent of Johnsen, J., in Ross v. Carroll, 138 Neb. 1, 291 N. W. 726. In all these cases the question which was determinative of liability was on which side of the roadway did the collision occur. In

Miller v. Arends, *supra,* we said that where the undisputed physical facts demonstrate the collision out of which the injuries arose was not caused by the negligence of the defendant, the evidence will not support a verdict for the plaintiff. That principle is not applicable in this case. Here the fact that the collision may have occurred (and if this court were the original trier of fact we would say it probably did occur) south of the centerline was not conclusive of the defendant's negligence and certainly not conclusive of the absence of contributory negligence on the part of the plaintiff.

The defendant's evidence indicated that the defendant entered the left-turn lane east of the intersection with the intention of making a left turn onto 40th Street. She testified she had just begun the turn with perhaps her front wheels just south of the centerline when the plaintiff's motorcycle suddenly appeared weaving and at high speed from between eastbound cars. She stated she stopped her car and the collision occurred. The testimony of a motorist following the plaintiff tends to support this version. Other testimony and evidence would indicate that she was further into her turn with the front of her car pointed southwest and that the point of impact may have been at about the dividing line between the two eastbound traffic lanes and near the east edge of the intersection. Evidence tending to support that version comes from other witnesses and is reinforced by the presence of what the investigating officer stated was under-carriage dirt on the street located at about the dividing line between the eastbound lanes and a few feet east of the east line of the intersection. This debris is shown in some of the photographs received in evidence. When the collision occurred the plaintiff and his motorcycle flew in the air. The motorcycle broke into two parts, one part landing at the base of a tree immediately adjacent to and south of the sidewalk on the south side of Center Street, 46 feet east of the east line of 40th Street; and the second

part coming to rest also at the south edge of the sidewalk, but somewhat west of the tree. The evidence does not show clearly where the plaintiff landed. Photos received in evidence would indicate that the motorcycle struck the front of the automobile at a point about a foot left of center of the bumper. Both vehicles were severely damaged. Defendant testified that her vehicle was driven backward by the collision. The plaintiff did not testify as to the collision because of amnesia. His last recollection was that he was headed toward the 40th Street intersection in the southernmost eastbound lane of traffic shortly before the collision occurred. There is no physical evidence to show the precise line of travel of the motorcycle immediately before the collision. It is evident that the direction of flight of the motorcycle after impact was dependent upon the relative position and line of travel of the two vehicles at impact. There is nothing in the nature of the physical damage to the Volkswagen from which these matters can be conclusively determined. This was a question for the jury to decide.

The instructions given by the court correctly informed the jury of the law applicable to the case. No attack is made on the correctness of these instructions. They did not preclude the jury from finding that the collision occurred south of the centerline and near the east edge of the intersection. If the plaintiff felt that he was entitled to a more specific instruction as to some undisputed fact shown by physical evidence, it was up to him to make such a request in writing. A party may not complain that correct instructions are not sufficiently specific when no request is made for more specific instructions. Thorpe v. Zwonechek, 177 Neb. 504, 129 N. W. 2d 483; Dittrick v. Deuel, 181 Neb. 428, 149 N. W. 2d 57. The plaintiff's first assignment is without merit.

During the course of the direct examination of the police officer who made the on-the-scene investigation of the collision, plaintiff laid a foundation to show that

the officer's duties included automobile accident investigation and that he had examined the scene of about two such accidents daily for a period of 4 years. He was then asked if he had sufficient experience to determine the significance of debris at an accident scene. The officer answered in the affirmative. He was then asked: "What do you understand with respect to debris in connection with any significance in an accident investigation?" Objection was made and sustained. He was permitted to testify to the location of debris and its nature, viz: ". . . it was a substance similar to that found under the undercarriage of vehicles." He stated in response to a question that he did not know where it came from. He stated it was present when he arrived at the scene. He was not permitted to testify as to the time the deposit of debris was made nor to the position of the vehicles at the time of impact. He was not permitted to give his opinion as to where on the street the vehicles collided. Objections to questions designed to elicit the above information were made and sustained on the basis that they called for the conclusion of the witness and that sufficient and proper foundation had not been laid.

Heretofore we have held it has not ordinarily been permissible for an accident investigator to give his opinion as to the point of impact. Stillwell v. Schmoker, 175 Neb. 595, 122 N. W. 2d 538; Caves v. Barnes, 178 Neb. 103, 132 N. W. 2d 310. The reason usually given is that the witness may not give his opinion to the ultimate issue which is for determination by the jury. The plaintiff urges we apply sections 27-702, 27-703, and 27-704, R. S. Supp., 1975, which became law August 24, 1975. This case was tried previous to the effective date of the new evidence code. We ought not, unless justice requires it, reverse the decision of the trial court for following rules of evidence in effect at the time of trial even though legislative change then awaits only the effective date of the act. Justice does not require we do so

in this case. We simply point out that, although the new rules abolish the "ultimate issue" rule, nonetheless under the provisions of section 27-702, R. S. Supp., 1975, the admissibility of such testimony depends upon whether the "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." It is for the trial court to make the initial decision on whether the testimony will "assist" the trier of fact. The soundness of its determination, of course, depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case. Were we to say that section 27-702, R. S. Supp., 1975, is applicable, we would not be likely to disturb the discretion of the trial court in this instance. The plaintiff's second assignment is not meritorious.

The plaintiff suffered severe, permanent injuries as a result of the collision. Life expectancy tables were received for the purpose of assisting the jury in determining damages for such permanent injuries. During cross-examination of the plaintiff's physician the defendant's counsel sought to elicit information as to the plaintiff's previous habits which might affect his health and longevity. Questions concerning smoking habits were asked and answered. The following then occurred: "Q. Did he indicate to you a history with respect to the use of alcohol? A. Yes. Q. To the extent that that would affect his health? A. Probably." Counsel then asked the following question: "Would you tell us what he had indicated the amount of alcohol that he was using?" Objection was made and after the court determined by inquiry of defense counsel that his purpose was to determine plaintiff's "condition of health," the following occurred: "Q. Let me ask it this way as a matter of preliminary investigation: The amount of alcohol that he told you he consumed, one which if it was on a prolonged period of time would that affect his health?" After some discussion the doctor answered, "Yes." Then

came the following: "Q. How much did he take at that time when he was consuming the alcohol?" Objection was made, "there being no showing and no claim by anyone that there was any influence of alcohol in connection with this accident." The court then overruled the objection and stated that the only basis was the "health problem." The doctor then answered as follows: "On January 12, 1971 in the History we had taken he told me that he was drinking a fifth of booze a day." The following colloquy then took place: "THE COURT: . . . he is trying to show the comparison of the health prior to the accident and after the accident. Is that what you are attempting to do? MR. WELCH: Yes, sir. It has no bearing upon the happening of the accident, merely upon his health. THE COURT: It is on that basis that the court is admitting this evidence and the jury is admonished to keep that in mind in their deliberations." In an action where permanent, personal injury is claimed, the defendant may show as affecting damages that the plaintiff was a person of intemperate habits. Century "21" Shows v. Owens, 400 F. 2d 603; 9 A. L. R. 1406. Plaintiff's third assignment is not meritorious.

A motorist who witnessed the collision and who was traveling west on Center Street about 1/2 to 3/4 block from the collision site was permitted over objection to testify that he thought the speed limit at the scene of the accident was 35 miles per hour. Later in the trial an Omaha ordinance was received in evidence which provided among other things: ". . . nor in any case at a greater rate of speed than twenty-five miles per hour, except on street or streets where a greater rate of speed is permitted, as designated by signs installed along such street or streets." Objection to the witness' testimony was solely upon the ground that he should not be permitted to testify "what the law is." There was no objection on the basis of either insufficient foundation or that the testimony was not the best evidence. There

was no error in admitting this testimony. A witness may testify as to the posted speed limit at a given location if an appropriate foundation is laid. The plaintiff's fourth assignment of error is not meritorious.

The plaintiff's fifth assignment relates to an order made by the trial court during the taking by the plaintiff of a pretrial discovery deposition of one of the defendant's listed witnesses, denying the production of a written statement previously made by the witness. This witness later testified at the trial. During the deposition the plaintiff's counsel asked the witness if her statement had been taken by anyone after the accident. It developed that she then had the statement in her possession. Plaintiff's counsel asked to see it. Objection was made and almost immediately a ruling was obtained from the same judge who later presided at trial. He denied production because there was no showing of good cause.

Plaintiff relies upon section 27-612, R. S. Supp., 1975, effective August 24, 1975. That section is in part as follows: Rule 612. Writing used to refresh memory. "If a witness uses a writing to refresh his memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness." This rule codifies in part previous law and in part enlarges previous rules. See Art. VI, Witnesses, p. 19 et seq., Nebraska Rules of Evidence, 1975, Nebraska Continuing Legal Education, Inc. This rule continues the former rule requiring that any writing used by a witness to refresh his recollection at a hearing must be produced for an adverse party. The rule adds to previous law by requiring, among other things, the production of any statement used by the witness to refresh his recollection previous to testifying and by permitting the adverse party to introduce the parts of the statement which re-

late to the testimony of the witness. Under the rule, however, a precondition to the production and use is the requirement that it has been used to refresh the witness' recollection. In this case the gist of the witness' testimony on the point of refreshment was that she just glanced at it. "What I looked at was the date." There is here no disagreement involving either the date of the accident, the witness' presence at the time, nor is the date of the taking of the statement relevant. Even if the changes in the law are to be applied before the effective date of the act, the rule is not applicable here because the witness had not refreshed her recollection by means of the statement. The trial court did not err in its ruling.

The last assignment relates to the trial court's refusal to permit the plaintiff at the end of trial to amend his petition to include an allegation that at the time of the collision the defendant was operating her vehicle on the wrong side of the street. The court gave as the reason for its ruling: "There is no evidence in the record that the defendant was operating her car on the wrong side of the street, under Nebraska law . . . . The evidence is that the defendant attempted to make a left turn at an intersection." In his brief the plaintiff states his contention as follows: "We contend that when an automobile 'cuts a corner' on a left hand turn rather than going beyond the center point of the intersection, that automobile is operating on the wrong side of the street rather than simply failing to yield the right of way on a properly executed left hand turn." No eyewitness testified that the defendant was driving her car south of the centerline as she approached the intersection. All the direct testimony is to the contrary.

An eastbound motorist whose car was passed by the motorcycle at "about the second entrance where you come out of Kilpatrick's on the north side" (the record indicates that entrance is 192 feet west of the west line of 40th Street), and whose view of the collision was ob-

structed by a car or cars ahead of her own car, but who saw the motorcycle flying in the air, testified that moments later after the accident when she passed the collision site the Volkswagen was in the inner eastbound lane of traffic, facing directly west, and that the defendant then drove her car to the curb immediately after the witness' car had passed. The photographs indicate that the Volkswagen after the collision was facing directly south with its front wheels against the curb. The photos and testimony also indicate that the debris previously mentioned was directly north of the rear of the car and north of the dividing line between the two eastbound traffic lanes. Any inference from the foregoing that the defendant was driving her car in the lane of traffic south of the centerline before the collision was entirely too speculative to require a wrong side of the street instruction. The court did properly instruct the jury on the law applicable to the proper manner of making left-hand turns at intersections. All the evidence indicating negligence on the part of the defendant was before the jury. It was properly able to consider under the instructions given whether the defendant was negligent in cutting the corner, and whether such negligence, if any, was the proximate cause of the accident. The trial court did not abuse its discretion in refusing the request to amend made at the end of trial. The courts may, in the furtherance of justice, either before or after the judgment, permit the amendment of a pleading by conforming the pleading to the facts proved. § 25-852, R. R. S. 1943. Justice did not require amendment in this case.

AFFIRMED.

BRODKEY, J., dissenting.

I would reverse and remand this case for a new trial. The record reveals that at the close of all the evidence, a conference was had between the court and counsel for the parties at which the following occurred: "MR. SCHREMPP: Comes now the plaintiff and at the close

of all of the evidence moves the Court for an Order allowing plaintiff to amend his Petition to allege that the defendant under the present state of the evidence — that there is evidence of the fact that the defendant was operating her vehicle on the wrong side of the street, and further requests the Court that on the allowance of such an amendment that the same be included as a specification of negligence in Instruction No. 2.

"THE COURT: There is no evidence in the record that the defendant was operating her car on the wrong side of the street, under Nebraska law operating on the wrong side of the road or street. The evidence is that the defendant attempted to make a left turn at an intersection. Overruled and denied. Your request is denied and your motion is overruled."

In this, I believe the court erred, as a review of the record reveals that there was testimony and evidence received during the trial from which the jury might well have concluded that the defendant, in fact, was driving on the wrong side of the street. This evidence exists apart from the evidence pointed out by counsel for the plaintiff relative to his claim that the defendant allegedly cut the corner in making a left-hand turn before reaching the east line of 40th Street as extended in a northerly direction through the intersection. I direct attention to the testimony of Ida Johnson, who was called as a witness for the defendant. She testified that on August 7, 1972, she was driving her car east on Center Street near the intersection of 40th and Center Streets at the time of the accident. She had stopped for a red light at 42nd and Center Streets, and when the light turned green she proceeded east in the right-hand lane. Shortly thereafter the plaintiff's motorcycle passed her on the left and swerved in front of her and then swerved out in the middle between the cars on both sides. She lost sight of the motorcycle when it was approximately 1/2 block ahead of her and the next time

she observed it it was going up in the air above the trees. She then proceeded through the intersection of 40th and Center Streets. She testified at that time the Volkswagen was stopped and to her left. She also testified that after she passed through the intersection, the driver of the Volkswagen moved it to the south curb, as shown in exhibit 2, which shows the Volkswagen with its front wheels against the south curb of Center Street. She went back to the scene of the accident and saw plaintiff lying in the street, and his motorcycle by a tree. The front of the Volkswagen was "mashed in." We add parenthetically at this point that exhibits 9, 10, and 29, colored photographs showing the damage to the Volkswagen, strongly indicate that the collision between the motorcycle and the Volkswagen was a head-on collision, as the hood of the Volkswagen appears to have been pushed directly back toward the windshield of the automobile.

Witness Johnson was examined in great detail and at some length, both in direct examination and in cross-examination, as to the location of the Volkswagen when she observed it, and it is necessary and helpful to set out verbatim certain portions of her testimony. In direct examination by defendant's attorney, as it appears in the record, the following questions were asked and answers given: "Q. What lane were you in when you passed in front of the blue Volkswage (sic)? A. Well, I was to the right of her. Q. What lane were you in? A. I was in the south lane. Q. And what lane was she in at that time? A. In the left lane. Q. Was she moving or stopped? A. No, she was stopped." Later, on cross-examination by counsel for the plaintiff, the following appears: "BY MR. SCHREMPP: Q. Mrs. Johnson, you say that when you went past going east there was enough room in the curb lane for you to get by south of the Volkswagen, is that right? A. Yes. Q. The Volkswagen then was in the lane — A. To the left of me. Q. To the left of you? A. Yes. Q. In other words that

would be the lane between the center line — well, it would be the first lane south of the center line, wouldn't it? You were in the curb lane? A. Yes. Q. And the Volkswagen was in the lane immediately north of you? A. It was north of me. I had enough room to get past. Q. So there was one whole clear lane but the other lane was occupied by the Volkswagen, was it not? A. Yes. Q. At the time you drove past it after the accident in what direction was the Volkswagen facing in this lane? A. Well, it looked to me like it was just practically straight west. Q. Would you come here and put this up for us then, if you would, ma'am? Well, maybe I can help. If you place the car facing straight west in approximately that position, would that be about correct? A. I expect. It looked to me like it was just about straight. Q. In other words it was facing due west, wasn't it? A. Yes. Q. This was after the whole collision was over? A. Yes."

On further cross-examination of the witness, Ida Johnson, she gave these answers to questions propounded to her: "Q. All right, I will ask you this: You say that after you saw the motorcycle go up toward the trees that you drove east? A. Right. Q. On Center Street? A. Right. Q. And that you drove east on the curb lane, which would be the lane closest to the south - right? A. Yes. Q. And in the next lane over; in other words, the lane next to you you saw the Volkswagen for the first time? A. Yes. Q. And it was in the lane right next to your lane, was it not? A. Yes. Q. And it was facing you say due west? A. Right. Q. No problem then about that where it was. A. I was going east and she was going west. Q. And you are sure of that? A. Sure, I am sure. I know which direction I was going. Q. Well then that would be correct as to where you saw the car, would it not? A. I was in the south lane and she was in the north lane. Q. All of course south of the center line? A. Yes." She also testified that following the impact she saw the defendant drive her Volkswagen

to the south curb and thought to herself "You shouldn't have moved that."

In addition, debris, which the police accident investigator testified was similar to that on the undercarriage of vehicles, was found in the left or northern east bound lane.

From the testimony quoted above and the evidence noted, it is clear there was indeed evidence in the record from which the jury could find that at the time of the accident the defendant was driving on the wrong side of the street. Had the jurors been instructed that driving on the wrong side of the street could be considered by them as evidence of negligence, and had they chosen to believe witness Johnson's testimony, they might well have found, at least circumstantially, that at or immediately before the moment of impact the defendant was driving her Volkswagen in a westerly direction on the north half of the east bound lane of Center Street, all south of the centerline of Center Street.

The law applicable to this situation is that when a motion has been made to amend a pleading to include a material allegation upon which some evidence has been received, such amendment should be allowed. Of course, whether or not the evidence is sufficient to support a favorable finding thereon remains a question of fact. Curren v. Certain Parcel of Land, 149 Neb. 477, 31 N. W. 2d 405 (1948); Seeman v. Pagels, 184 Neb. 757, 172 N. W. 2d 100 (1969); § 25-852, R. R. S. 1943. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence, and a failure to do so is prejudicial. Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571 (1957); Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758 (1957); Stillwell v. Schmoker, 175 Neb. 595, 122 N. W. 2d 538 (1963).

Since both the negligence of the defendant, and the contributory negligence of the plaintiff were issues in this case, it is possible that had the jury been instructed on the issue of whether the defendant, Mrs. Andersen,

was driving on the wrong side of the road at the time of the accident, there being evidence in the record to sustain that contention on the part of the plaintiff, its conclusions and verdict may have been different, either as to defendant's negligence, or as to the degree of contributory negligence of the plaintiff.

There being evidence in the record on the issue, the plaintiff was entitled to have his theory of defendant's liability submitted to the jury under proper instructions, and I conclude that the failure of the court to do so was, in this case, prejudicial.

Finally, I am of the opinion that plaintiff's objection to the testimony of witness Madsen as to the speed limit at the scene of the accident should have been sustained. While it is undoubtedly true that a witness may testify as to the posted speed limit at a given location if an appropriate foundation is laid, the record in this case is absolutely silent as to whether the witness had even seen a speed limit sign and his testimony as to his opinion of the applicable speed limit at that place was, to say the least, indefinite. During the course of the trial, the court, over objection of plaintiff's counsel, permitted the attorney for defendant to read the following city ordinance to the jury: "It shall be unlawful for any person to operate any motor vehicle on, over or upon any street or streets in the City of Omaha at a rate of speed greater than is reasonable and prudent, having due regard for the traffic, surface, width and condition of the road and the hazard at intersections, nor at a rate of speed such as to endanger life or limb of any person, nor in any case at a greater rate of speed than twenty-five miles per hour, except on street or streets where a greater rate of speed is permitted, as designated by signs installed along such street or streets." It is the general rule that municipal ordinances must ordinarily be pleaded and proved. Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677 (1954). The District Court may not, in original actions, take judicial notice of mu-

nicipal ordinances. Section 14-138, R. R. S. 1943, provides that city ordinances "may be proved by a certificate of the clerk under the seal of the city, and when printed or published in a book or pamphlet form, and purporting to be published or printed by authority of the city counsel, shall be read and received in all courts and places without further proof." There is no showing in the record that counsel for the defendant read the ordinance in question to the jury out of such a book or pamphlet. Before permitting the counsel to read the ordinance in question to the jury, the judge commented that he would possibly give the ordinance to the jury as part of the instructions. In instruction No. 14, the court told the jury: "If you find from the evidence that any of the parties violated any of the laws of the State of Nebraska *or City of Omaha Ordinances* which are set out in these Instructions, the violation thereof is not in and of itself negligence as a matter of law; but the violation thereof is evidence of negligence which you should consider with all the other evidence in the case to determine whether or not the parties or either of them were guilty of negligence." (Emphasis supplied.) However, the court did not instruct the jury as to the Omaha ordinance relative to speed, nor did he inform it of what the specific speed limit was at the location in question. This may have well resulted in confusing the jury, to the prejudice of the plaintiff. I feel that the plaintiff should be afforded a new trial, and an opportunity to present his theory of the case to the jury under proper instructions.

JOHN D. CAMPBELL, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
240 N. W. 2d 339

Filed April 1, 1976. No. 40207.

1. **Legislature: Statutes: Constitutional Law.** It is the province

of the Legislature to make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relationship to the legitimate objectives and purposes of the legislation.

2. **Legislature: Statutes: Actions.** Where legislation creates a right of action, the Legislature has absolute power to determine the conditions under which the action must be brought.
3. **Legislature: Statutes: Constitutional Law.** Public agencies, generally speaking, afford a proper subject for legislative classification.
4. **Political Subdivisions: Torts: Constitutional Law.** The Nebraska Political Subdivisions Tort Claims Act, in creating a special class of tort-feasors consisting of all political subdivisions as defined, does not violate Article III, section 18, of the Nebraska Constitution.
5. ———: ———: ———. The classification of persons and corporations as created in the Nebraska Political Subdivisions Tort Claims Act constitutes a reasonable classification for purposes of the act, operates uniformly upon all members of the class, and is not constitutionally defective.
6. **Actions: Constitutional Law.** Neither the United States nor the Nebraska Constitution forbids the creation of new rights nor the abolition of old ones recognized by the common law to attain a permissible legislative object.
7. **Political Subdivisions: Torts: Notice: Constitutional Law.** The notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act is a condition precedent to the institution of suit against a political subdivision and neither that notice requirement nor the limitation of time for suit as set out in section 23-2416, R. R. S. 1943, violate constitutional guaranties of equal protection or uniformity under state or federal Constitutions.

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

Philip M. Aitken and Gilbert G. Lundstrom of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellant.

James M. Bausch of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

MCCOWN, J.

This is an action for damages for personal injuries sustained by the plaintiff in a fall in a hospital owned and operated by the defendant City of Lincoln. The District Court sustained defendant's demurrer, overruled plaintiff's motion for new trial and rehearing, and the action was dismissed. Plaintiff has appealed.

This action was filed July 1, 1974. The amended petition alleged that plaintiff was a paying patient in Lincoln General Hospital on July 4, 1972. He was directed to use a shower room in the hospital on that date. Due to the alleged negligence of the hospital, its agents, and employees, the plaintiff slipped and fell and fractured his hip. The amended petition also alleged that the hospital was a purely business enterprise for profit operated by the city in competition with privately owned and operated hospitals. Plaintiff prayed for damages and costs.

The defendant demurred on the ground that the petition failed to state a cause of action and there was no showing that plaintiff had complied with the provisions of the Nebraska Political Subdivisions Tort Claims Act prior to the institution of the action. The District Court found that the action was a negligence action within the purview of the Nebraska Political Subdivisions Tort Claims Act, sections 23-2401 to 23-2420, R. R. S. 1943; and that the Lincoln General Hospital is owned and operated by the City of Lincoln, Nebraska, in a proprietary capacity. The court also found that the petition did not allege that notice of claim was ever filed as required by the act, and that plaintiff's brief admits that no such filing was ever made. The District Court also found that the Nebraska Political Subdivisions Tort Claims Act was a procedural enactment rather than one of substantive law; that the act was not unconstitu-

tional as special legislation; and that the classification of political subdivisions as a separate class was reasonable. The District Court also determined that the act does not violate the uniformity and equal protection provisions of either the United States or Nebraska Constitutions.

Plaintiff's basic position is that prior to the adoption of the tort claims act, the city was carrying out a proprietary rather than a governmental function in operating the hospital, and was subject to the same liability for negligence as a private or charitable hospital. Plaintiff contends that the defendant, in operating the hospital, was therefore in the same class and subject to the same statute of limitations as other private tort-feasors. The argument then goes that the tort claims act created a special class of tort-feasors and gave special privileges to municipal corporations conducting proprietary activities without any reasonable basis for the classification. The plaintiff also contends that the act does not meet constitutional requirements of uniformity and equal protection because it requires him to file a notice of claim within 1 year after the claim accrued and to begin suit within 2 years, while no notice is required and there is a 4-year statute of limitations for an identical cause of action against a hospital which is not owned and operated by a political subdivision.

A brief history of sovereign and charitable immunity in Nebraska may be appropriate. Prior to 1966, hospitals operated by nonprofit charitable corporations were immune from tort liability to patients under the doctrine of charitable immunity. Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N. W. 2d 86 (1955). The great majority of hospitals in Nebraska are of this category and were and are operated similarly to the Lincoln General Hospital involved here. Effective April 23, 1966, this court overruled former cases and abrogated the charitable immunity doctrine. We held that nonprofit charitable hospitals no longer were exempt from

tort liability to their patients. Myers v. Drozda, 180 Neb. 183, 141 N. W. 2d 852.

During a comparable time frame, the doctrine of sovereign immunity was in effect in Nebraska and extended to political subdivisions, including cities, as to all governmental functions. In an effort to avoid the adverse effects of the doctrine upon victims of negligence, this court, as did others, developed the concept over the years that a political subdivision or city which was negligent in carrying out an activity described as a proprietary function was held to be subject to the same duties and liabilities in tort "as are imposed on private corporations or individuals, who enjoy corresponding privileges." Updike v. City of Omaha, 87 Neb. 228, 127 N. W. 229 (1910).

In Brown v. City of Omaha, 183 Neb. 430, 160 N. W. 2d 805 (1968), this court held that even when engaged in governmental activities local public bodies were no longer immune from tort liability arising out of the ownership, use, and operation of motor vehicles. We announced a case-by-case approach to the issue of abrogation of the doctrine of sovereign immunity. In Johnson v. Municipal University of Omaha, 184 Neb. 512, 169 N. W. 2d 286 (June 20, 1969), this court extended its abrogation of the doctrine of sovereign immunity to tort liability arising out of a physical condition voluntarily created by a public body on its premises. On December 25, 1969, the Political Subdivisions Tort Claims Act became effective and applies to tort claims accruing on and after January 1, 1970.

The Legislature's declaration of purpose and intent contained in section 23-2401, R. R. S. 1943, states that no political subdivision was to be liable for and no suit was to be maintained against it on any tort claim except and only to the extent provided by the act. That section also provides: "The Legislature further declares that it is its intent and purpose through this enactment to provide uniform procedures for the bringing of tort

claims against all political subdivisions, whether engaging in governmental or proprietary functions, and that the procedures provided by this act shall be used to the exclusion of all others."

Section 23-2416, R. R. S. 1943, provides that every claim permitted under the act shall be forever barred unless within 1 year after such claim accrued the claim is made in writing to the governing body. It also provides that except as otherwise provided, all suits permitted by the act shall be forever barred unless begun within 2 years after such claim accrued. Extensions of time for both notice and suit as to minors, incompetents, and prisoners, in accordance with section 25-213, R. S. Supp., 1974, are incorporated by reference. Other extensions of time are provided for in certain circumstances.

Prior to Brown v. City of Omaha, *supra*, governmental activities of a political subdivision were immune from liability for torts, while activities which were judicially classified as proprietary in nature were not immune. With the exception of the cases carved out in Brown and Johnson, that situation existed at the time of the passage of the act. The act, however, waived the immunity from liability for both governmental and proprietary functions, with specified exceptions, and the procedures provided by the act apply to tort claims arising out of both governmental and proprietary activities.

The plaintiff basically contends that the act violates the uniformity clause of the Nebraska Constitution, Article III, section 18. That section provides in pertinent part: "The Legislature shall not pass local or special laws * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever."

The general test of constitutionality with respect to prohibitions against special legislation is reasonableness of classification and uniformity of operation. County of Otoe v. State Board of Equalization & Assessment, 182

Neb. 621, 156 N. W. 2d 728. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act. Gossman v. State Employees Retirement System, 177 Neb. 326, 129 N. W. 2d 97; Sandberg v. State, 188 Neb. 335, 196 N. W. 2d 501.

The tort claims act involved here specifically applies to torts which occur in the exercise of governmental as well as proprietary functions. As to tort claims arising out of governmental activities from which political subdivisions had previously been immune from liability, the act created a new right of action. As to those claims, the Legislature created the right of action and had absolute power to determine the conditions under which it must be brought. County Board of Platte County v. Breese, 171 Neb. 37, 105 N. W. 2d 478.

The plaintiff contends that the act is unreasonable and does not operate uniformly because it puts persons injured by governmental torts in a different class than those injured by private torts, and imposes special notice requirements and limitations of actions for claims against governmental subdivisions to which tort claims against private persons are not subject.

The act creates one single class of tort-feasors — all political subdivisions — which includes "villages, cities of all classes, counties, school districts, public power districts, and all other units of local government." The act applies equally and uniformly to all tort claims against a political subdivision. The fact that public agencies, generally speaking, differ from private persons or corporations in many respects is obvious. Under many circumstances that difference has been held to be sufficient in itself to afford a proper subject for

legislative classification. See Dias v. Eden Township Hospital Dist., 57 Cal. 2d 502, 20 Cal. Rptr. 630, 370 P. 2d 334. The court there said: "Likewise without merit is the contention that, since it is not necessary to file a claim before maintaining an action against a private nonprofit corporation operating a hospital for the use of the public, the statutory requirement that a claim must be filed before bringing an action against a hospital district constitutes an arbitrary and unreasonable discrimination. Public agencies, generally speaking afford a proper subject for legislative classification."

The taxpaying public has an interest in seeing that prompt and thorough investigation of claims is made where a political subdivision is involved. The public does not have such an interest as to claims against private persons or corporations. The taxpayers who provide the public treasury with funds have an interest in protecting that treasury from stale claims. That interest may well be intensified where the political subdivision has not been protected by insurance. It is clear under the act that while the procurement of insurance coverage is authorized, it is not required, and there are provisions for loans by the State Treasurer to a political subdivision in the event insufficient funds are available to pay awards or judgments under the act. The Nebraska Political Subdivisions Tort Claims Act, in creating a special class of tort-feasors consisting of all political subdivisions as defined, does not violate Article III, section 18, of the Nebraska Constitution. The classification of persons and corporations as created in the Nebraska Political Subdivisions Tort Claims Act constitutes a reasonable classification for the purposes of the act, operates uniformly upon all members of the class, and is not constitutionally defective.

The requirement of notice imposed by the act is a factor here only with respect to activities previously classified as proprietary. This court long ago held that the primary purpose of notice provisions in connection

with actions against political subdivisions was "to afford to the municipal authorities prompt notice of the accident and injury in order that an investigation may be made while the occurrence is still fresh and the municipal authorities placed in a position to intelligently consider the claim, allow it if deemed just, or in the alternative to adequately protect and defend the public interest." Bethscheider v. City of Hebron, 137 Neb. 909, 291 N. W. 684. See, also, Knapp v. City of Omaha, 172 Neb. 78, 108 N. W. 2d 419.

Other courts, under similar or related circumstances, have held that notice requirements as conditions precedent to suit against a municipal corporation are not unreasonable and unconstitutional, even though no notice is required in suits against private corporations for similar tort claims. See McCann v. City of Lake Wales, 144 S. 2d 505 (Fla., 1962). In Hirth v. Village of Long Prairie, 274 Minn. 76, 143 N. W. 2d 205, the Minnesota Supreme Court said: "We cannot sustain plaintiff's argument that because the law includes no notice requirement in suits against private corporations, justice and fairness demand the same law apply in suits involving a municipality acting in a proprietary capacity. * * * '[T]he legislature is not, because of similarity of liability, precluded from making distinctions between municipalities and private corporations in respect to conditions precedent to suit.' "

Finally the plaintiff contends that the Legislature had no power to impose a notice requirement or shorten any statute of limitations with respect to a tort claim against a governmental subdivision engaged in a proprietary activity. Basically the contention is that the Legislature is powerless to alter a common law right. The law itself as a rule of conduct may be changed at the will or even at the whim of the Legislature unless prevented by constitutional limitations. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. The Constitution does not forbid the creation of new rights, nor the abolition of old ones

recognized by the common law, to attain a permissible legislative object. Silver v. Silver, 280 U. S. 117, 50 S. Ct. 57, 74 L. Ed. 221.

With respect to the shortening of a statute of limitations, this court said: "* * * The only restriction on the exercise of this power is that the Legislature cannot remove a bar or limitation which has already become complete, and 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." Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc., 192 Neb. 431, 222 N. W. 2d 125.

Cases which have held notice requirements to be constitutionally defective in somewhat related circumstances have often rested on an unreasonably short period of time for notice or on the fact that time requirements for notice and commencement of suit provided no extensions for minors or other persons under disability. See Annotation, 59 A. L. R. 3d 93. The Nebraska act, on the other hand, provides for a 1-year notice limitation and that time period commences to run from the time the claim *accrued* rather than from the date of the injury. The Nebraska act also provides for a period of 2 years within which suit shall be brought, and grants extension of time for both notice and suit in the case of minors and others under mental disability. The practical advisability of providing a uniform procedure for all tort claims against political subdivisions is apparent and is specifically set out in the legislative declaration of purpose. To accept plaintiff's contentions would create different classes of political subdivision tort-feasors, victims, and procedures. It would seal in judicial concrete the outmoded and no longer valid distinctions between proprietary and governmental activities of political subdivisions in determining tort liability.

The notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act is a condition

precedent to the institution of suit against a political subdivision, and neither that notice requirement nor the limitation of time for suit as set out in section 23-2416, R. R. S. 1943, violate constitutional guaranties of equal protection or uniformity under state or federal Constitutions.

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

AFFIRMED.

FRED W. PETTID, BY AND THROUGH HIS FATHER AND NEXT FRIEND, FRED J. PETTID, APPELLEE, V. MICHAEL EDWARDS, APPELLEE, WESTERN CASUALTY AND SURETY COMPANY, INTERVENER-APPELLANT.
240 N. W. 2d 344

Filed April 1, 1976. No. 40273.

1. **Insurance: Contracts.** The parties to an insurance contract may contract for any lawful coverage and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
2. ———: ———. An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning.
3. **Insurance: Contracts: Motor Vehicles.** The purpose of the uninsured motorist statute is to give a person injured by an uninsured motorist the same protection he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy.
4. ———: ———: ———. The Nebraska uninsured motorist statute does not prohibit a limitation of liability to the minimum limits required by statute in each policy issued even though a single policy may insure more than one automobile.

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

Pilcher, Howard & Dustin, for intervener-appellant.

John J. Higgins and J. Patrick Green, for appellee Pettid.

Paul E. Watts, for appellee Edwards.

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

BOSLAUGH, J.

This case involves a controversy concerning the policy limits under the medical payments coverage and uninsured motorists coverage of an automobile liability insurance policy issued to the plaintiff by the intervener, the Western Casualty and Surety Company. There is no dispute concerning the facts.

On February 19, 1973, Fred W. Pettid, a minor 8 years of age, was crossing 76th Street in Omaha, Nebraska, as a pedestrian when he was struck by an automobile operated by Michael Edwards. As a result of the accident Fred W. Pettid sustained fractures of the right clavicle, right humerus, and left femur; a laceration of the left neck; and a cerebral concussion. His medical and hospital expenses amounted to $3,179.55. This action was commenced against Michael Edwards on June 15, 1973, by Fred J. Pettid, as father and next friend of Fred W. Pettid, to recover the damages sustained by Fred W. Pettid in the accident.

The automobile which was being operated by Michael Edwards at the time of the accident was insured by the Great Plains Insurance Company, but the policy contained an endorsement specifically excluding coverage as to Michael Edwards. As a result, Michael Edwards was an uninsured motorist at the time of the accident.

On the date of the accident an automobile liability insurance policy issued to Fred J. Pettid by the intervener was in force. The policy provided both medical payments coverage, Coverage "C," and uninsured motorist coverage, Coverage "K."

The intervener was allowed to intervene in this action to protect its interest under the uninsured motorist coverage of its policy. Thereafter, the action proceeded as a suit upon its policy.

The policy issued by the intervener insured two automobiles owned by Fred J. Pettid, a 1969 Pontiac station wagon and a 1970 Pontiac 2-door hardtop. The policy provided medical payments coverage, in the amount of $1,000 for each person, and uninsured motorist coverage, in the amount of $10,000 for each person, for each automobile and separate premiums were charged for each coverage for each automobile.

Paragraph 5 under "Conditions" in the policy provides in part as follows: "5. Limits of Liability: Regardless of the number of automobiles to which this policy applies: * * * Coverage C: The limit of liability for medical payments stated in the declarations as applicable to 'each person' is the limit of The Western's liability for all expenses incurred by or on behalf of each person, including each insured, who sustains bodily injury as the result of any one accident. * * * Coverage K: The limit of liability for coverage K stated in the declarations as applicable to 'each person' is the limit of The Western's liability for all damages because of bodily injury sustained by one person as the result of any one accident * * *."

The intervener contends its liability is limited to $1,000 under the medical payments coverage and $10,000 under the uninsured motorist coverage. Its tender of those amounts to the plaintiff was refused. The plaintiff contends the maximum liability of the intervener is $2,000 under the medical payments coverage and $20,000 under the uninsured motorist coverage.

The trial court found the plaintiff was entitled to recover $18,500 and made no allocation of the judgment between the coverages involved. The intervener has appealed. There is no cross-appeal.

The medical payments coverage provided in the inter-

vener's policy is in the nature of a limited accident policy. In general, the insurer agrees to pay reasonable expenses incurred within 1 year of the date of the accident by each person who sustains bodily injury caused by accident while occupying the automobile, or to each insured who sustains bodily injury caused by accident while occupying or being struck by an automobile. It is a coverage provided voluntarily by the insurer and is strictly a matter of contract between the parties.

The parties to an insurance contract may contract for any lawful coverage and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. Mills v. Aetna Ins. Co., 168 Neb. 612, 96 N. W. 2d 721. An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. Preferred Risk Mut. Ins. Co. v. Continental Ins. Co., 172 Neb. 179, 109 N. W. 2d 126.

The plain language of the policy in this case limited the liability of the intervener to the limit stated in the declarations as applicable to each person, *regardless of the number of automobiles to which the policy applied.* It is difficult to see how the intervener could have stated more clearly the limit for medical payments coverage would be $1,000 per person per accident although the policy might apply to more than one automobile. In view of the language used the plaintiff could have no reasonable expectation that the policy did not mean exactly what it said.

In determining the question concerning the uninsured motorist coverage an additional consideration is involved. Section 60-509.01, R. R. S. 1943, provides that: "No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for de-

livery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in section 60-509, under provisions approved by the Director of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; * * *." We have said the purpose of the statute is to give a person injured by an uninsured motorist the same protection he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133; State Farm Mut. Auto. Ins. Co. v. Selders, 187 Neb. 342, 190 N. W. 2d 789.

The requirement of the statute is that every automobile liability insurance *policy* include uninsured motorist coverage with limits as set forth in section 60-509, R. R. S. 1943, unless such coverage is rejected by the insured. There is no requirement in the statute that if coverage is provided for more than one automobile in a single policy, each coverage shall be considered as if it were provided by a separate policy.

We have held that the limits of uninsured motorist coverage cannot be reduced by other coverages in the policy, or by other insurance or excess escape clauses, and that where separate policies insuring different automobiles are issued to the same insured, the insured is entitled to the benefit of the full coverage in each policy. Stephens v. Allied Mut. Ins. Co., *supra*; Bose v. American Family Mut. Ins. Co., 186 Neb. 209, 181 N. W. 2d 839; Protective Fire & Cas. Co. v. Woten, 186 Neb. 212, 181 N. W. 2d 835. Essentially, the question in this case is whether the insurer can by appropriate language limit its liability in a single policy to the limits required

by statute even though the policy insures more than one automobile.

In extensive briefs the parties have discussed in detail many of the decisions from other jurisdictions which have considered the question. The cases are in sharp conflict. In Weemhoff v. Cincinnati Ins. Co., 41 Ohio St. 2d 231, 325 N. E. 2d 239, the Supreme Court of Ohio held the requirements of the statute are met when the minimum limits are provided. The court further held the statute did not require coverages in one insurance policy to be compounded if more than one vehicle was afforded uninsured motorist protection. The court noted, however, that separate policies would allow the coverages to be "stacked."

In Hilton v. Citizens Ins. Co. of New Jersey (Fla. App.), 201 S. 2d 904, in construing a policy insuring two vehicles and containing language similar to that issued by the intervener, the Florida Court of Appeals said: "The insurance policy on which plaintiffs base their claim for judgment clearly provides that regardless of the number of vehicles insured thereunder, or the number of insureds who may sustain damages in any one accident, the limit of the company's liability shall be the amount set forth in the declarations clause of the policy. This amount is shown to be the sum of $20,000.00. To hold with the contention of appellants would amount to rewriting the clear and unambiguous terms of the insurance policy sued upon and to impose on appellee twice the amount of liability it agreed to assume for the premium charged in exchange for the coverage granted."

In Schelfo v. Government Emp. Ins. Co., 387 F. Supp. 108, affirmed 506 F. 2d 16, the policy insured three automobiles and contained language similar to that issued by the intervener. The Indiana statute was almost identical with the Nebraska statute. Applying Indiana law, the limitation of liability was held enforceable and the inclusion of a second and third automobile did not

enlarge the policy limits. The court distinguished cases involving separate policies. To the same effect, see Miller v. Hartford Acc. & Ind. Co., 506 F. 2d 11.

Representative of the cases which have held the insured is entitled to multiple coverages where more than one automobile is insured under the same policy are Great Central Ins. Co. v. Edge, 292 Ala. 613, 298 S. 2d 607, and Wilkinson v. Fireman's Fund Ins. Co. (La. App.), 298 S. 2d 915. In the Edge case the limitation of liability clause was held ineffective, primarily upon the basis that separate premiums had been charged for each automobile insured. In the Wilkinson case two policies had been issued, each policy insuring three different automobiles. The court held the statute required uninsured motorist protection in all insurance issued "with respect to *any* motor vehicle" and permitted "stacking" of the coverages for all six automobiles.

After considering the various authorities, we have concluded the Nebraska law does not prohibit a limitation of liability by clear language where the minimum limits required by statute are provided in each policy issued.

The judgment of the District Court is reversed and the cause remanded with directions to enter judgment for the plaintiff and against the intervener in the amount of $11,000. Since the judgment does not exceed the amount tendered by the intervener, the plaintiff is not entitled to an allowance for attorneys' fees.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I dissent. If this case were one of first impression not controlled by valid binding precedent, I would have no hesitancy in joining in the majority opinion. However, I believe it is controlled by our opinion in Bose v. American Family Mut. Ins. Co., 186 Neb. 209, 181 N. W. 2d 839. Whether the uninsured motorist coverage by which two automobiles are insured is provided in one policy or in two is not significant, and that is the only

distinction between this case and Bose v. American Family Mut. Ins. Co., *supra*.

McCOWN, J., dissenting.

Bose v. American Family Mut. Ins. Co., 186 Neb. 209, 181 N. W. 2d 839, is controlling here unless it can be distinguished. The majority opinion distinguishes this case from Bose on one ground only. In this case there was only one insurance policy covering two vehicles while in Bose there were two policies covering two vehicles. In making that distinction the majority opinion also adopts a strict and literal interpretation of section 60-509.01, R. R. S. 1943, which is in conflict with the liberal construction mandated by Bose and other cases.

In Protective Fire & Cas. Co. v. Woten, 186 Neb. 212, 181 N. W. 2d 835, this court said: "Our uninsured motorist law was enacted for the benefit of the innocent victim of the financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose." We also said: "It is obvious to us that it is undesirable to permit an insurance carrier to satisfy a statutory requirement by a policy provision that reduces or eliminates liability in those instances where its insured is not fully indemnified. We have no quarrel with provisions to prevent overcompensation, but where, as here, defendants' damages exceed the possible liability, to allow the insurer to escape or limit liability is to pervert the intent of the statute."

In Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133, we said: "The general rule is that an insurer may not limit its liability under uninsured motorist coverage by set offs or limitations through 'other insurance,' excess insurance, or medical payment reduction clauses, and this is true even when the setoff for the reduction is claimed with respect to a separate, independent policy of insurance (workmen's compensation) or other insured motorist coverage."

In Bose, we said: "The letter of the statute prohibits issuance of a policy without uninsured motorist cover-

age subject to exceptions of no consequence here. Although a literal interpretation does not support defendant's position, we consider the spirit of the statute * * *."

Section 60-509.01, R. R. S. 1943, provides in part: "No policy insuring against loss * * * arising out of the ownership, maintenance or use of a motor vehicle shall be delivered * * * with respect to *any* motor vehicle registered or principally garaged in this state unless coverage is provided therein * * * in limits * * * set forth in section 60-509" for protection against uninsured motorists. (Emphasis ours.)

The interpretation adopted by the majority opinion makes the amount of statutorily required uninsured motorist coverage dependent upon the number of liability policies issued to the insured instead of on the number of vehicles insured or the number of premiums paid. In this connection it should be noted that the premium for uninsured motorist coverage on each of the two vehicles listed in the policy here was identical and that each premium was the same as it would have been had there been separate policies issued on each of the vehicles. It should be noted also that the insured was a pedestrian when struck by the uninsured motorist and neither of the vehicles actually insured here was involved.

The majority holding here limits the required uninsured motorist coverage to $10,000 whenever a single policy insures more than one vehicle. Aside from semantics and the technical niceties of policy provisions, in this case that holding of necessity determines either that each of the vehicles had only $5,000 of uninsured motorist coverage or that one vehicle had $10,000 of uninsured motorist coverage while the other had none. In either case, the minimum uninsured motorist coverage required by statute "with respect to any vehicle" did not apply to one or both of the vehicles here.

The holding of the majority opinion reads section 60-509.01, R. R. S. 1943, as requiring uninsured motorist

coverage in the statutory minimum amount of $10,000 and requires that amount of coverage to be allocated or divided between the number of vehicles insured under the same policy. That interpretation ignores the fact that the statute refers to "a motor vehicle" and "any motor vehicle," and that the term is only singular and not plural.

The majority holding also disregards the fact that separate premiums were paid and charged for the uninsured motorist coverage on each vehicle and Bose specifically held that under such circumstances the reasonable expectations of the insured would be defeated if policy limits were decreased or prorated. Where the insured pays the premium for uninsured motorist coverage in the minimum amount on each of two vehicles but receives only one policy from the insurance company covering both vehicles, that fact ought not to reduce the coverage which he would have had had the insurance company issued separate policies. Such a result is neither just nor reasonable and, in my opinion, is in direct conflict with our prior decisions.

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

M.R.D. CORPORATION, A NEBRASKA CORPORATION, APPELLANT, V. CITY OF BELLEVUE, A MUNICIPAL CORPORATION IN THE STATE OF NEBRASKA, ET AL., APPELLEES.
240 N. W. 2d 46

Filed April 1, 1976. No. 40286.

1. **Municipal Corporations: Notice: Eminent Domain.** Where one appears and actively participates before a city council hearing where the city council is to vote to acquire land, he cannot afterward complain that he did not receive notice in a legal manner.
2. **Municipal Corporations: Words and Phrases.** The term "street" as used in section 19-709, R. R. S. 1943, is a generic term and includes the portion of the street for vehicular traffic, the parkway, and the sidewalk.

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

Haney, Hansen & Katz, for appellant.

John E. Rice, for appellee City of Bellevue.

Heard before SPENCER, BOSLAUGH, and CLINTON, JJ., and FAHRNBRUCH and GRANT, District Judges.

FAHRNBRUCH, District Judge.

Appellant herein filed for injunctive relief to restrain appellees from proceeding with eminent domain proceedings to acquire 6.7 square feet of appellant's land. Appellant adduced evidence at trial and rested. The trial judge sustained a motion to dismiss appellant's case. We affirm.

Appellant, M.R.D. Corporation, first complains that appellee City of Bellevue, a municipal corporation in the State of Nebraska, did not give proper notice by publication of a city council meeting prior to the city council voting to acquire appellant's land. It is undisputed that appellant's president and its attorney participated actively on behalf of appellant at the city council proceedings. Where one appears at such a hearing and takes part in the proceedings, he cannot afterward complain that he did not receive notice in a legal manner. Richardson v. Frontier County, 94 Neb. 27, 142 N. W. 528. Appellant's first complaint is without merit.

Secondly, appellant complains that appellee City of Bellevue is attempting to condemn appellant's land for a walkway without authority.

The eastern terminus of Elm Street in the City of Bellevue forms a circular-type cul-de-sac. Running tangentially from the closed end of the cul-de-sac to the northeast is a walkway which has been dedicated to public use. The 6.7 square feet being condemned consists of two triangular parcels of land, one on each side of the walkway tangent point. The larger curved side of each of the triangles is approximately 10 feet long

and abut the cul-de-sac. The base of each triangle is 1.01 foot and runs in a tangent from the cul-de-sac. In short, appellee City of Bellevue is extending a portion of the right-of-way line of Elm Street at its eastern terminus.

Cities of the first class have the power of eminent domain for street purposes. § 19-709, R. R. S. 1943.

It makes no difference whether such extension in the instant case was for vehicular traffic or pedestrian traffic on a sidewalk adjacent to the portion of the street used for vehicular traffic. The word "street" as used in section 19-709, R. R. S. 1943, is a generic term. It includes the portion for vehicular traffic, the parkway, and the sidewalk. See Acton v. Wymore School Dist. No. 114, 172 Neb. 609, 111 N. W. 2d 368. See, also, Campbell v. Brandeis Investment Co., 121 Neb. 50, 236 N. W. 150; City of Beatrice v. Williams, 172 Neb. 889, 112 N. W. 2d 16.

The trial judge herein was correct on both the law and the facts.

The judgment of the trial court is affirmed.

AFFIRMED.

JOSEPHINE GLASS, APPELLANT, V. WILLIE HARPER, APPELLEE.
240 N. W. 2d 48

Filed April 1, 1976. No. 40317.

1. **Trial: Evidence.** Photographs, accurately depicting the matters shown therein, are not admissible in evidence unless the matters shown are relevant to the issues in the case.
2. **Trial: Witnesses.** The overruling of an objection to a question upon cross-examination is not prejudicial when the answer elicited is a repetition of prior testimony by the same witness.
3. **Trial: Judgments.** The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Edna R. Atkins, for appellant.

John F. Akin of Pierson, Pierson & Fitchett, for appellee.

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

KUNS, Retired District Judge.

The appellant herein instituted a paternity action in the District Court for Douglas County, Nebraska, alleging that the appellee was the father of a child born to her out of wedlock. The appellee answered denying generally the allegations of the petition and thereafter waived trial by jury. After trial to the court, a finding was made that the evidence was insufficient to support the appellant's allegations and the court entered judgment for the appellee. This appeal followed. We affirm the judgment of the trial court.

The appellant assigns three errors, two as to evidentiary rulings and finally that the judgment is contrary to the evidence. They will be considered in turn.

During the course of the presentation of appellant's case, one photograph showing the appellee and another showing the 2½-year-old child of the appellant were offered and reoffered in evidence upon a foundation that each photograph accurately represented the person shown therein. There was no evidence, either expert or nonexpert, that the photographs displayed any features or traits which might aid the court in determining the ultimate issue of parentage. The appellant assigns error in the ruling of the trial court sustaining an objection to the offer of the exhibits. Even though the photographs are accurate representations, they are not admissible unless the matters shown are relevant to the issues of the case. The ruling of the trial court was correct.

On cross-examination, the appellant stated that she had sexual relations with another person before the time when conception could have occurred and that her employment under the supervision of such person continued until after the probable time of conception. The appellee inquired about the nature and extent of the appellant's relation with such other person; objections to the questions were overruled and the rulings are assigned as error. The appellant's replies were virtual restatements of her prior testimony. No other evidence on this subject was introduced by either party. The answers made by the appellant were as favorable as possible to her side of the case and she was not prejudiced by the ruling upon her objections. No error is shown. Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820.

Finally, the appellant contends that the finding and judgment by the trial court was contrary to the evidence. A careful examination of the record shows that the evidence concerning the time and place of conception and the corroboration of the appellant was in such conflict that the determination of the issues depended entirely upon the credibility of the witnesses. The judgment of the trial court has the effect of the verdict of a jury and should not be set aside on appeal unless clearly wrong. Henkle & Joyce Hardware Co. v. Maco, Inc., *ante* p. 565, 239 N. W. 2d 772. The trial court heard the witnesses, observed their demeanor and manner of testifying, and determined their credibility. We find nothing in the record to show clear error in the finding.

The judgment of the trial court is affirmed.

AFFIRMED.

PAUL PHILLIPPE, APPELLANT, V. JOSEPH P. BARBERA ET AL., APPELLEES.

240 N. W. 2d 50

Filed April 1, 1976. No. 40333.

1. **Appeal and Error: Records: Pleadings: Trial.** In the absence of a bill of exceptions, prepared and filed in accordance with applicable statutory provisions and rules of practice, review on appeal is limited to whether the pleadings support the judgment entered by the lower court.
2. **Appeal and Error: Courts: Trial: Civil Matters.** On appeal to the District Court in civil matters, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county court.

Appeal from the District Court for Otoe County: BETTY PETERSON SHARP, Judge. Affirmed.

William B. Brandt, John J. Horan, and Healey, Healey, Brown, Wieland & Burchard, for appellant.

Wellensiek & Davis, for appellees.

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

REAGAN, District Judge.

This is an appeal from an order of the District Court modifying a judgment of the county court in favor of the appellant.

The trial on appeal in the District Court was on the record, no additional evidence being received. The record consisted of the county court transcript and bill of exceptions, both of which were apparently marked as exhibits in the District Court, and received in evidence by the District Judge. The District Court thus had jurisdiction of the appeal. § 24-541, R. S. Supp., 1974; Riggert v. King, 192 Neb. 607, 223 N. W. 2d 155.

The appellant filed no praecipe requesting a bill of exceptions, and no bill of exceptions has been certified and filed in this court. Since the record before us contains no bill of exceptions, and the pleadings support

the judgment, the action of the District Court must be, and is, affirmed. Occidental Bldg. & Loan Assn. v. Carlson, 134 Neb. 574, 279 N. W. 162.

Both parties have cited State v. Clark, 194 Neb. 487, 233 N. W. 2d 898, and argue that a District Court should affirm a judgment rendered by a county court unless there is error or an abuse of discretion. This contention may have resulted from the original opinion in State v. Clark, *supra,* which cited section 24-541, R. S. Supp., 1974, as the statute governing appeals from county court to the District Court in criminal matters. The applicable statute governing appeals in criminal matters as indicated in the substituted opinion in State v. Clark, *supra,* at p. 490, is section 29-613, R. S. Supp., 1974. Under that statute, the District Court has no discretion to receive additional evidence, and under the rule now announced in State v. Clark, *supra,* should examine the record presented only for error or abuse of discretion. Section 24-541, R. S. Supp., 1974, governs appeals from county courts to District Court in matters other than criminal, and allows the District Court to receive additional evidence. Whether the District Court exercises its discretion to receive additional evidence, it is the obligation of the court to reach an independent conclusion without reference to the decision of the county court, with the caveat that where evidence is in irreconcilable conflict, the District Court should consider the lower court's opportunity to observe the witnesses and their manner of testifying.

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

AFFIRMED.

LEO L. BROWN, APPELLANT, V. JOHN L. SULLIVAN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

240 N. W. 2d 51

Filed April 1, 1976. No. 40352.

1. **Statutes.** Legislative intent is the cardinal rule in the construction of statutes.
2. ———. A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
3. **Motor Vehicles: Licenses and Permits.** The revocation of a license to operate a motor vehicle is not a penalty.

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

Kirby, Duggan & McConnell, for appellant.

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

Heard before WHITE, C. J., MCCOWN, NEWTON, and BRODKEY, JJ., and KORTUM, District Judge.

NEWTON, J.

The driver's license of appellant was suspended under the point system and he appeals. We affirm the judgment of the District Court.

On April 23, 1974, appellant was convicted of operating a motor vehicle without a valid operator's license in his possession and was charged with two points under the point system as provided in section 39-669.26, R. S. Supp., 1974. Subsequently he was assessed 5 more points on two speeding charges which made a 2-year total of 13 points, one over the 12-point limit. His license was suspended June 10, 1975.

Section 39-669.26, R. S. Supp., 1974, was amended effective August 24, 1975. As amended, the section now exempts one convicted of operating a motor vehicle without a valid operator's license in his possession from the assessment of points. Appellant contends that the

1975 statutory amendment is retroactive and that the two points mentioned cannot be considered. The amended section, as found in Laws 1975, L.B. 381, section 4, does not provide for retroactive operation.

"Legislative intent is the cardinal rule in the construction of statutes." Pettigrew v. Home Ins. Co., 191 Neb. 312, 214 N. W. 2d 920.

"A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed." School Dist. of Omaha v. Adams, 151 Neb. 741, 39 N. W. 2d 550. See, also, Housand v. Sigler, 186 Neb. 414, 183 N. W. 2d 493. There is no indication of legislative intent to make the amended section of the statute retrospective and we conclude that it was only intended to act prospectively.

The ruling in State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, that an amendatory act changing a penalty which becomes effective before final judgment in a criminal case shall govern the sentence is not applicable. The revocation of a license to operate a motor vehicle is not a penalty.

The judgment of the District Court is affirmed.

AFFIRMED.

VIVIAN W. BOOTH, DECEASED, APPELLEE, REVIVED IN THE NAME OF BILLY D. BOOTH, EXECUTOR OF THE ESTATE OF VIVIAN W. BOOTH, DECEASED,
AUDREY BOOTH, INTERVENER-APPELLEE, V. DEANE WILKINSON ET AL., APPELLANTS.
240 N. W. 2d 578

Filed April 7, 1976. No. 40256.

1. **Deeds: Reformation of Instruments.** A court of equity will reform the description contained in a deed of conveyance where it is established by clear and convincing evidence that the instrument fails to express the real intention of the parties.

2. ———: ———. Where there is no mistake as to the identity of the land intended to be conveyed, but there is a mistake in the description of it, equity may reform the instrument to conform to the true intention of the parties.
3. **Deeds: Reformation of Instruments: Evidence: Trial.** To justify reformation the mistake must be proven by clear and convincing evidence, but a mere denial by one party that a mistake has been made, or the fact that testimony is conflicting, will not preclude reformation.
4. **Equity: Appeal and Error: Evidence: Witnesses.** Actions in equity on appeal to this court are subject to the rule that when credible evidence on material questions of fact is in irreconcilable 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 Saline County: ORVILLE L. COADY, Judge. Affirmed.

Jack L. Craven, for appellants.

John McArthur, for appellee.

Bryce Bartu, for intervener-appellee.

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

MCCOWN, J.

This is an action for reformation of a deed. The District Court granted reformation and defendants have appealed.

At one time the plaintiff and her husband owned all of Block 96, City of Crete, Saline County, Nebraska. From time to time they sold various lots and had deeds and abstracts made up for each sale. In the summer of 1972, Mrs. Booth, then a widow, wanted to sell a large house which had been converted into apartments. The apartment house was located in the southwest portion of Block 96 and the residence in which Mrs. Booth lived adjoined the apartment house to the east. Between Mrs. Booth's house and the apartment house were

two driveways paralleling each other and entering the property from the street to the south. The driveway on the west was a rock driveway which led directly to the apartment house garage at the rear of the apartment house. The driveway on the east was a concrete driveway with a curb dividing it from the rock driveway. The concrete driveway paralleled the rock driveway for some distance and then turned east to enter the Booth garage, which was a part of the house itself.

Mrs. Booth's son took care of much of her business and he contacted Gateway Realty Company and listed the apartment house property for sale. He did not give the realty company any legal discription. A realtor stated that Mrs. Booth gave him the description for the listing from the abstract over the telephone. It was the description which had been used for the apartment house before the Booth residence was built. The defendant, Deane Wilkinson, saw the for sale sign in the yard of the apartment house and inquired about it. Mrs. Booth sent her son with Wilkinson to show him the property. Mr. Booth testified that when he took Wilkinson to inspect the property he pointed out the two driveways, they talked about the garage and the boundary line, and that Wilkinson knew and understood where the boundaries were. Wilkinson testified that he was mostly interested in the apartment house but did not pay much attention to the surrounding area. He said there was no discussion between them as to where the boundary lines were, but agreed that he must have noticed two driveways between the properties and that one was rock and the other was concrete. Wilkinson did not visit the property again until he purchased it.

Mr. and Mrs. Wilkinson went to the real estate company and told the agent they wished to buy the Booth property. All the agent knew about the property was what showed on the listing agreement and the description she used in the contract was obtained from the listing ticket. The deed was also drawn up by Gateway

Realty and the contract and deed were signed by Mrs. Booth. The transaction was closed on October 16, 1972. At that time there was no discussion about the description of the property and no survey was made prior to sale. In the deed the property was described as Lots 7 and 8 and the south 22.12 feet of Lot 9, Block 96, City of Crete, Saline County, Nebraska, otherwise known as 808 East 16th Street, Crete, Nebraska.

The east boundary of that description came within 3 feet of the west side of the Booth house and embraced all the concrete driveway, including the portion leading into the Booth garage. After closing, the Wilkinsons used the rock driveway and the Booths continued to use the concrete driveway. Wilkinson testified he did not find out that he owned the property almost to the Booth house until the deed was delivered and recorded. In December, some 2 months later, Wilkinson informed Booths that he claimed the property, including the concrete driveway to the Booth house.

Mr. Booth testified that if the boundary line was located on the description in the deed it would be impossible for the Booths to get into their garage without trespassing on Wilkinson's property, and the cost of making another opening in the house for the garage to change the entrance would cost from $10,000 to $12,000.

Mrs. Booth filed this action February 2, 1973, but died shortly thereafter. The action was revived in the name of the executor of her estate. At the conclusion of the trial the District Court entered judgment finding that the parties had an agreement on the boundary lines of the properties, and that the plaintiff intended to sell and the defendants intended to purchase a tract of land in which the east boundary line was 36.75 feet west of the boundary line in the deed description; and that by reason of mistake the deed erroneously described the property. The court reformed the deed to convey the property intended and directed the defendants to execute a quit claim deed to the plaintiff for the portion of the

property erroneously included. The defendants have appealed.

The defendants' argument rests on the contention that the evidence is insufficient to support the judgment because it does not clearly and convincingly establish a mutual mistake of fact. It has been firmly established in this state that a court of equity will reform the description contained in a deed of conveyance where it is established by clear and convincing evidence that the instrument fails to express the real intention of the parties. See, Gwyer v. Spaulding, 33 Neb. 573, 50 N. W. 681; Ingraham v. Hunt, 159 Neb. 725, 68 N. W. 2d 344.

The basic issue is whether or not the true agreement of the parties was or was not accurately stated in the instrument. If the instrument fails to express the true intention and agreement of the parties, then it may be reformed where that fact is established by clear and convincing evidence. In a case somewhat similar to the case at bar, the boundary of property conveyed was intended to be the north 1 foot of the area described, but by mistake was shown as 11 feet. The seller testified that prior to the sale he had pointed out the boundary to the buyer, but the buyer testified that the boundary had only been pointed out in vague terms. The parties continued to use and possess the intended property. The mistake was discovered when a survey was made. The trial court found there was mutual mistake and allowed reformation of the deed. This court affirmed and said: "Where a mistake of the parties relates to the identity of the property itself, reformation may not be had. However, where there is no mistake as to the identity of the land intended to be conveyed, but there is a mistake in the description of it, equity may reform the instrument to conform to the true intention of the parties." Lippire v. Eckel, 178 Neb. 643, 134 N. W. 2d 802, citing cases.

The mistake must be proven by clear and convincing evidence, but this does not mean that the evidence must

be uncontradicted. A mere denial by one party that a mistake has been made will not preclude reformation. Neither will relief be denied merely because there is conflicting testimony. It is sufficient if the ground for relief is established in a clear and convincing manner to the satisfaction of the court. Olds v. Jamison, *ante* p. 388, 238 N. W. 2d 459. See, also, 66 Am. Jur. 2d, Reformation of Instruments, § 125, p. 651.

While some of the evidence may be circumstantial, the evidence as a whole is nonetheless clear and convincing that the parties understood and intended that the boundary line of the property was the line between the two driveways. This action is one for equitable relief in which we are required to try the issues of fact de novo. Our review, however, is subject to the rule that when credible evidence on material questions of fact is in irreconcilable 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. Harre v. White, 189 Neb. 404, 203 N. W. 2d 99.

We conclude that the evidence was clear and convincing, and established that the description of the property in the agreement and deed did not express the true intention and understanding of the parties. The plaintiff was entitled to reformation. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

LEHAN K. TUNKS ET AL., APPELLEES, V. HARLAN O'BRIEN, APPELLANT.
240 N. W. 2d 349

Filed April 7, 1976. No. 40265.

1. **Appeal and Error: Records: Trial: Rules of Supreme Court.** When a case is tried in the District Court upon the record

from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the Revised Rules of the Supreme Court, 1974, before it can be considered on appeal to this court.

2. **Appeal and Error: Records: Evidence: Pleadings.** In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is the sufficiency of the pleadings to sustain the judgment of the trial court.

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

Tye, Worlock, Tye, Jacobsen & Orr and John P. Icenogle, for appellant.

David Jorgensen of Nye, Hervert & Jorgensen, for appellees.

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

PER CURIAM.

Plaintiffs filed an action for forcible detention against the defendant in the county court of Buffalo County. After trial in the county court, judgment was entered for plaintiffs and against defendant. Defendant appealed to the District Court. The bill of exceptions from the county court was filed but was not introduced in evidence. The District Court reviewed the case, considered the bill of exceptions in making his decision, and affirmed the judgment of the county court. Defendant has appealed to this court and there is no properly certified bill of exceptions in accordance with the revised rules of this court, although the county court bill of exceptions is a part of the transcript here.

When a case is tried in the District Court upon the record from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the Revised Rules of the Supreme Court, 1974, before it can be considered on appeal to this court. In the absence

of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is the sufficiency of the pleadings to sustain the judgment of the trial court. State v. Jacobsen, 194 Neb. 105, 230 N. W. 2d 219. That case is controlling here.

The judgment is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The rule expressed in the majority opinion in this case represents the triumph of rules over reality. I see no reason whatever why this court, on its own motion, could not and should not request the District Court to certify the county court bill of exceptions to this court if the bill includes all the evidence the court considered in making its decision and judgment. To insist upon exact compliance with procedural rules, particularly at a time when a new county court system of appeals to the District Court is in its infancy, elevates form over substance. In this case it is clear beyond all reasonable doubt that the bill of exceptions from the county court was considered and acted upon as the evidence in the District Court. Nevertheless, because of oversight, or misunderstanding of the changed appellate procedures, it was not formally received in evidence in the District Court and therefore cannot be certified to this court. To deny appellate review under such facts makes a legal mountain out of a procedural molehill. Justice is a fragile thing and can easily be lost in a sea of rules.

CARL O. SCHWARTZ, APPELLANT, V. RIEKES AND SONS, A NEBRASKA CORPORATION, ET AL., APPELLEES.
240 N. W. 2d 581

Filed April 7, 1976. No. 40328.

1. **Equity: Estoppel.** The principle prohibiting a party from

mending his hold after commencement of litigation is ordinarily applicable only if some previous conduct on his part would render present assertion of the right unjust.

2. **Master and Servant: Trial.** The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there has been a change in relationship and he has become, for the time being, the employee of another person. In such case, whether the right of control, or want of it, existed, is ordinarily a question of fact for the jury; but where the pertinent facts pertaining to the contract and relationship of the persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court.

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

John T. Carpenter of Matthews, Kelley, Cannon & Carpenter, for appellant.

Michael P. Cavel, for appellees.

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

NEWTON, J.

This is an action for personal injuries. Plaintiff Carl O. Schwartz was an employee of Manpower, Inc., hereinafter referred to as Manpower, a temporary help service contractor supplying temporary labor to various types of concerns. Plaintiff was injured while working for defendant Riekes and Sons, hereinafter referred to as Riekes, through the alleged negligence of the defendant Bruce Koepcke, an employee of Riekes. The primary question presented is whether plaintiff was a temporary employee of Riekes. Summary judgment was entered for the defendant Riekes. We affirm the judgment of the District Court.

As a part of its contract with Riekes, Manpower agreed to assign some of its employees to furnish services for Riekes. Riekes paid Manpower for the services

rendered and Manpower, in turn, paid the plaintiff. Manpower also agreed to carry workmen's compensation insurance on the employees assigned and to take care of social security and withholding taxes. Plaintiff and another Manpower employee went to the place of business of Riekes. They were told that one was to drive a truck and the other to be a laborer. They flipped a coin to see who would drive the truck and plaintiff lost. Plaintiff was set to work sorting glass containers and then at pulling down bags of plastic milk containers at which time he fell and was injured.

Plaintiff, in a previous proceeding, sought to recover workmen's compensation from Manpower and Riekes. The latter denied it was plaintiff's employer. Prior to any hearing on the merits, a lump sum settlement was agreed upon and consummated between plaintiff, Manpower, and the latter's insurer. Defendant Riekes presents as a defense to this action the fact that plaintiff was an employee of Riekes and barred under the Workmen's Compensation Act from recovery in tort.

It is evident that while working for Riekes plaintiff was under the exclusive direction of the foreman for Riekes and was to perform whatever tasks or types of labor were assigned to him. Nothing in the contract with Manpower, or the circumstances under which plaintiff went to work, reflects any other situation. The answer filed by Riekes in the compensation action is understandable in view of the Manpower guarantee to protect Riekes from such claims. In any event, the answer is not res judicata or binding upon Riekes in the present case. The compensation action was settled without a trial and without involvement of Riekes. There was no prejudice to plaintiff. He received the workmen's compensation he sought. In Enterprise Co., Inc. v. Nettleton Business College, 186 Neb. 183, 181 N. W. 2d 846, we held: "The principle prohibiting a party from mending his hold after commencement of litigation is ordinarily applicable only if some previous

conduct on his part would render present assertion of the right unjust." Furthermore, plaintiff is not in a position to raise the issue of equitable estoppel. Plaintiff himself has changed his position. He sought recovery in the compensation court from Riekes as an employer. He now alleges that this concern was not his employer. Both parties were fully aware of the facts and the applicable law at all times. Neither has been prejudiced by the change of positions.

In regard to the question of whether or not Riekes was plaintiff's temporary employer, plaintiff relies on the case of Shamburg v. Shamburg, 153 Neb. 495, 45 N. W. 2d 446. That case holds that such an issue must be decided on the peculiar facts present in each case and that: "* * * the general test in determining whether an employee is a servant of his original master, or of the party to whom he has been furnished, is whether in the particular service which he is engaged to perform he continues to be liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired."

In Mansfield v. Andrew Murphy & Son, 139 Neb. 793, 298 N. W. 749, it was stated: " 'It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his

work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work.'" See, also, Kessler v. Bates & Rogers Constr. Co., 155 Neb. 40, 50 N. W. 2d 553; Barton v. Hobbs, 181 Neb. 763, 151 N. W. 2d 331.

The case of St. Claire v. Minnesota Harbor Service, Inc., 211 F. Supp. 521 (1962), is in point in that it too involved an employee of Manpower. There, too, the plaintiff recovered workmen's compensation from Manpower and then sought to recover in tort from the firm to which he was temporarily assigned. Summary judgment was entered for the defendant. The case holds: "Plaintiff and other personnel were sent by Manpower to clean barges under the control of the defendant. Manpower just provides temporary help for a fee. Manpower had no interest in the barge. Plaintiff went to the defendant because the defendant needed some temporary help. Manpower was in the business of selling temporary help, and the defendant wanted to buy some. That is why the plaintiff went to the barge on that fateful day, and it seems patently clear that any argument to the contrary would be met with utter disbelief by a jury. The law is clear; the test is control. The control originated at the defendant. No reasonable jury could find that the plaintiff and his brother were on that barge for any reason save that the defendant had sent for them. * * *

"It is therefore the opinion of this Court that where the primary employer (Manpower here) does no more

than provide personnel for the use of the ultimate employer (the defendant here), where the fees received by the primary employer from the ultimate employer include provision for Workmen's Compensation coverage for the employees supplied, where this Workman's Compensation was in force at the time of the accident, and where the injury occurred (1) while the employee was under the control of the ultimate employer (the defendant here) and (2) while the employee was engaged in a task which all the parties (the plaintiff, the defendant and Manpower) must be deemed to have contemplated that the employee would perform (i. e., while the plaintiff was within the scope of his employment), then the injured employee cannot sue the ultimate employer as a third-party tort-feasor.

"In this case that means that the defendant is entitled to a summary judgment, for there are no genuine issues as to the facts."

We have the identical situation here. Manpower was simply in the business of selling the services of its general employees. It did not attempt to exercise any supervision or control over them in the slightest degree once it had assigned them to work for the defendant Riekes. Riekes had the sole right to designate the work to be done by plaintiff and where and how it was to be done. Defendant Riekes also had full power and authority to dispense with plaintiff's services at any time. The defendant Riekes, not Manpower, was in full control of the situation in regard to the services to be rendered by plaintiff. The facts reflect that an implied contract of employment existed between plaintiff and the defendant Riekes. The plaintiff voluntarily went to work for Riekes and performed tasks assigned to him.

Although a jury question is sometimes presented on similar questions, here the facts are clear and undisputed. The question presented on those facts is one of law and the entry of a summary judgment for the de-

fendant Riekes was proper. The judgment of the District Court is affirmed.

AFFIRMED.

THELMA E. BROWERS, APPELLEE AND CROSS-APPELLANT, V. HEROLD E. BROWERS, APPELLANT AND CROSS-APPELLEE.
240 N. W. 2d 585

Filed April 7, 1976. No. 40330.

Divorce: Alimony: Property. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. § 42-365, R. S. Supp., 1974.

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

David Jorgensen of Nye, Wolf & Hervert, for appellant.

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

Heard before SPENCER, BOSLAUGH, and CLINTON, JJ., and FAHRNBRUCH and GRANT, District Judges.

CLINTON, J.

This is an action by the petitioner wife for a dissolution of marriage. The trial court found the marriage was irretrievably broken and entered a decree of dissolution. By the decree the court awarded household goods and an automobile to the wife and a pickup truck to the respondent, subject to the encumbrances on the respective vehicles. It directed the respondent husband to pay

certain antecedent debts of the parties in the approximate amount of $3,000. The court also awarded the wife alimony in the amount of $150 a month for 2 years and $100 a month for an additional 2 years.

The respondent appeals, asserting the award of alimony is excessive and that under the circumstances of this case the court had no power to make an alimony award in any event. The petitioner cross-appeals and claims the award of alimony is insufficient. We affirm.

The evidence shows the parties were married in 1943 and were the parents of five children, the youngest of whom became 18 years of age shortly after the decree of dissolution. At the time of the decree respondent was 57 years of age and the petitioner 56. Respondent is employed by the United States Postal Service and his take-home pay is $363 every 2 weeks. He has 24 years of service and upon retirement will receive a pension in an unspecified amount. The petitioner for 29 years of the married life of the parties taught school. She holds B.A. and M.A. degrees. She testified that she has no teacher pension rights. At the time of the dissolution she was employed as district manager for an encyclopedia publisher. In that employment she is paid on a commission basis and during the year 1974 her gross income from that source was $8,002 and her adjusted gross income was $1,237. The health of both parties is good. We conclude that under the facts of this case an award of alimony to the wife was appropriate and that the amount awarded was not excessive. On the other hand, we do not conclude that it is inadequate. The parties accumulated almost no property during the marriage. The respondent was required by the decree to pay the accumulated debts of the parties except the encumbrance on the petitioner's automobile. The petitioner has an excellent education and a demonstrated earning capacity. The petitioner's cross-appeal is denied.

The respondent claims that the award of alimony was unauthorized because the facts alleged in the petition do not support an alimony award and the petitioner did not specifically pray for an award of alimony. The prayer of the petition was for temporary support, attorney's fees, equitable division of property, and further equitable relief. To support his position the respondent relies upon the holding of this court in Roberts v. Roberts, 157 Neb. 163, 59 N. W. 2d 175. There we held the general rule to be that where permanent alimony is not asked or desired or brought before the court by any statement of claim therefor or evidence sufficient to support the same, it is not made an issue in a divorce action and the court is not warranted in making it an issue by deciding the matter as such and allowing permanent alimony.

Our holding in Roberts v. Roberts, *supra,* has no application here. In that case there was a prayer for absolute divorce, restoration of maiden name, suit money, costs, attorney's fees, and equitable relief. The defendant husband there made neither answer nor appearance and relied upon an agreement between the parties that no alimony would be sought. The trial court was informed that alimony was not being sought by the wife. It nonetheless awarded alimony. The defendant husband, when he learned of the entry of the alimony judgment, sought to have the decree modified under the provisions of former section 42-340, R. R. S. 1943, which authorized vacation or modification of the decree within 6 months of its entry. Such modification was denied by the trial court and on appeal we set aside the alimony award. We specifically noted that alimony was, by agreement of the parties, not an issue in that case. We also pointed out that there was no evidence in the record to support an alimony award.

This case was tried with both parties present; and their property situation, their earning capacity and

their earnings, their health, and to some extent their marital history were explored.

Section 42-365, R. S. Supp., 1974, provides in part as follows: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party." Pertinent statutes, to wit, sections 42-307 and 42-318, R. R. S. 1943, in force at the time of Roberts v. Roberts, *supra*, have been repealed.

At least four factors distinguish Roberts v. Roberts, *supra*, from the present case. These are: (1) In the Roberts case the decree was entered upon a default. (2) There existed an antecedent agreement between the parties that no alimony would be sought and the trial court was so informed. (3) The parties in Roberts introduced no evidence to support the award of alimony. There is such evidence in this case. (4) The pertinent statutes are wholly different.

AFFIRMED.

ELMA SCOTT, WIDOW OF RAY E. SCOTT, DECEASED, APPELLEE, V. YOUNG MEN'S CHRISTIAN ASSOCIATION OF GRAND ISLAND ET AL., APPELLANTS.
240 N. W. 2d 587

Filed April 7, 1976. No. 40351.

Workmen's Compensation: Appeal and Error: Evidence. On appeal of a workmen's compensation case to the Supreme

Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence.

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

Nelson, Harding, Marchetti, Leonard & Tate and Alan L. Plessman, for appellants.

Richard L. Huber of Higgins, Higgins & Huber, for appellee.

Heard before SPENCER, NEWTON, and CLINTON, JJ., and WARREN and RIST, District Judges.

WARREN, District Judge.

This is an action by the widow of Ray E. Scott to recover benefits under the Workmen's Compensation Law resulting from her husband's death while employed by the defendant Young Men's Christian Association of Grand Island. The one judge Workmen's Compensation Court found and determined that the plaintiff's decedent died by drowning as a result of an accident arising out of and in the course of his employment by the defendant when he fell into the indoor swimming pool located on the premises of his employment, and made an award accordingly. On rehearing before the Workmen's Compensation Court en banc, similar findings and award were made. Defendants appealed to the District Court, which affirmed the en banc judgment of the Workmen's Compensation Court. Defendants have now appealed to this court.

The facts are not in dispute. The body of the decedent Ray E. Scott was found at about 9 p.m., on April 20, 1974, lying at the bottom of the filled swimming pool located in the YMCA building. His body was fully clothed, his eyeglasses were still in place, and no cuts, bruises, or other external signs of trauma were evidenced when the body was pulled from the pool. A

small sledge hammer and a towel were found on the pool floor in the southeast corner near the body. The decedent's pipe and cap, together with a discarded notebook, two T-shirts, and some campaign cards were found floating at various places in the pool. The interior lights were off, and there was no evidence of an illegal entry.

The decedent, age 75, had worked as custodian for the YMCA for 8 or 9 years, never missing a day from work. His mental health and physical condition were excellent except for borderline diabetis for which he took oral medication. He had never suffered from blackouts, fainting spells, or heart problems, and had uneventfully taken his normal monthly medical examination 3 days before his death. He had worked normally from 4 a.m. to 9 a.m. the morning of his death, using his own sledge hammer to demolish some wooden bicycle racks at the front of the building. He appeared normal at his home and after breakfast went out and worked in the garden, and returned to work at about 6 p.m., as was his normal practice, to clean up after the end of the day's swimming for church services to be held the next morning. He parked near the rear or south end of the building. No one observed his activities from that time on. He was a nonswimmer. It was his practice to use the back or south exit to empty trash and to enter and leave the building, but when so exiting, the location of the only light switch at the north end of the pool building caused one to first shut off the lights and then walk along the darkened six-foot walkway beside the pool in order to get to the rear exit door, which was slightly offset from the walkway, toward the center of the pool.

Dr. Pierce T. Sloss, a qualified pathologist who performed an autopsy, testified that the cause of death was drowning, based upon his finding of fresh hemorrhages into the mastoid air sacs of both temporal bones, which in the absence of mechanical injury are found

only in death from drowning. He further found that shortly before Mr. Scott's death, he suffered acute backward heart failure. He testified that the three possible causes of backward heart failure are drowning, high blood pressure, and hardening of the arteries that supply the musculature of the heart. He found a prominent degree of hardening of the arteries in the decedent, and that decedent suffered from high blood pressure. Dr. Sloss could not say whether the backward heart failure preceded or followed the decedent's entry into the water. He did give the opinion that Mr. Scott was alive when he went into the water, but could not say whether or not he was then conscious.

The defendants contend that the evidence gives rise to the inference that plaintiff's decedent became distressed or unconscious by reason of a natural disease which caused acute backward heart failure, and he thereby fell into the swimming pool. Plaintiff theorizes that Mr. Scott simply slipped, stumbled, or fell into the pool and then drowned.

Section 48-184, R. R. S. 1943, sets forth the standard for review. "The Supreme Court, on an appeal from the District Court in a workmen's compensation case may set aside the judgment of the District Court only upon the grounds provided by statute, which include '(3) the findings of fact are not supported by the evidence as disclosed by the record.' * * * If this court so finds, it then considers the matter de novo." McPhillips v. Knox Constr. Co., Inc., 190 Neb. 306, 208 N. W. 2d 261 (1973).

It is fundamental that in order to recover benefits under the act, a plaintiff must establish by a preponderance of the evidence that the death occurred within the time and place limits of the employment and that the injury or death was incidental to or caused by the employment. Oline v. Nebraska Nat. Gas Co., 177 Neb. 851, 131 N. W. 2d 410 (1964).

"For an injury to be compensable the accident must

have had its origin in or have been incidental to the employment, or it must have resulted from a risk which by reason of the employment exposed the employee to a greater hazard than if he had not been so employed." Henry v. Village of Coleridge, 147 Neb. 686, 24 N. W. 2d 922 (1946).

"Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved." Cochran v. Bellevue Bridge Commission, 174 Neb. 761, 119 N. W. 2d 292 (1963).

"The 'by accident' requirement of the Workmen's Compensation Act is now satisfied, either if the cause was of an accidental character, or if the effect was unexpected or unforeseen, and happened suddenly and violently. The problem in cases such as this is now causation, and whether an accidental injury arose out of and in the course of employment." Brokaw v. Robinson, 183 Neb. 760, 164 N. W. 2d 461 (1969). Scott's drowning death clearly falls within the "by accident" requirement above stated.

"* * * 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. * * * 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." Reis v. Douglas County Hospital, 193 Neb. 542, 227 N. W. 2d 879 (1975).

The "in the course of" employment requirement presents no problem. It is unquestioned that Scott's death occurred within the time and space limits of his employment. The problem here is causation.

"Where the testimony gives rise to conflicting infer-

ences of equal degree of probability so that the choice between them is a mere matter of conjecture, a workmen's compensation award cannot be obtained." Pocevicius v. Armour & Co., 185 Neb. 668, 178 N. W. 2d 265 (1970).

The cause of Scott's fall into the swimming pool remains a close question. It may have been idiopathic or purely accidental. Death has removed the only possible witness who could prove causal connection by direct testimony. No one saw Scott fall into the pool, but this fact is not fatal to a finding of how it occurred. Considerable circumstantial evidence was available to the Workmen's Compensation Court and to the District Court in determining whether the plaintiff met her burden of proof to establish causation.

" 'It arises "out of" the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. * * * The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.' " Socha v. Cudahy Packing Co., 105 Neb. 691, 181 N. W. 706, 13 A. L. R. 513 (1921).

Scott was a nonswimmer, and as such, a body of water was a special risk to him. His employment required him to work around an indoor swimming pool where slippery walkways were a fact of life. The lighting

arrangement precluded use of his normal exit door except after the lights had been extinquished. The location of the exit door practically invited one heading blindly toward it to "cut the corner."

At the time of the accident, Scott had evidently completed his evening cleanup, turned out the lights and was heading for the rear exit, carrying several items discarded by swimmers earlier in the day toward trash barrels located at the rear of the building.

The evidence indicates that Scott had completed his task involving the use of the sledge hammer which he had brought from his home and it can be fairly inferred that he was also then carrying it with him to take back home. The location of the sledge hammer in the southeast corner of the pool almost certainly marks his point of entry. A wet and slippery floor along the walkway would have been the most natural condition after swimmers had used the pool from 9 a.m. until 5 p.m. that day.

It can be inferred with reasonable certainty that Scott fell into the pool as a result of slipping or stumbling, or that in the darkness he misjudged the 75-foot length of the pool, "cut the corner" too soon, and simply walked into the pool. In either event, it is highly significant that *all* the articles he was carrying (sledge hammer, towel, notebook, two T-shirts, and campaign cards) ended up in the pool water. Not a single one of the items was dropped on the pool walkway. It is neither logical nor probable to believe that if he had felt faint or ill, or even became suddenly unconscious, he would have held onto all these items and carried them with him into the pool. If suddenly stricken, the very first reaction would have been to drop the articles and at least some of them would have been found on the walkway.

The fact that Scott suffered from hardening of the arteries and high blood pressure, without evidence that these conditions caused him to become distressed or un-

conscious, does not warrant an inference that the cause of the fall into the pool was idiopathic. On the contrary, his good state of health, and lack of prior difficulty stemming from these conditions, justifies the inference that natural disease was not the cause of his fall into the pool. The proof as to "backward heart failure" amounts to nothing more than evidence that Scott's heart failed, which it must before death in all cases of drowning. There is no evidence that the heart failure preceded or caused Scott's entry into the pool.

Defendants raise the affirmative defense that Scott was guilty of willful negligence in attempting to walk alongside the pool in the dark. We do not regard decedent's conduct as even approaching the level of willful negligence.

"On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence." Marion v. American Smelting & Refining Co., 192 Neb. 457, 222 N. W. 2d 366 (1974).

There is evidence in the record supporting the finding that the decedent suffered death as a result of an accident arising out of and in the course of his employment by the defendant. This evidence was obviously accepted by both the Workmen's Compensation Court and the District Court and we do not find it was error to do so.

We affirm the judgment. Plaintiff is allowed an attorney's fee of $750 for services in this court.

AFFIRMED.

ELMER E. KASPER, APPELLANT, V. DOROTHY A. KASPER, APPELLEE.

240 N. W. 2d 591

Filed April 7, 1976. No. 40353.

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

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Alfred A. Fiedler, for appellant.

A. James McArthur, for appellee.

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

WHITE, C. J.

This case involves a petition to modify a divorce decree. The plaintiff, Elmer E. Kasper, was divorced from the defendant, Dorothy A. Kasper, in 1972. The divorce decree, dated March 14, 1972, provided: "That the Plaintiff shall pay to the Defendant in the way of alimony the sum of $24,200.00, payable at the rate of $200.00 per month for a period of 121 months to the Clerk of the District Court of Douglas County, Nebraska."

On November 26, 1974, the defendant remarried. In March 1975, the plaintiff filed an application to modify the March 14, 1972, divorce decree with respect to alimony. The District Court overruled the application to modify. The plaintiff filed a motion for a new trial, which was overruled. The plaintiff appeals. We affirm the judgment of the District Court.

The plaintiff argues that he should no longer be required to pay alimony pursuant to the decree because of the defendant's remarriage. The plaintiff urges us to

apply the provisions of sections 42-347 to 42-379, R. R. S. 1943, to this case and to terminate the alimony.

The alimony award in the March 14, 1972, divorce decree was an award of alimony in gross. It was unqualified. No provision was made in the decree that it should terminate upon death or remarriage of the recipient.

The law here is clear. "An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification." Bryant v. Bryant, 191 Neb. 539, 216 N. W. 2d 162 (1974). See, also, Karrer v. Karrer, 190 Neb. 610, 211 N. W. 2d 116 (1973); Ziegenbein v. Damme, 138 Neb. 320, 292 N. W. 921 (1940). The facts of this case fall clearly within the above-cited authorities. There is no merit to plaintiff's contention.

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

AFFIRMED.

WARD BARTLETT ET AL., APPELLANTS AND CROSS-APPELLEES, V. WILBUR KLOEPPING ET AL., APPELLEES AND CROSS-APPELLANTS.
240 N. W. 2d 592

Filed April 7, 1976. No. 40364.

1. **Tenancy in Common: Boundaries: Adverse Possession.** When there is common ownership of two contiguous tracts of land, subsequently conveyed to different grantees, one of the grantees cannot, for the purpose of establishing title by adverse possession against the other grantee, tack his possession to that of the common grantor.
2. **Tenancy in Common: Adverse Possession.** Generally, possession of real estate by one cotenant is possession of all and such possession is presumed friendly as to all cotenants.
3. **Tenancy in Common: Adverse Possession: Notice.** Before a

cotenant can hold adversely to other cotenants, there must be an ouster of possession of the latter by the former, with notice or knowledge of the acts causing the ouster being brought home to such other cotenants in a plain and unequivocal manner and be shown by acts of such notorious and hostile character as would put a man of ordinary prudence on guard. Acts which are reasonably consistent with the existence of title in other cotenants are insufficient.

Appeal from the District Court for Dawson County: S. S. SIDNER, Judge. Reversed and remanded with directions.

Cook, Lubberstedt & Kopf, for appellants.

Bernard B. Smith and Steven B. Timm of Smith & Smith, for appellees.

Heard before SPENCER, NEWTON, and CLINTON, JJ., and WARREN and RIST, District Judges.

RIST, District Judge.

This is an action to quiet title. Plaintiffs are the owners of record of the east 96 acres of the southeast quarter of Section 20, Township 11 North, Range 24 West, of the 6th P.M., Dawson County, Nebraska. Defendants Kloepping (hereinafter called defendants) are the owners of record of the west 64 acres of said southeast quarter. Plaintiffs assert title by adverse possession to a portion of said west 64 acres, more particularly described as: "All that part of the West (W) 64 acres of the Southeast Quarter (SE¼) of Section Twenty (20), Township Eleven (11) North, Range Twenty-four (24) West of the 6th P.M., Dawson County, Nebraska, lying East (E) of a line running North and South (N & S); said line starting at a point on the South (S) line of the Southeast Quarter (SE¼) of Section Twenty (20), 24.221 chains West (W) of the Southeast (SE) corner of the Southeast Quarter (SE¼) of Section Twenty (20), and running North (N) to a point on the North (N) line of the Southeast Quarter (SE¼), 24.423

chains West (W) of the Northeast (NE) corner of the Southeast Quarter (SE¼) of Section Twenty (20)," and pray that the title to the same be quieted in them. Defendants deny plaintiffs' claim, and assert that no boundary was ever established between the tracts of the parties in any manner until a survey was made in 1969 which survey defendants claim establishes the correct boundary. The 1969 survey line lies east of and generally parallel to the line to which plaintiffs claim and the area between the two lines is the area in dispute. Defendants further assert their right to the use of a roadway running generally north and south in the area of the disputed land and pray that the 1969 survey line be determined to be the true boundary between the lands of the parties, and to establish defendants' right to the use of the roadway by prescriptive right.

The trial court established the boundary line between the tracts to be the centerline of the roadway, said line running between the 1969 survey line and the line to which plaintiffs claim, and caused the same to be surveyed and established. The trial court also found and determined that both parties had the right to use the roadway as a private road, the same to extend 10 feet on either side of the boundary line established by the court. The roadway as so established is located largely, if not entirely, in the disputed area.

Both parties filed motions for new trial. Defendants commenced their appeal to this court which was subsequently dismissed on defendants' motion, and plaintiffs have perfected their appeal upon their motion for new trial being overruled.

Although provided by statute, an action to quiet title is an action in equity and is considered de novo in this court. § 25-1925, R. R. S. 1943; Neylon v. Parker, 177 Neb. 187, 128 N. W. 2d 690.

In reviewing the record we are convinced that the survey line established in 1969 was made in appropriate manner and would correctly establish the boundary line

between the tracts owned of record by the parties unless plaintiffs have established their claim to the disputed area by adverse possession.

While the parties raise numerous issues in their briefs, one issue must first be resolved before any others are considered, and that is whether or not plaintiffs are entitled to tack the alleged possession of their predecessors in title to their own claimed possession in order to show adverse possession for the requisite period of 10 years.

The record reflects that plaintiffs acquired title to the east 96 acres here involved by referee's deed in a partition action, said deed being dated December 13, 1971, and filed of record March 9, 1972. The defendants acquired title to the east 32 acres of the west 64 acres here involved by warranty deed dated December 31, 1962, and recorded March 20, 1963. Plaintiffs commenced this action October 27, 1972.

While the record is not as precise as it might be, it nonetheless shows that prior to the conveyances to the parties as noted above, both tracts were owned as tenancies in common with at least three cotenants common to both tracts.

We therefore have a situation in which plaintiffs must show a basis for adverse possession by their predecessors in title for a period prior to the conveyance of the east 32 acres of the west 64 acres to the defendants by deed dated December 31, 1962, in order to show adverse possession for 10 years. This in turn raises the question of whether during this period it can be found that the cotenants who were the predecessors of plaintiffs' title, or any of them, held adversely to the cotenants who were defendants' predecessors in title, bearing in mind the three cotenants who were common to both tracts during this period.

Plaintiffs seek to show such adverse possession through one John P. (Jack) Kennedy, who was apparently one of the cotenants owning the east 96 acres prior to plaintiffs acquiring this land, and who occupied the same to

the time of his death in 1970. Plaintiff Ward Bartlett was asked on direct examination if Jack Kennedy had ever told him who owned the road in the disputed area. Objections to that question were sustained and the offer of proof was that Kennedy said he owned it. We believe the objection was properly sustained as the question was not one calling for the reputation of a property line so as to be an exception to the hearsay rule. We note however that on cross-examination of Mr. Bartlett he did testify without objection that Kennedy had told him he, Kennedy, owned the road.

The appropriate rules of law in this situation are: (1) When there is common ownership of two contiguous tracts of land, subsequently conveyed to different grantees, one of the grantees cannot, for the purpose of establishing title by adverse possession against the other grantee, tack his possession to that of the common grantor. Foltz v. Brackhage, 151 Neb. 216, 36 N. W. 2d 768. (2) Generally, possession of real estate by one cotenant is possession of all. Severson v. McKenzie, 122 Neb. 827, 241 N. W. 774. Such possession is presumed friendly as to cotenants. Walter v. Walter, 117 Neb. 671, 222 N. W. 49. (3) Before a cotenant can hold adversely to other cotenants there must be an ouster of possession of the latter by the former, with notice or knowledge of the acts causing the ouster being brought home to such other cotenants in a plain and unequivocal manner and be shown by acts of such notorious and hostile character as would put a man of ordinary prudence on guard. Acts which are reasonably consistent with the existence of title in other cotenants are insufficient. Unick v. St. Joseph Loan & Trust Co., 146 Neb. 789, 21 N. W. 2d 752.

We conclude from the record that the statement by Kennedy to the plaintiff Ward Bartlett is insufficient to establish that Kennedy was claiming the disputed territory or any part thereof adversely to defendants' predecessors in title. Nor do we find any actions of Ken-

nedy described in the evidence which would evidence such a claim of ownership in himself or his cotenants. Again, bearing in mind that there were common cotenants to both tracts during the period above noted, it would have been necessary for Kennedy to so act toward the cotenants of defendants' tract that he was ousting them from possession of the disputed area. Kennedy's actions were not inconsistent with the respective cotenancies of the tract involved and his statement of ownership of the road to another person not a cotenant is insufficient to constitute an ouster. Nothing was done by Kennedy that could be said to put the other cotenants on notice that he sought to oust them. The provisions of Kennedy's will relating to the land in which he had an interest is both after the fact and also by its language says nothing that can reasonably be said to be inconsistent with the cotenancies. The provisions of his will would not be an open hostile act during his lifetime that would put other cotenants on notice even if the language did indicate an intent to oust, which it does not.

The parties in their briefs discuss the doctrine of acquiescence and recognition of boundaries by adjoining landowners. Suffice it to say the record reflects no evidence of any mutual acquiescence or recognition of the boundary line between the tracts here involved.

We conclude therefore that the plaintiffs, having the burden to prove their claim by adverse possession (Pallas v. Dailey, 169 Neb. 533, 100 N. W. 2d 197), have failed to prove any basis for tacking their claimed possession to that of their predecessors in title and accordingly their claim to the disputed area must fail.

We are mindful that the trial judge had both the opportunity to see and hear the witnesses and to view the premises, but the record is such that we cannot sustain the trial court's determination of the boundary line between the parties for the reasons previously set forth.

We therefore determine that the correct boundary line between the parties is that established by the 1969

survey and title to the disputed area described earlier in this opinion should be quieted in the defendants. The location of the 1969 survey line is more precisely stated to be: The south terminus thereof is 23.821 chains west of the southeast corner of Section 20, Township 11 North, Range 24 West of the 6th P.M., Dawson County, Nebraska, and the north terminus thereof is determined to be on the north line of said southeast quarter, 23.913 chains west of the east one quarter corner of said section 20.

With respect to the roadway previously described, we conclude that the use thereof was not adverse for the required period of 10 years, the reasons therefor being the same as those set forth above with respect to the issue of adverse possession incident to the boundary line. Accordingly, neither party has a prescriptive right to the roadway, or any portion thereof, on the property of the other, and the trial court's determination as to such roadway must be set aside.

The judgment of the trial court is therefore reversed and the cause remanded with directions that the boundary line between the land of the parties here involved be fixed on the line established by the 1969 survey and the trial court's judgment respecting the roadway set aside. Costs taxed to appellants.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. TERRY A. WADE, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. GARY EUGENE WADE, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. DUANE M. WADE, APPELLANT.

240 N. W. 2d 351

Filed April 7, 1976. Nos. 40398, 40399, 40400.

Criminal Law: Sentences: Probation and Parole. A sentence

denying probation and imposing a period of imprisonment within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion.

Appeals from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

T. Clement Gaughan and George R. Sornberger, for appellants.

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

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

KUNS, Retired District Judge.

These appeals involve identical charges, fact situations, and assignments of error. It is appropriate to dispose of them in a single opinion.

Separate charges of possession of a forged instrument with intent to defraud were filed against the three appellants, Terry A. Wade, Gary Eugene Wade, and Duane M. Wade. Before arraignment in the District Court for Lancaster County, Nebraska, a plea bargain resulted in the filing of amended informations charging the obtaining of money by false pretenses; the bargain did not include any recommendation of sentence nor agreement for the disposition of other charges pending against the appellants elsewhere in Nebraska and Oklahoma. Each appellant pleaded guilty to the amended charge; and the pleas were accepted after the trial court satisfied itself that such pleas were being made knowingly, understandingly, and voluntarily. Presentence investigations were ordered, although each appellant requested immediate sentencing.

According to the record, including the pre-sentence investigation reports, the appellants, three brothers from Columbus, Ohio, each had a background of criminal activity with no indication of desire or potential to engage in constructive and legal employment. Terry, the

youngest, was subject to a pending charge of petit larceny and the other two had violated the conditions of the paroles granted to them from their imprisonment after convictions of felony; and all were addicted to the use of heroin at a high daily cost. From a base in Omaha, Nebraska, they went to various other cities in Nebraska where they forged apparent payroll checks upon stolen check blanks; an accomplice, using false identification, then passed the checks at stores and supermarkets during rush periods; and the proceeds were then divided equally and used principally for the purchase of more drugs. In addition to forging and passing the checks in Lincoln, Nebraska, upon which these charges were based, similar conduct led to the filing of other charges, still pending, in Adams, Franklin, and Madison Counties in Nebraska, as well as Garfield and Comanche Counties, Oklahoma.

No checks were passed in Omaha, Nebraska, for the reason that the appellants were afraid that a local telephone warning system might cause their apprehension. It is noteworthy that although their admittedly criminal activities subjected each of them to substantial sentences of imprisonment, nevertheless the fear of apprehension was the only circumstance which operated as a deterrent.

The trial court sentenced each appellant to a term of imprisonment in the Nebraska Penal and Correctional Complex of not less than 18 months nor more than 3 years, with credit for 47 days spent in confinement. The appellants argue that the trial court should have sentenced them to probation instead of imprisonment. Terry refers us to this statement from State v. Etchison, 188 Neb. 134, 195 N. W. 2d 498: "The primary function of the criminal law is to protect individuals and society from the depredations of the criminally bent. In furtherance of this purpose, it is deemed necessary to mete out punishment as a deterrent to others and to lock up incorrigible criminals. On the other hand, the rehabilita-

tion of criminals is one of society's major safeguards. Among factors meriting consideration are the family ties, age, mentality, education, experience, and social and cultural background of the convicted individual; his willingness to work at honest labor; his past criminal record or law abiding conduct; the motivation for the offense, the nature of the offense, and the amount of violence, if any, involved; the frankness and willingness of the defendant to cooperate; narcotic addiction, if any, circumstances aggravating or mitigating the offense; community attitudes toward the offense; and the individual's potentialities for reform or recidivism."

The entire record shows that the trial court followed both the letter and the spirit of the sentencing procedure. It is evident that the trial court, after full consideration of the circumstances mentioned, properly exercised its discretion to impose a sentence of imprisonment upon each of the appellants. Each sentence was within statutory limits and no abuse of discretion has been shown. § 28-1207, R. R. S. 1943; State v. Weiand, 194 Neb. 461, 232 N. W. 2d 28.

The judgment of the trial court in each case is affirmed.

AFFIRMED.

GULUF TORSTENSON ET AL., APPELLANTS, V. HAROLD MELCHER, APPELLEE.
241 N. W. 2d 103

Filed April 14, 1976. No. 40223.

1. **Evidence: Appeal and Error: Judgments.** In determining the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and he must have the benefit of every inference that can reasonably be drawn from the evidence.
2. **Evidence: Verdicts.** The verdict of a jury based upon con-

flicting evidence will not be set aside on appeal unless it is clearly wrong.

3. **Trial: Appeal and Error: New Trial.** Alleged errors of the trial court in an action at law which are not referred to in a motion for new trial will not be considered on appeal in this court.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Frederick M. Deutsch of Deutsch & Hagen, for appellants.

Edward E. Hannon and Michael O. Johanns of Cronin & Hannon, for appellee.

Heard before SPENCER, NEWTON, and CLINTON, JJ., and WARREN and RIST, District Judges.

SPENCER, J.

This was an action to recover the purchase price of a registered Hereford bull and resulting damages by reason of express and implied warranties. A jury returned a verdict for the defendant. Plaintiffs appeal, alleging an erroneous instruction on exclusion of an implied warranty, and the insufficiency of evidence to support the verdict. We affirm.

Plaintiffs, father and son, have been engaged in the registered Hereford cattle business in Pierce County since 1949. They run 60 to 70 cows on their 345-acre farm. The defendant has been in the registered Hereford cattle business since 1948 on a 4,500-acre Holt County ranch. He sells about 150 Hereford bulls each year.

Prior to April 8, 1972, plaintiffs went to the defendant's ranch to look at bulls. They were particularly impressed with a certain 2-year-old bull, and questioned Melcher about his price. Melcher responded that the bull had been consigned to sale at auction on April 8, 1972, and that he would sell the bull at that time.

Prior to the sale, Melcher sent a sale catalogue to

prospective buyers, including the plaintiffs. The catalogue contained the following notice: "All animals are guaranteed to be without known defects. Animal failing to breed after trial of six months may be returned to the seller if in good condition. The seller reserves the right to try said animal for six months and if it proves a breeder to return it to the station of the buyer at his expense. If animal proves a non-breeder, a satisfactory exchange will be made or the purchase price will be refunded."

Plaintiffs purchased the bull at the sale for $3,600. The bull, named H M Silver Domino 10, was then taken to the plaintiffs' farm and isolated for a period of time in a corral with access to a 3-acre pasture. On June 10, 1972, H M Silver Domino 10 was turned into an 80-acre pasture with 32 of the plaintiffs' stock cows.

The bull covered the cow herd well, but in later weeks the plaintiffs noticed that the cows continued to recycle. On September 9, 1972, the plaintiffs complained to Melcher that the bull was unable to settle any of the cows. Melcher asked the plaintiffs to bring the bull to his ranch for a semen test. On September 27, 1972, the bull was given a field semen test. A veterinarian, Doctor Dierks, reported that the bull was capable of breeding, and Melcher asked the plaintiffs to try him for a longer time. Doctor Dierks recommended that the bull be rested for approximately 2 weeks before running him back in with the cow herd. Plaintiffs immediately turned the bull back in with the cows. They continued to be dissatisfied with the bull's performance, and on December 11, 1972, the bull was returned to Melcher.

Subsequently, at least three samples of the bull's semen were taken by Melcher and sent for analysis to Doctor Carroll of Colorado State University's Veterinary School. Samples of the semen were caught on January 29, March 22, and in May or June 1973. Doctor Carroll reported an abnormality rate in this sperm which was somewhat higher than that found in a normal healthy bull. He

stated that semen of the quality exhibited by H M Sliver Domino 10 fell in the "questionable" range and might be responsible for some reduction in fertility. He did state in exhibit 2 that he would not expect a problem in pasture breeding with 25 females, but there might be a reduction in conception rate with a heavier breeding load.

Tests conducted by Doctor Stevens, another veterinarian, on January 5, 1973, indicated that 17 of the plaintiffs' 32 cows had been impregnated. Orvel Torstenson testified that his cows birthed 14 calves from the bull. He estimated from birth records that these cows had been impregnated between September 16, 1972, and November 11, 1972. About January 10, 1973, a different bull was turned in with the cows. All but one of the remaining cows were settled thereafter in one cycle.

At trial, the defendant introduced evidence to the effect that 32 cows would be too many for a 2-year-old bull to cover, and that a reduction in fertility could result from overuse. Plaintiffs' evidence was that placing the bull with 32 cows would be within acceptable limits.

The issue at trial centered around the meaning to be attached to the term "breeder," contained in the catalogue warranty set out above. There was evidence that a normal bull should impregnate from 50 to 75 percent of the healthy cows he bred in each heat cycle, and that 95 percent of the cows should be settled within 3 months. There was also testimony that an animal settling 10 cows in a lifetime could technically be termed a "breeder."

Doctor D. K. Theophilus, a Norfolk, Nebraska, veterinarian, testified that with the sperm abnormalities exhibited by Doctor Carroll's tests, the bull "just would not be up to being a consistent breeder." Doctor Carroll, in his deposition testimony, stated that in his opinion the level of abnormal sperm in the bull did not create

the low level of impregnation in the cows, but that this low level could be the result of a number of other factors, including the ability of the cows to come into heat.

With reference to the catalogue warranty, Orvel Torstenson testified that the provision was standard in the Hereford industry, and that it was the only guarantee expected among people in the business. A field representative of the American Hereford Association testified that in his experience negotiations between buyer and seller concerning unsatisfactory bulls have always been under terms and conditions of warranties like the catalogue warranty. A director of the American Hereford Association testified that in the trade the catalogue warranty was the only warranty used.

Plaintiffs make essentially two assignments of error. First, the verdict and judgment are contrary to and not sustained by the evidence. Second, instruction No. 14, allowing the jury to find an exclusion of an implied warranty of fitness for breeding by trade usage, was erroneous. We examine the second assignment first. If the instruction used was prejudicially erroneous, the case must be reversed without need for an examination of the evidence.

Section 2-315, U. C. C., reads as follows: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the sellers' skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

Section 2-316(3)(c), U. C. C., provides: "an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade."

After explaining the implied warranty in an earlier instruction to the jury, the trial court gave contested instruction No. 14. It reads as follows: "The jury is instructed that under the facts in this case an implied warranty of fitness for breeding purposes may be ex-

cluded by the usage of the trade in question, and that before the jury shall consider whether or not the implied warranty of fitness stated in Instruction No. 13 is breached, the jury shall consider and determine whether or not the implied warranty of fitness has been excluded by the usage of the purebred hereford cattle trade. In the event the jury shall find the implied warranty of fitness has been excluded, then the jury shall disregard all instructions with regard to damages, for breach of the alleged and implied warranty of fitness for breeding purposes."

Plaintiffs contend that trade usage excluding the implied warranty of fitness was not properly presented by the pleadings or the evidence, so that any instruction allowing the jury to find the warranty excluded was erroneous.

The answer filed by the defendant in this case alleged: "That said written warranty is in accord with the custom and usage of the cattle trade in the community where the sale was made: That by custom (of) the trade in breeding animals there is no implied warranty of fitness for particular purpose in the case of sale of a bull."

Section 1-205(6), U. C. C., provides evidence of trade usage offered by a party is not admissible until the other parties have been given such notice as the court finds sufficient to prevent unfair surprise. We find defendant's answer herein was sufficient to put plaintiffs on notice of the defense of exclusion of implied warranty of fitness. The record does not disclose that plaintiffs were subjected to any unfair surprise. Pleading that a "custom (of) the trade" exists is not pleading a conclusion of law, as plaintiffs suggest.

We also find sufficient evidence in the record to support instruction No. 14. Orvel Torstenson testified the catalogue guarantee was the only warranty expected in the Hereford cattle business. The testimony of the field representative of the American Hereford Association

indicated that he had observed no other warranties in his extensive experience in the trade. This evidence is sufficient to submit the issue to the jury.

Ruskamp v. Hog Builders, Inc. (1974), 192 Neb. 168, 219 N. W. 2d 750, upon which plaintiffs rely, is distinguishable on its facts. There, plaintiffs purchased hogs under an implied warranty of fitness for breeding purposes. The hogs later developed a disease which destroyed their value for such purpose. The defendants sought to show that the scope of their warranty was limited to breeding and producing offspring and no warranties as to disease could be implied where the animals had been expressly warranted as having been vaccinated and tested for certain diseases. Defendants further sought to show that under the trade usage a hog guaranteed by the seller to be disease free would have a particular designation not given to the hogs in question. Ruskamp held: "The claim that a usage of the trade with respect to an SPF (specific pathogen free) hog modifies the provisions of the Code with respect to implied warranties is not supported by the evidence." In the present case there is ample evidence from which the jury could find a modification.

Plaintiffs also contend the evidence herein was insufficient to support the verdict and judgment. Their argument is essentially that the bull could not be found to be a "breeder" since in the cattle business a bull that settles roughly half of a 32-cow herd, as this one did, will not be considered acceptable. We believe the question of the bull's status as a "breeder" was properly submitted to the jury. In addition to the plaintiffs' evidence that 95 percent of their herd should have been settled, there was testimony that a bull which settles 50 percent of the healthy cows he breeds may be considered a "breeder." There was also a question as to whether the bull was turned in with too many cows. One of the experts, from a semen test, said he would not expect any problem in pasture breeding with 25 females. While

we may have some question on the result herein, the trial was held in a farm and ranch community. It was a question of fact for the jury. We are bound by its determination.

As we stated in Ridenour v. Kuker (1970), 185 Neb. 321, 175 N. W. 2d 287: "In determining the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and he must have the benefit of every inference that can reasonably be drawn from the evidence."

The standard of review is settled. "The verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong." Cook v. Nordahl (1974), 191 Neb. 424, 215 N. W. 2d 643. We cannot say that on these facts the jury was clearly wrong.

Plaintiffs direct our attention to the Uniform Commercial Code provisions dealing with warranty of merchantability. Section 2-314, U. C. C., provides in part as follows: "(1) Unless excluded or modified (section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. * * * (2) Goods to be merchantable must be at least such as * * * (c) are fit for the ordinary purposes for which such goods are used; * * *."

Plaintiffs in their brief argue the exclusion of an implied warranty of merchantability was not pleaded in the defendant's answer. Defendant's answer attempted to exclude implied warranties by limiting the transaction in the express warranty. It further specifically pled, by the custom of the trade in the community where the sale was made, there was no implied warranty of fitness for breeding purposes.

Plaintiffs' petition and proof were directed to an implied warranty of fitness for breeding purposes. The case was tried on that issue. The tendered instructions were directed to that issue. The objections at the instruction conference were confined to that issue. An

implied warranty of merchantability in the sale of a breeding bull is for all intents and purposes identical with a warranty of fitness for breeding purposes. If plaintiff felt there was a difference, this issue should have been clarified and presented.

In any event: "Alleged errors of the trial court in an action at law which are not referred to in a motion for a new trial will not be considered in this court." George Rose Sodding & Grading Co., Inc. v. City of Omaha (1973), 190 Neb. 12, 205 N. W. 2d 655.

The judgment of the District Court is affirmed.

AFFIRMED.

PICCOLO-LYNAM DRUG COMPANY, A CORPORATION, APPELLEE, V. THE OMAHA NATIONAL BANK, TRUSTEE OF AND FOR CENTER PLAZA, ET AL., APPELLANTS.
241 N. W. 2d 107

Filed April 14, 1976. No. 40295.

1. **Evidence: Appeal and Error: Judgments.** In determining the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and he must have the benefit of every inference that can reasonably be drawn from the evidence.
2. **Evidence: Verdicts.** The verdict of a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong.
3. **Conspiracy: Trial: Evidence.** A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must be, proved by a number of indefinite acts, conditions, and circumstances, which vary according to the purpose to be accomplished. If it be proved that defendants, by their acts, pursued the same object, although by different means, one performing one part and another another part, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Gerald P. Laughlin and Michael G. Lessmann of Baird, Holm, McEachen, Pedersen, Hamann & Haggart, and Tyler B. Gaines of Gaines, Spittler, Otis, Mullen & Carta, for appellants.

R. David Garber of Garber & Batt, and Marks, Clare, Hopkins & Rauth, for appellee.

Heard before SPENCER, BOSLAUGH, and McCOWN, JJ., and COLWELL and KELLY, District Judges.

SPENCER, J.

Plaintiff, Piccolo-Lynam Drug Company, brought this action for damages for breach of an exclusive covenant in its lease. The case was divided into two segments for trial. The first half of the trial involved the issue of liability, and was submitted to the jury on three specific questions in the form of special interrogatories. The jury answered each of the interrogatories in the affirmative, and the second half of the trial was held. It involved only the issue of the amount of damages.

This appeal involves only the three issues tried in the first segment of the case. They are: (1) Whether the provisions of the lease were intended to give plaintiff exclusivity of 2½ acres or 20 acres; (2) whether the defendants conspired to violate the provisions of plaintiff's lease; and (3) whether plaintiff is the real party in interest. We affirm.

In 1960, a 20-acre tract on the southwest corner of 84th Street and West Center Road in Omaha was transferred from Marshall Nurseries, Inc., to Evergreen Company, Inc., a wholly owned subsidiary of the defendant, American Community Stores Corporation. The tract was unimproved. American, owner-operator of the Hinky Dinky grocery chain, and hereinafter referred to as Hinky Dinky or American, decided to build a grocery store on the northeast corner of the tract. Through a declaration of trust, dated February 21, 1964, and a corporate warranty deed from Evergreen Company,

Inc., dated February 13, 1964, the portion of the northeast corner on which the store and its parking lot were to be situated was transferred to the defendant, The Omaha National Bank, in trust. The beneficiary of the trust was Jule M. Newman, at that time the chairman of the board of American Community Stores Corporation.

Prior to August 1964, Louis J. Piccolo, a former stockholder, director, and officer of the plaintiff, who operated a drugstore business on the north side of West Center Road across from the 20-acre tract, determined that it was desirable to relocate his store. He contacted Hinky Dinky about leasing space in a new building being erected east of the Hinky Dinky store building. He and his attorney, William J. Lindsay, worked out the terms of a lease with Dean Hascall, an attorney employed by Hinky Dinky to manage its real estate and to negotiate for space in its buildings.

Lindsay testified that during his negotiations in August of 1964, his independent knowledge of Hinky Dinky's ownership of the 20-acre tract was confirmed by Hascall when Hascall referred to future commercial development on the unimproved land. At Lindsay's insistence, as attorney for Piccolo, provisions for exclusivity of Piccolo's drugstore operation on the property were discussed and eventually included in the lease.

At the time of the execution of the lease the title to the land on which the Hinky Dinky store stood with the parking lot had been conveyed to The Omaha National Bank, trustee. The balance of the 20-acre tract, including the area on which the building in which Piccolo was interested was being built, was in Evergreen Company, Inc., a completely owned subsidiary of American. At that time the 20-acre tract was occupied only by a Hinky Dinky store and the customer parking area.

Lindsay testified that Hascall mentioned during the negotiations that he did not know who the landlord in the lease would be but that it probably would be in a trust. The negotiations for the lease were concluded

with the understanding that a lease for a portion of the new space would be forwarded to Lindsay by Hascall. A lease was so forwarded in March of 1965. It was executed by Piccolo. At the time of its execution, lessor's name did not appear on the lease. The lease was then returned to Hascall.

Hascall testified that because of an oversight, the land on which the plaintiff's store was located had not been conveyed to a trust prior to the plaintiff's execution of the lease. For this reason, Evergreen Company conveyed the remainder of the northeast corner of the 20-acre tract to the bank as trustee by deed dated June 29, 1965. Thereafter, the lease was executed by the bank and a copy forwarded to the plaintiff. Lindsay testified that he first learned that the bank, as trustee, was named as lessor when he received the executed lease about July 7, 1965.

The lease contained the following pertinent clauses: "2. PREMISES: That in consideration of the rents and covenants to be paid and performed by the Lessee, the Lessor hereby demises and leases to the Lessee the building or part thereof described as follows:

"A room measuring approximately 30 x 126 feet and containing approximately 3,780 square feet situated in Omaha, Douglas County, Nebraska, as shown on the attached plot plan marked Exhibit 'B', together with the right of ingress and egress and with all rights, easements and appurtenances thereunto belonging and usually had and enjoyed therewith, and upon all the terms and conditions hereinafter set out. * * *

"5. USE: The Lessee shall have the right to the exclusive operation of a retail drugstore upon the location hereinabove described and the Lessee agrees that he will conduct such drugstore similar to the one which he has operated the past seven years in the vicinity of the above property. The Lessee further agrees that he will not sell groceries, meat, produce and will not change the operation of his drugstore so as to be in competition

with the sale of groceries and meats and produce as being presently sold by the Hinky Dinky Store on the same premises. * * *

"22. PERCENTAGE RENTAL * * *

"The Lessor agrees that it will not lease any other portion of property owned by it to anyone engaged in the same or similar business as the Lessee."

On September 1, 1968, the stock in plaintiff corporation was sold to Allen Kubat who took over direction and control of the business. Both Kubat and Piccolo testified that all dealings concerning the drugstore property were handled by Hinky Dinky employees. The bank's trust officer testified that the bank did nothing other than to make certain that taxes on the property were paid and to make occasional remittances to the beneficiary, Jule M. Newman. Hinky Dinky collected the rent, saw to it that the services required under the lease were provided, and handled all complaints by the tenants.

In late 1968 and early 1969, representatives of L. J. Newman, who is Jule M. Newman's son and who had been involved with American's business, made arrangements to lease the remainder of the 20-acre tract (approximately 17 acres) to an Indiana real estate developer. A 55-year lease, dated September 1, 1968, was signed in January of 1969, by Omaha Development, Inc., the Indiana concern, and in February 1969, by L. J. Newman and his wife. At the time, title to the remaining 17 acres was still held by Evergreen Company. Subsequently, on April 3, 1969, Evergreen conveyed this tract to American by warranty deed. The next day, American deeded the tract to L. J. Newman in a transaction designed to allow L. J. Newman to exchange his stock in American for the land. At this time, L. J. Newman's father was chairman of the board and his brother president of American. This transaction was deemed desirable since L. J. Newman, a California resi-

dent, no longer desired to be involved in the American operation.

Earlier, in March 1969, while title was still in Evergreen, L. J. Newman, as owner of the 17-acre tract, and the bank, as trustee, had signed a document styled "Easement and Agreement," under which the owners of both tracts agreed to cross-easements between the properties. This "Easement and Agreement" was amended later to authorize development of a "community unified commercial shopping center under a general plan or scheme" on the 20-acre tract. These documents were negotiated by Hinky Dinky and presented to the bank for signature.

On May 1, 1969, Omaha Development, the ground lessee of the 17-acres, assigned its lease to Douglas Development Company, an Indiana limited partnership. The Walgreen lease which gave rise to this cause of action was made by Douglas Development in November 1969. Under that lease, Walgreen obtained space in a building to be constructed as part of a new shopping center on the 17-acre tract.

In April 1969, Kubat filed articles of incorporation for Allen's Pharmacy. On March 27, 1970, the plaintiff corporation made a written assignment of its lease to Allen's Pharmacy to be effective May 1, 1970. On July 2, the plaintiff made a bill of sale of all its assets to Allen's Pharmacy, Inc. Plaintiff then requested approval of an assignment of its lease to the new corporation. Lessor bank, through the attorneys representing the defendants herein, refused to accept the assignment or to release the plaintiff.

When Kubat learned that Walgreen contemplated opening a drugstore on the 17-acre tract, he contacted Hinky Dinky to protest. He was informed that the lease was to be made and Walgreen would operate its store regardless of his protest. This action was filed March 11, 1970.

Walgreen opened for business on June 30, 1970. Its

store was approximately 300 feet from the plaintiff's store. The drugstore business operated in the plaintiff's establishment closed in August 1971, as a result of the competition of the Walgreen store.

The primary question herein is the one covered by the first interrogatory. Was the evidence sufficient to prove Piccolo-Lynam Drug Company had been given an exclusive right to operate a drugstore on the entire 20-acre tract? The jury answered this question in the affirmative. We find there is evidence in the record from which the jury could reach this conclusion.

As we stated in Torstenson v. Melcher (1976), *ante* p. 764, 241 N. W. 2d 103: "In determining the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and he must have the benefit of every inference that can reasonably be drawn from the evidence."

The standard of review is settled: "The verdict of a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong." Cook v. Nordahl (1974), 191 Neb. 424, 215 N. W. 2d 643.

American argues plaintiff could not have had an exclusive use covenant over the 17 acres because the bank never had title to more than 2½ acres. Actually, the bank did not have any title to the property covered in the lease at the time it was negotiated and signed by the plaintiff. At that time, while the area embraced by the Hinky Dinky store was in the trust, the balance of the 20 acres was owned by American through its subsidiary, Evergreen.

Dean Hascall was employed solely by Hinky Dinky. He had no connection with The Omaha National Bank, trustee. The representatives of the plaintiff were insisting on exclusivity for its drugstore. Plaintiff's drugstore was to embrace approximately one-fourth of the space in the new building on the 2½ acres which otherwise was occupied solely by the Hinky Dinky store

and the parking lot. It seems only logical that the plaintiff, knowing Hinky Dinky owned the balance of the tract, in talking about exclusivity was concerned about more of the area than the remaining office space in the small building it was to occupy.

The name of The Omaha National Bank was never disclosed to any representative of the plaintiff at any time during the negotiations. As noted, the property was not even titled in The Omaha National Bank at that time. The transfer to the trustee was made subsequent to the negotiations, and subsequent to the time that the lease was executed on behalf of the plaintiff. The name of the grantor was not in the lease at the time it was executed by the plaintiff. The evidence is also undisputed that no plot plan marked "Exhibit B," as mentioned in the lease, was ever attached to the lease.

The representatives of the plaintiff had every reason to believe they were dealing solely with Hinky Dinky which owned this property and the remaining 17 acres through its wholly owned subsidiary, Evergreen Company. It was evident the remaining property in the 20-acre tract was suitable for commercial purposes and that would undoubtedly be its ultimate use.

The fact that the Evergreen Company conveyed the property covered by the lease to a trust for the benefit of Jule M. Newman, the chairman of the board of American, should not deprive plaintiff of the benefit of its lease. Control and management of the property was exercised by Hinky Dinky at all times thereafter.

On the issue of conspiracy, the jury additionally had the following facts: Hascall testified he assumed the portion of the tract on which the new building which plaintiff leased had been conveyed by deed to the defendant bank. When he discovered it had not been deeded to the bank, without making any disclosure to any representative of the plaintiff he prepared the deed of June 29, 1965. He had the bank execute the lease as lessor and forwarded it to Lindsay. It was received by

Lindsay on or about July 7, 1965. The deed of June 29, 1965, was not recorded until July 9, 1965. It is to be noted that the deed of June 29 was made to the bank by Evergreen Company, the wholly owned subsidiary of American. It was not made by the beneficiary of the trust, Jule M. Newman, the chairman of the board of American. Hinky Dinky presented no evidence as to any earlier sale or trade of that real estate to Newman or any consideration for the conveyance.

Richard Hiller, the bank trust officer, testified he had never made an inspection of the 2½-acre portion of the tract for which the bank held legal title on behalf of the trust. He had no contact with any representative of the plaintiff. The trustee did nothing other than make certain that taxes on the property were paid and make occasional remittances to the beneficiary of the trust. The documents through which cross-easements were granted between the respective legal owners of the 2½-acre portion and the 17-acre portion of the tract were negotiated by Hinky Dinky, and thereafter presented to the bank for signature.

In connection with the execution of these cross-easements, the trustee relied solely upon what its representatives were told by representatives of Hinky Dinky. The trustee made no independent investigation to determine the necessity of the cross-easement encumbering the bank's 2½-acre portion of the entire tract. It did not have any contact with the plaintiff either before or after the execution of the agreement. In essence, the record indicates that the trustee did whatever it was asked to do, based upon assurance of propriety from Hinky Dinky. It exercised no independence of judgment or action. It exercised none of the caution one would expect a legal title owner of real estate to exercise if it were more than a financing agent for American and Jule M. Newman.

Harlan Noddle, the director of real estate of Hinky Dinky, testified he had knowledge of the existence of the

exclusivity provision in the lease. He had had various telephone conversations with representatives of the plaintiff. He knew of no exclusivity covenants in other tenant leases negotiated with Hinky Dinky. Noddle testified that although Hinky Dinky was not a party to any of the cross-easement agreements, provision was made acknowledging Hinky Dinky's exclusivity in the tract to prohibit leasing of space to a competitive grocery supermarket.

Noddle was directly involved in the negotiations of the cross-easement agreements on behalf of the defendant bank as well as the owners of the 17-acre tract. He also represented the special interests of Hinky Dinky in both the bank's and Newman's respectively owned portions of the entire tract. The conveyances and cross-easement agreements ultimately enabled the commercial developer of the 17-acre Newman-owned portion of that tract to successfully negotiate a lease with the Walgreen Company. This permitted Walgreen to open a drugstore in direct competition with the plaintiff and within 300 feet of the plaintiff's establishment. The cross-easement agreement states as a purpose for the agreement that the entire 20-acre tract development should be a unified and uniform development.

When the plaintiff's representatives learned of the possibility of Walgreen leasing space on the 17-acre tract, they visited with Noddle about the exclusivity provision. They were advised that space in the 17-acre tract was going to be leased to Walgreen in spite of the provision in plaintiff's lease.

Allen Amil Kubat, who bought the stock in the plaintiff corporation, assumed the office of president in September of 1968. Sometime in 1967 or early 1968, he observed a Hinky Dinky sign on the 17-acre tract. It stated that space was available in a developing shopping center, and gave a Hinky Dinky telephone number. Exhibit 23 is a photograph of that sign. It reads:

"Hinky Dinky
15 acres
SHOPPING CENTER
Now being developed on this
site — space available for lease
CALL Dean Hascall
341-3688"

All the rent checks in evidence show they were deposited to the account of Center Plaza in The Omaha National Bank. All but two of the checks are made payable to Center Plaza. Of those two, one is made payable to Omaha National Bank, Trustee, Center Plaza. The other, for 3 months' rent, dated 12/31/1969, is payable to Hinky Dinky. All the checks were delivered to American. Center Plaza was the name given to the 20-acre development.

In Marsh-Burke Co. v. Yost (1915), 98 Neb. 523, 153 N. W. 573, we held: "A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must be, proved by a number of indefinite acts, conditions and circumstances, which vary according to the purpose to be accomplished. If it be proved that defendants, by their acts, pursued the same object, although by different means, one performing one part and another another part, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object."

On the record, the jury could infer that plaintiff's representatives at all times believed they were dealing with Hinky Dinky on a partial development of a 20-acre tract and entered into the lease on the strength of the exclusivity covenant. It could have inferred that from the inception of the transaction the conveyance to the bank was an attempt to avoid the effect of plaintiff's exclusivity agreement. It might further have inferred that this action was a conspiracy on the part of the defendants; also, that it continued through the deeding of

the 17-acre tract and the execution of the cross-easement agreements leading to the development of the tract. Further, it allowed the developer to lease space for a Walgreen store within 300 feet of plaintiff's drugstore, thus violating plaintiff's exclusivity contract. It could have inferred the bank was well aware of the exclusivity covenant and should have protected plaintiff in the cross-easement agreements as it did Hinky Dinky.

On the third issue, the real party in interest, the evidence in the record clearly and unequivocally indicates that the defendants refused to accept an assignment of plaintiff's lease to a related corporation, Allen's Pharmacy, Inc. Consequently, plaintiff corporation, even if owned by Allen's Pharmacy, had no alternative but to continue as lessee and to pursue this action in its own name. It should be patent that the defendants could not refuse to accept an assignment of a lease and then in an action brought on the lease insist that the named lessee with whom they insisted on dealing was not the real party in interest. On this record, the finding of the jury that the plaintiff was the real party in interest is fully sustained by the record.

The judgment of the District Court is affirmed.

AFFIRMED.

KAREN MAGDALENO, APPELLANT, V. NEBRASKA PANHANDLE COMMUNITY ACTION AGENCY ET AL., APPELLEES.
241 N. W. 2d 114

Filed April 14, 1976. No. 40338.

1. **Workmen's Compensation: Appeal and Error: Evidence.** Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record.
2. ———: ———: ———. In a workmen's compensation pro-

ceeding a District Court finding against a party will only be set aside if the evidence compels a finding for that party.

3. **Witnesses: Trial.** The value of an opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true.
4. ———: ———. Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Wright & Simmons, for appellant.

James R. Hancock, for appellees.

Heard before SPENCER, MCCOWN, and BRODKEY, JJ., and MURPHY and COADY, District Judges.

SPENCER, J.

This appeal is from a trial de novo in the District Court after that court sustained the finding of the Workmen's Compensation Court on a direct appeal. Both courts found Karen Magdaleno, plaintiff, had failed to maintain her burden of proving the disabilities she now suffers are the result of an accidental injury arising out of and in the course of her employment by the defendant, Nebraska Panhandle Community Action Agency, and dismissed her petition. We affirm.

To point up the issue it is only necessary to briefly sketch the testimony. Plaintiff injured her back in April of 1968 when she fell down some stairs at home. She had pain in the lumbosacral area with nerve root irritation of sufficient severity to hospitalize her for a full week. X-rays at that time revealed a narrowing of the disc space between discs L-4 and L-5, and a questionable narrowing between L-5 and S-1. Her physician, Doctor Gentry, discontinued his treatment of her May 21, 1968.

Plaintiff testified that on October 6, 1970, while riding in the defendant's school bus, it left the road and came to a sudden stop. She testified she felt a sudden sharp pain in her back. Plaintiff was wearing a seat belt at the time. Because of pain she went to a chiropractor a day or so after that event. The chiropractor's treatment did not give her relief, so on October 22 she consulted Doctor Gentry.

Doctor Gentry testified X-rays showed very little if any change from the previous ones. Plaintiff still had a narrowing of the disc spaces referred to previously. Plaintiff had a slightly abnormal back. Whether it was caused by the 1968 injury nobody could say. The pain on this occasion was considerably more severe than in 1968. Also, the objective finding of muscle spasm and limp was worse. Plaintiff consulted Doctor Gentry on several occasions after she went back to work. The record, however, does not indicate she lost any time from work because of back trouble from then until 1973.

On February 18, 1973, after doing breakfast dishes at home, a rag slipped from plaintiff's hand and she stooped over to pick it up. She felt a real sharp pain that made her "go down." The pain was in the same area where she had suffered pain before, but it was much sharper than before. She was hospitalized and put in traction. Her doctor consulted Doctor Simpson, an orthopedic specialist, on February 26, 1973.

Plaintiff was thereafter referred to Doctor Boyd, an orthopedic specialist in Denver, where she was hospitalized. Doctor Boyd first saw her on March 18, 1973. At that time she advised him that she had suffered intermittent trouble with her back for about 6 years. The doctor took X-rays but found nothing not disclosed in the other X-rays. He performed a myelogram and treated her with bed rest. She became dissatisfied with his treatment and decided to go home. She was discharged from the Denver hospital on March 24, 1973,

and returned to the Nebraska hospital. After gradual improvement she was dismissed on April 6, 1973.

On June 18, 1973, a sudden onset of more severe pain resulted in her readmission to the hospital. Tests taken at this time indicated a disc infection and inflammation of L-4 to L-5. It was Doctor Simpson's opinion that plaintiff had a disc space infection on June 26, 1973, and that its cause was hematogeneous, which we translate to mean an infection disseminated by the circulation, or through the blood. Plaintiff did not return to work until October 1973.

In the opinion of plaintiff's two medical witnesses, her problems on February 18, 1973, with reasonable medical certainty, were caused by her accident of October 1970. Both doctors testified the June 1973 infection had localized in the area it had because that part of the back was a place of continuous stress, and further the October 1970 accident had caused the continued stress and diminished resistance.

Doctor Boyd, who testified by deposition, stated he was not aware of any body of scientific evidence that would support the conclusion that continued stress could lead to infection. He believed the severity of the February 18, 1973, injury would be more significant. Plaintiff had worked without much interruption from her hospitalization in 1970 until February 18, 1973, when she ceased working until October of 1973. Doctor Boyd felt plaintiff may have had the infection in her body prior to February 18, 1973, but it developed in the disc about the time of her hospitalization following the February 18 injury. He specifically disagreed with the conclusion that her problem was caused by the injury of October 6, 1970. He was positive also that her disc space infection had no connection with her injury in 1970.

The opinion of plaintiff's doctors was based in part on their assumption that plaintiff had been symptom free from the time of her injury in 1968, which occurred at home, until the 1970 work-related incident. Plaintiff

admitted in cross-examination that she had seen a chiropractor for back problems more than once between 1968 and 1970. A coworker testified that on several occasions plaintiff complained of back trouble during that period. Plaintiff's doctors admitted their opinions might be changed by knowledge of visits to chiropractors or incidents of back trouble between 1968 and 1970.

Plaintiff sought to minimize her visits to a chiropractor by testifying she consulted him for treatment of her upper back and shoulder. Doctor Boyd, on the other hand, testified plaintiff told him she had experienced back pain for 6 years prior to the time he saw her in March 1973. Plaintiff did not deny she gave this history to Doctor Boyd.

In Gifford v. Ag Lime, Sand & Gravel Co. (1971), 187 Neb. 57, 187 N. W. 2d 285, we said: "We * * * hold that on appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. We also hold that upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record."

The specific finding of the District Court challenged here is that the plaintiff failed to prove her injury arose out of and in the course of her employment. Since Gifford, when we review a case de novo, we essentially hold to the rule that in a workmen's compensation proceeding a District Court finding against a party will only be set aside if the evidence compels a finding for that party. See Adler v. Jerryco Motors, Inc. (1972), 187 Neb. 757, 193 N. W. 2d 757.

Plaintiff's argument is essentially that the testimony of her two medical witnesses compels a finding in her favor. We do not agree. First, there is a serious disagreement in the medical testimony. Defendant's expert medical

witness was equally positive that the accident of October 1970 was not the cause of plaintiff's problems in 1973. To accept plaintiff's argument would require us to ignore the defendant's evidence. This we cannot do. It is obvious to us why the two previous courts, in view of defendant's evidence, found plaintiff had failed to meet her burden of proof.

Second, there is the problem of the incomplete history given by the plaintiff to her physician. It is undisputed that both of plaintiff's witnesses based their medical opinion on the history of trouble given to them by her. This did not include reports of any problems or treatment between 1968 and 1970. There is some evidence in the record that plaintiff did have such problems. As we said in Gotfrey v. Sakurada (1960), 169 Neb. 879, 101 N. W. 2d 470: "The value of an opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true."

In Snowardt v. City of Kimball (1962), 174 Neb. 294, 117 N. W. 2d 543, we said: "Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence."

On this record, we cannot say that the two previous courts were wrong. The evidence does not compel a finding that the injuries now suffered by the plaintiff arose out of and in the course of her employment by the defendant.

Doctor Boyd testified that the February 18, 1973, injury was of significant severity. Her own orthopedic specialist testified that plaintiff's injury of 1973 was of significant proportions. Plaintiff stooped to pick up a washcloth and could not straighten her back. To hold for plaintiff we would need to hold this was a continuation of the problem created by the October 1970 acci-

dent. This we are unable to do. On this record we cannot say the 1973 problem was not the culmination of the problem created when plaintiff first fell down the stairs at her home in 1968, or possibly some occurrence other than the 1970 episode.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD LEE SANDERS, APPELLANT.
241 N. W. 2d 117

Filed April 14, 1976. No. 40339.

Trial: Attorneys at Law: Records. Statements constituting alleged misconduct of counsel in argument to the jury must be taken by the court reporter at the trial, together with the objection made thereto and the court's ruling thereon.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

Heard before WHITE, C. J., McCOWN, NEWTON, and BRODKEY, JJ., and KORTUM, District Judge.

WHITE, C. J.

The defendant was found guilty of possession of a controlled substance, specifically lysergic acid diethylamide, or as it is commonly known, LSD, in violation of section 28-4,125, R. S. Supp., 1974. The defendant was sentenced to a term of 1 year in the Nebraska Penal and Correctional Complex. The defendant's sole contention on appeal is that the District Court committed error in refusing to grant the defendant's motion for a mistrial

based upon alleged remarks made by the prosecutor in his closing argument. We affirm the decision of the District Court.

The defendant asserts that the prosecutor acted improperly in his closing argument when he allegedly stated that the evidence showed the defendant to be a purveyor of drugs. The defendant, by mere assertion in his motion for a mistrial, alleged that the District Court reprimanded the prosecutor for making such statement, and, again by mere assertion, alleged that the prosecutor again referred to evidence showing that the defendant was "dealing dope." These statements, asserted in his motion for a mistrial, do not appear in the bill of exceptions or in the record. There is no claim that the defendant was deprived of his right to make a proper record and to prove the factual basis for the assertions in the motion for a mistrial.

"* * * statements constituting alleged misconduct of counsel in argument to the jury must be taken by the court reporter at the trial, together with the objections made thereto and the court's ruling thereon." Garska v. Harris, 172 Neb. 339, 109 N. W. 2d 529.

In Peery v. State, 165 Neb. 752, 87 N. W. 2d 378, this court said: "'* * * statements to which exception is taken must appear in the bill of exceptions, and in the absence of such appearance there is nothing which becomes the subject of review.'" We further point out that this court cannot determine whether counsel was guilty of misconduct while presenting his closing argument to the jury where the bill of exceptions does not contain *all* the argument objected to. Melcher v. Murphy, 149 Neb. 541, 31 N. W. 2d 411. The defendant's contention is without merit.

Moreover, assuming arguendo the facts as the defendant contends, it seems clear that it was not prejudicial error to deny the defendant's motion for a mistrial. The record reveals that the evidence was overwhelming as to the defendant's guilt of mere possession. In this

case the allegedly improper statements are directly related to the charge of possession of a controlled substance, and according to the evidence résumé by the defendant himself in his brief, the facts readily support the inference that the defendant was in fact dealing in drugs. The large quantity of drugs, the individual packaging of the marijuana, the numerous hashish pipes, and the large quantity of LSD all support the inference that the defendant was in fact dealing in drugs. Under these circumstances, even though it is technically asserted that this evidence is irrelevant to the charge of mere possession, it effectively forecloses any claim of prejudicial error or injustice. A defendant is entitled to a fair trial, but not a perfect trial. State v. Escamilla, 187 Neb. 457, 191 N. W. 2d 548.

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

AFFIRMED.

JOHN H. VON SEGGERN, APPELLEE, V. KASSMEIER IMPLEMENT ET AL., APPELLANTS.
240 N. W. 2d 842

Filed April 14, 1976. No. 40350.

1. **Trial: Appeal and Error: Records: Evidence.** Section 24-541, R. S. Supp., 1974, providing for review "de novo on the record" intends that the District Court exercise independent judgment, which must be based on the issues, pleadings, and evidence presented in the lower court unless additional evidence is adduced pursuant to that statute.
2. **Judgments: Appeal and Error: Trial.** In reviewing orders affecting procedural matters this court will presume in the absence of evidence to the contrary that the District Court has not abused its discretion, and the burden of showing an abuse of discretion is upon the party adversely affected by the District Court's order.

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

Hurt & Gallant and Daniel A. Smith, for appellants.

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

Heard before WHITE, C. J., MCCOWN, NEWTON, and BRODKEY, JJ., and KORTUM, District Judge.

BRODKEY, J.

Kassmeier Implement and John Deere Company appeal to this court from an order of the District Court vacating and setting aside an order entered by the county court of Dodge County dismissing an action brought by John H. Von Seggern against Kassmeier Implement and John Deere Company, and remanding the cause to the county court for further action. In his amended petition filed in the county court on December 23, 1974, Von Seggern sued the defendants for damages to his grain wagon sustained when a tractor sold by Kassmeier Implement and manufactured by John Deere Company tipped over while pulling the wagon. His action was based on the theories of negligence, breach of warranty of fitness for particular use, and strict liability.

On December 30, 1974, defendant Kassmeier Implement served written interrogatories upon Von Seggern's attorneys pursuant to section 25-1267.37, R. R. S. 1943. That statute requires that answers to interrogatories shall be served on the party submitting them within 15 days of the service of the interrogatories, unless the court, for good cause shown, extends the time to answer them. On January 14, 1975, defendant Kassmeier filed a motion for an order extending the time for further pleading until a reasonable time after the answers to the interrogatories were received, but it does not appear that this motion was ever acted upon by the county court. On April 4, 1975, Kassmeier filed a motion in the county court to dismiss the action because of plaintiff's failure to answer the interrogatories within the

statutory time limit. Five days later, on April 9, 1975, plaintiff filed answers to the 42 interrogatories submitted by Kassmeier. The hearing on Kassmeier's motion to dismiss was held on April 25, 1975, and on May 1, 1975, the county court entered its order sustaining Kassmeier's motion and dismissing plaintiff's action with prejudice. The order of dismissal entered by the county judge does not contain an explanation of his reasons for the dismissal, but it is clear from the arguments of counsel made at the hearing on April 25, 1975, that the court undoubtedly dismissed it pursuant to section 25-1267.44(4), R. R. S. 1943, as this section is referred to by counsel in their arguments to the court. That subsection provides as follows: "(4) If a party or an officer or managing agent of a party willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under section 25-1267.37, after proper service of such interrogatories, the court on motion and notice *may* strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party." (Emphasis supplied.)

Plaintiff Von Seggern thereupon appealed the judgment of the county court to the District Court for Dodge County, Nebraska, which, after a trial de novo on the record held on July 30, 1975, vacated and set aside the order of the county court and remanded the cause to the county court for further action. Defendants then moved that the District Court vacate and set aside its order of July 30, 1975. The motion was overruled, and they then prosecuted a timely appeal to this court. We affirm.

Defendants claim that the District Court erred by exercising an impermissibly broad power of review substituting its discretion for that of the county judge. In support of their contention, they cite language contained

in a recent opinion of this court in State v. Clark, which was originally published in 63 SCJ 487, No. 13, issue of October 15, 1975, and which interpreted the "de novo on the record" standard of review set forth in section 24-541, R. S. Supp., 1974. We point out, however, that the language in State v. Clark relied upon by defendants was later deleted and an amended opinion was filed in that case. The citation for the corrected opinion is 194 Neb. 487, 233 N. W. 2d 898.

The relevant portion of section 24-541, R. S. Supp., 1974, provides: "All such appeals shall be de novo on the record except those matters referred to in section 30-1601, which matters shall be appealed de novo. In matters appealed de novo on the record, the district court may, in its discretion, receive additional evidence if the court determines that such evidence is reasonably necessary to determine the issues, make findings of fact and render judgment thereon. The district court may affirm, modify, or vacate the judgment, or may remand the case to the county or municipal court for a new trial."

The phrase "de novo" indicates that a new trial will be had in the appellate court in which the entire case is gone into as if there had been no trial in the lower court. This, of course, would grant the District Judge sufficient discretion and latitude for making independent decisions in cases appealed to his court. "On the record" indicates that, unless the District Court takes additional evidence, as permitted in that section, the review is limited to the issues, pleadings, and evidence presented in the county court. The legislative history of Laws 1972, L.B. 1032, of which section 24-541 was a part, indicates that the "de novo on the record" language was a compromise between those senators wanting to retain an earlier provision for de novo review requiring, in effect, a retrial, and those senators advocating a more strictly appellate review on the record. Under section

24-541 the District Court may exercise independent judgment, which, however, must be based on the issues, pleadings, and evidence presented in the lower court, unless additional evidence is adduced pursuant to section 24-541, R. S. Supp., 1974. See, e.g., Metropolitan Dining Room v. Jensen, 126 Neb. 765, 254 N. W. 405 (1934); State ex rel. Nelson v. Lincoln Medical College, 81 Neb. 533, 116 N. W. 294 (1908).

In this case, the District Judge indicated in his trial notes that the hearing was "de novo on the record," and there is nothing to show that he heard additional evidence. He had a right to evaluate the parties' contentions and reach his own decision; and, in accord with section 24-541, R. S. Supp., 1974, he remanded the cause to county court for further proceedings, as he had a right to do.

In reviewing orders in a case affecting procedural matters, this court has held that it will presume, in the absence of evidence to the contrary, that the District Court has not abused its discretion. Jones v. Nebraska Blue Cross Hospital Service Assn., 175 Neb. 101, 120 N. W. 2d 557 (1963). The burden of showing an abuse of discretion is upon the party adversely affected by the court's order. Urwin v. Dickerson, 185 Neb. 86, 173 N. W. 2d 874 (1970). Defendants have not established that they were prejudiced, as distinguished from inconvenienced, by the delay in the filing of the answers. Nor have they demonstrated that the District Court abused its discretion in reversing and remanding the cause for trial on the merits. We find that the District Court did not abuse its discretion, and the order of the District Court must, therefore, be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD L. MCMULLEN, APPELLANT.
240 N. W. 2d 844

Filed April 14, 1976. No. 40375.

Criminal Law: Sentences. A sentence imposed within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion.

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

Gwyer Grimminger, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

WHITE, C. J.

The defendant pled guilty to embezzlement in violation of section 28-538, R. R. S. 1943. After considering the presentence investigation report, the District Court sentenced the defendant to a term of 7 years in the Nebraska Penal and Correctional Complex. The defendant's sole contention on appeal is that the sentence is excessive. We affirm the judgment and sentence of the District Court.

The sentence imposed, although the maximum, was within the statutory limits and will not be disturbed on appeal in the absence of an abuse of discretion. State v. Allen, *ante* p. 560, 239 N. W. 2d 272. We point out that under the terms of section 83-1,105, R. S. Supp., 1974, and our decision in State v. Hedglin, 192 Neb. 545, 222 N. W. 2d 829, the defendant's sentence under the law is an indeterminate sentence of 1 to 7 years. The contention of the defendant, therefore, is narrowed in practical terms to a contention that the maximum term should be less than 7 years. This contention, almost on

its face, would not constitute an abuse of discretion on the part of the trial judge.

It is asserted in substance that the defendant is entitled to probation or a minimum sentence. It may be true that this case is the occasion of the defendant's first prosecution. However, the record reveals that the defendant embezzled $110,000 in a series of continuous offenses, each one of which would have constituted embezzlement, over a period of time for approximately 3½ years. The checks were written in comparatively small amounts, and the defendant himself said that the biggest check he ever wrote was approximately $800. The record shows that he spent about $50 to $100 a day on the horse races, that he spent money by living beyond his means, gambled on football games, and made trips to Las Vegas. This repetitive and continuous felonious conduct, combined with the lack of mitigating circumstances in the disposition of the embezzled funds, clearly demonstrates that the sentence imposed in this case is not an abuse of discretion. The record supports, as in most embezzlement cases, that there is not much danger of the defendant committing a violent crime. But the serious and continuous offenses committed and the conduct of the defendant in the community give weight to a determination that a lesser sentence would depreciate the seriousness of the defendant's crime and promote disrespect for the law. § 29-2260(2)(c), R. S. Supp., 1974. The contention of the defendant is without merit.

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

AFFIRMED.

CHARLES SESEMANN ET AL., APPELLANTS, V. SAMUEL J. HOWELL, JR., COUNTY TREASURER OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.
241 N. W. 2d 119

Filed April 14, 1976. No. 40378.

1. **Schools and School Districts: Actions: Parties: Demand.** Ordinarily a demand upon the responsible officers of a governmental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity.
2. **Schools and School Districts: Taxation: Actions.** Tax money received by one school district from personal property taxed in that district but which should have, under the pertinent statutes, been taxed in another district cannot be recovered by the district within which the property should have been taxed where no levy was made on the property for its uses and purposes, where both districts involved obtained the amount of money for which the budget called, and where neither district obtained any money intended for the other.
3. **Schools and School Districts: Actions: Parties.** Taxpayers, whose right to sue to protect the interests of the school district arising out of the failure or refusal of the officers to do so, have no greater right to sue to protect such interests than the designated officials have.
4. **Schools and School Districts: Taxation.** The provisions of section 77-1216, R. R. S. 1943, if timely pursued, afford an administrative remedy to a school district where it claims that personal property which it was entitled to tax has been erroneously assessed in the wrong district.

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

Charles O. Forrest of Kneifl, Kneifl & Forrest, for appellants.

Roger R. Holthaus and Verne Moore, Jr., of Moore, Moore & Peters, and Gerald P. Laughlin of Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellees.

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

CLINTON, J.

This is an action commenced in the District Court for Douglas County, Nebraska, on January 13, 1975, by the plaintiffs, who allege they are citizens of Douglas County, Nebraska, residing within School District No. 1 of Douglas County, to have the sum of $184,975.41 allegedly collected by the county treasurer of Douglas County in August 1973 from the Xerox Corporation for personal property taxes assessed in the years 1971 and 1972 and "presently credited to the school fund of Defendant, School District No. 66, . . . transferred and credited to the school fund of Defendant, School District No. 1, as required by sections 77-1201, 77-1202, 77-1218, R. R. S. of Nebraska, 1943, as amended." The defendants in this action are the two school districts above named, the county treasurer of Douglas County "as . . . ex-officio collector of taxes for Defendant School Districts," and the past and present tax assessors of Douglas County. We note that sections 77-1201, 77-1202, and 77-1218, R. R. S. 1943, cited in the petition, provide rules to determine situs for the taxation of personal property and do not provide for the transfer of tax funds from one district to another.

The defendant School District No. 66 demurred to the plaintiff's petition. The District Court sustained the demurrer. The plaintiffs elected not to amend and their petition was dismissed. They then perfected their appeal to this court. Only the plaintiffs and School District No. 66 have filed briefs and made appearances here. We affirm.

The petition, among other things, alleges that School District No. 66 at the appropriate time reported to the county board of Douglas County, Nebraska, its budgets for the years 1972 and 1973, the county board did levy the number of mills of tax necessary to provide the funds for said budgets, and that pursuant to the levies taxes were collected by the defendant treasurer; that during the 2 years mentioned the county assessor "as-

sessed personal property of the Xerox Corporation, to-wit, inventory, with the situs within School District No. 66, wherein in fact, the Xerox Corporation had removed their offices from the said School District No. 66 and transferred them to School District No. 1"; also, that the county treasurer collected from the Xerox Corporation the aforementioned amount of taxes; and by the way of conclusion: "That by reason of the controversy which has arisen between the Defendants as to their respective rights and duties under the taxing laws of the State of Nebraska, the Court should make a determination and enter a declaratory judgment with respect thereto, pursuant to Section 25-21,149, et seq., R. R. S., 1943, as amended."

The plaintiffs' petition does not contain any allegation that School District No. 1 has not received from the county treasurer for the years in question the full amount of tax funds budgeted and levied on its behalf. It makes no allegation that plaintiffs have made any demand upon the school board of School District No. 1 to take any action on its own behalf, nor does it allege any refusal on its part to act.

The plaintiffs devote their brief to attacking the various reasons given by the trial court for its action. They have not responded to the brief of the school district which supports the action of the trial court on various additional grounds as well. It is unnecessary to consider all the possible grounds which support the order sustaining the demurrer, so we deal only with the two grounds we feel are the most important and significant. These are: (1) The absence of right as disclosed by allegations of the petition of the plaintiffs to bring the action on behalf of School District No. 1. (2) The absence of right as disclosed by allegations of the plaintiffs' petition to sue on their own behalf.

Two principles previously announced by this court support the first ground. If we assume that the plaintiffs were at all pertinent times taxpayers of School District

No. 1 (the petition contains no such allegation), it was nonetheless necessary for them to allege that they had made a demand upon the officers of the district to bring an action to recover the improperly credited funds. Ordinarily a demand upon the responsible officers of a governmental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity. Scheschy v. Binkley, 124 Neb. 87, 245 N. W. 267. Such a demand is not required only where it would have been useless to make one. Taxpayers' League v. Wightman, 139 Neb. 212, 296 N. W. 886. Plaintiffs have pleaded neither a demand made by them and a refusal by the district, nor any facts which would show that such a demand was useless.

The second applicable principle was announced in School Dist. No. 8 v. School Dist. No. 15, 183 Neb. 797, 164 N. W. 2d 438. The petition in this case pleads no facts which would show that School District No. 1 had a right at the time this action was commenced to have the funds transferred from School District No. 66 to School District No. 1. In School Dist. No. 8 v. School Dist. No. 15, *supra,* land which was legally in School District No. 8 was erroneously assessed in School District No. 15. We there held: "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." The fact that in this case personal property may have been assessed in the wrong district does not make the principle inappli-

cable. Plaintiffs have alleged no facts which would make this principle inapplicable in this case.

It seems but common sense to say that if School District No. 1 has no right to bring this action, the plaintiffs' right as its claimed representative can rise no higher. Taxpayers, whose right to sue to protect the interests of the school district arising out of the failure or refusal of the officers to do so, have no greater right to sue to protect such interests than the designated officials have. See Davis v. White, 171 Ark. 385, 284 S. W. 764. Policy considerations which would deny the right of School District No. 1 to relief at this late date are well summarized in the dissenting opinion in School Dist. No. 8 v. Board of Education, 115 Kan. 806, 224 P. 892: "Giving property a wrong situs on the assessment roll occurs so frequently the legislature was obliged to provide a remedy. The mistake being administrative, the remedy provided is administrative. As a practical matter, all tax schemes must be closed against error and irregularity at some time, even though some inequality result. After administrative correction, adequate to meet every public and private need, is barred, the courts ought not to interfere.

"Should plaintiff recover, it will not be to make up any deficiency in its school money for 1918 or 1919. The effect of the judgment will simply be to place to plaintiff's credit a sum of money which will enable it to reduce its tax levy for 1924, on property then in its territory. The sum must be raised by a special levy for 1924, on property then in defendant's territory. The property in neither district will be the same as six years ago. Taxpayers will suffer who were not benefited by the assessor's mistake, and taxpayers will be benefited who did not suffer. The whole matter is stale, and the court's decision will create precisely the kind of disturbance which, as a matter of public policy, the legislature undertook to prevent, and will be an invitation to barratry." An administrative remedy was available

in this case. Section 77-1216, R. R. S. 1943, provides in part as follows: "Questions that may arise as to the proper place to list personal property shall be determined as follows: (1) If between several places in the same county, the place for listing and assessing shall be determined and fixed by the county board; . . . ." We hold that the plaintiffs did not plead a cause of action which would permit them to bring this action on behalf of School District No. 1.

Do the plaintiffs have the right to sue on their own behalf? If we assume that the plaintiffs bring this action on their own behalf as taxpayers, policy considerations identical and similar to those just stated weigh against such a right.

In addition we note the following considerations. The practical effect of assessing property in the wrong district for those taxpayers subject to tax in the district in which the assessment should have been made is the same as if the property of others taxable in that district had been undervalued. The statutes of Nebraska offer an administrative remedy in the latter instance. Section 77-1503, R. R. S. 1943, provides: "The county board of equalization shall . . . equalize the valuation of the personal property . . . and . . . on the application of any person who shall deem himself aggrieved or who shall complain that another is assessed too low, review the assessment and correct the same as shall appear to be just." Section 77-1216, R. R. S. 1943, previously cited, does not specifically state who may timely challenge an assessment made in the wrong district, however, the provisions of section 77-1503, R. R. S. 1943, would seem to set the legislative policy and would indicate that District No. 1 and the plaintiffs had an adequate remedy at law under section 77-1216, R. R. S. 1943, had it been timely pursued. For an analogous situation see State ex rel. Hepperla v. Glander, 160 Ohio St. 59, 113 N. E. 2d 357. We hold that the plaintiffs were not, un-

der the facts pleaded, entitled to declaratory relief in the District Court.

AFFIRMED.

MARILYN ANN LYNCH, APPELLEE, V. DONALD RAYMOND LYNCH, APPELLANT.
241 N. W. 2d 123

Filed April 21, 1976. No. 40241.

1. **Divorce: Alimony: 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. In determining those circumstances, the financial position of the husband, the earning capacity of each parent, and the estimated costs of support of the children must be taken into account.
2. **Divorce: Judgments: Parent and Child.** The decision of a trial court in awarding child support will not be disturbed on appeal unless it appears that the court abused its discretion.
3. **Divorce: Judgments: Alimony.** The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal.

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

Harry R. Meister of Meister & Morrison, for appellant.

Richard A. Douglas of Herman & Herman, for appellee.

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

BRODKEY, J.

Donald Raymond Lynch appeals from the child support, alimony, and property division provisions of a decree entered by the District Court in an action against him brought by his wife, Marilyn Ann Lynch, for the dissolution of their marriage. We affirm.

Donald and Marilyn Lynch were married in Scottsbluff, Nebraska, on November 17, 1956. They had five children who, at the time of the trial, ranged from 4 to 16 years of age. At that time Donald was 41 years of age and Marilyn was 42. The parties had been separated for about 4 years before Marilyn filed the action. During that period, the children lived with their mother and have continued to live with her since the entry of the decree.

So far as material to this appeal, the decree entered by the court on April 14, 1975, required Donald Lynch to pay as child support for the five children $1,000 per month, payable in installments of $500 each on the 25th and 10th day of each month. The court specified that the child support was based on $200 per child, and further provided that when any child became of age, married, or died the support was to be reduced by the amount designated for each child, except for the last two children, for whom the support is to be $250 per month for each child until he or she reaches his or her maturity. The decree also effected a division of property under which Marilyn was to receive the family home subject to encumbrances, all household furnishings and her separate effects located in the family home, a 1973 LTD Ford automobile, free and clear of encumbrances, and the cancellation of a $500 loan made to Marilyn by Donald. Donald received as his separate property "[a]ll property wherever located, both real and personal, whether in his name and under his control or in the name and control of the Donald Lynch Construction Company subject to encumbrances."

It was further provided in the decree that Donald should pay Marilyn as alimony "the sum of $900.00 per month, beginning May 1, 1975, for a period of 121 months. * * * The alimony herein granted shall be deemed to be alimony in gross and is not to be affected in any way or terminated by the marriage or death of either party. This alimony is not to draw interest except on

delinquent payments, and any and all delinquent payments shall draw interest at the rate of 8 percent per annum until paid. The unpaid alimony shall not be a lien on any of the property of respondent, except in the event of his death, the unpaid alimony shall forthwith become a charge against his estate and a lien on all his property." The decree also contained provisions requiring Donald to keep in force and effect certain insurance policies on the children, and to pay certain outstanding obligations and costs.

It appears from the record that the parties brought little, if any, money or assets into the marriage. At that time, Donald was employed as a laborer and in 1956 or 1957 commenced installing concrete-lined ditches using an old panel truck. He testified there were many years in which he did not make $2,000. At the time of the marriage, Marilyn was employed as a bookkeeper at a local hospital. She later acted as secretary and bookkeeper for her husband in his construction company, while also continuing her outside employment at the hospital, and rearing three children. In 1962, Donald formed a partnership with one Herbert Ziegler, and engaged in the contracting business under the names of Lynch Construction Company and also Ziegler and Lynch. At the insistence of her husband, Marilyn ceased to work outside their home so that she might devote full time to rearing their children. Donald continued to work in his construction business, engaging principally in water, sewer, and paving projects. In April of 1974, his partner, Ziegler, died; and shortly thereafter, Donald became the sole owner of the construction business by purchase from the estate of his deceased partner pursuant to a prior written agreement. The consideration for the purchase of his partner's interest in the construction business was $100,000, of which $80,000 was paid in cash and $20,000 by the transfer of equipment. Also, as a result of Mr. Ziegler's death, Donald received insurance

proceeds totaling $185,983.81, apparently from partnership insurance.

It appears that the monthly payments required from Donald under the terms of the decree are the sums of $1,000 for child support, $900 as alimony in gross, which we conclude obviously represents both property division and support payments, and approximately $244 for insurance premiums, or a total of $2,144. It also appears that he may be required to pay a substantial amount for drugs and medicines. His income tax returns for the years 1972, 1973, and from January to July of 1974 indicate that the amount expended for this purpose averaged out to approximately $114 per month. At the trial, Marilyn estimated that the monthly cost of running her household was around $988.50, not counting clothing, recreation, and other extras. She itemized her expenses in her testimony. On the other hand, Donald testified at the trial that in his opinion $800 to $900 per month would be adequate. His only testimony as to his own expenses for living apart from his wife was rent for his room in a Scottsbluff motel in the amount of $184.60 monthly, and office rent of $174 per month. He also testified that he eats his meals out.

We first consider the question of the excessiveness of the child support award as contained in the decree, and as augmented by the insurance expense and medical payments. 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. In determining those circumstances, the financial position of the husband as well as the estimated costs of support of the children must be taken into account. Connolly v. Connolly, 194 Neb. 241, 231 N. W. 2d 337 (1975); Schwaninger v. Schwaninger, 192 Neb. 681, 223 N. W. 2d 829 (1974). Section 42-364(3), R. S. Supp., 1974, also provides that in determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent.

Although Marilyn has had prior experience working at a local hospital and for her husband doing bookkeeping and credit work, she has not worked outside the home since 1962. At the time of the trial, the youngest child was 4 years of age; and Marilyn testified that she could not care for the children and work outside the home. On the other hand, although it is true that in the early days of his contracting business Donald did not make much money, the record shows that after the formation of the Ziegler and Lynch construction partnership in 1962 or 1963, the company began to grow rapidly and bring in sizable amounts of money for the partners. The record indicates that Donald drew the following amounts out of the business during recent years: 1970, $29,676.60; 1971, $36,594.50; 1972, $42,004.36; 1973, $44,734.46 (including his salary of $12,000); and 1974, $62,486.27.

We fully realize that a "draw" only represents what Donald took out of the business, and does not reflect the income of the business nor represent Donald's share of the profits; but there is no question that the business of the partnership increased substantially from 1971 on. In 1972 the net profits were $44,000. In 1973 they were $84,000. Of particular interest, however, is exhibit 9, the partnership income tax return, covering the period from January 1 to April 12, 1974, the date of the death of the partner, Ziegler. During that period of less than 4 months, it appears that the gross profit of the partnership was $178,729.64 and the return shows ordinary income for that period of $116,389.05. That income tax return also shows a long term capital gain on the sale of a sodding business owned by the partnership in the amount of $26,274.93 and a short term capital loss in the commodity future's market of $32,886.78. According to the testimony of an accountant who testified at the trial, Donald's share of the profit for that 4-month period was $61,594.52 in ordinary income. The record

does not contain the final income tax return for the year 1974, as it was not received into evidence.

Donald also owns 5 acres of unencumbered land valued at $11,000, on which a shop is located. He owns a drilling outfit valued by him at $1,500 and stocks valued at $2,500. He also owns three quarterhorses, which he purchased for $27,714.70 as an investment for the business. He has already commenced racing these horses, and testified he goes to Denver almost every weekend to watch his horses run. Donald also testified that in 1974 his company purchased about $100,000 of new equipment, which, at the time of the trial, was subject to a purchase money mortgage of approximately $14,000.

We have stated that the decision of a trial court in awarding child support will not be disturbed on appeal unless it appears that the court abused its discretion. Hermance v. Hermance, 194 Neb. 720, 235 N. W. 2d 231 (1975). We do not believe the record reveals an abuse of discretion in the award of child support. While the amount involved is significant, it does not appear to be excessive. There are five children involved, some of whom are approaching college age. In the past Donald has been an excellent provider and been generous with Christmas money and birthday gifts. It does not appear he has refused requests of his ex-wife or children for money.

We now discuss together, as did counsel for Donald in his brief, the question of whether the property division and the award of alimony in gross totaling $108,900, payable in installments of $900 for a period of 121 months, was excessive. Appellant Donald contends that the amount of the award of the specific property in addition to the award of $108,900 as alimony in gross constitutes an award to Marilyn of over 100 percent of the value of the assets of the parties; and is "grotesque and completely incongruous." Whether or not this allegation is correct necessarily involves the question of the valuation of the Lynch Construction Company, about which

there is conflicting evidence in the record. A certified public accountant, testifying for Marilyn, on the basis of capitalized earnings stated that if net earnings were $40,000 yearly, at a return rate of 8 percent, it would represent or require an initial investment or capital of $500,000 in order to yield that return. He also testified that an 8 percent return would not be a high rate of return to use as a base line. On the other hand, appellant Donald contends that the only competent evidence showing the company's worth was given by him. He testified that in his opinion the company was worth between $80,000 and $85,000. He did not call a certified public accountant to testify as to the value of his business, although he had employed accountants to prepare financial statements which were received in evidence. In cases of conflicting testimony, such as this, we have held that the court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Olson v. Olson, *ante* p. 8, 236 N. W. 2d 618 (1975); Tavlin v. Tavlin, 194 Neb. 98, 230 N. W. 2d 108 (1975). The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Olson v. Olson, *supra*; Wheeler v. Wheeler, 193 Neb. 615, 228 N. W. 2d 594 (1975). We conclude that there was no abuse of discretion on the part of the trial court with respect to the amount of the property and alimony provisions established in its decree; and we, therefore, affirm the judgment of the District Court.

AFFIRMED.

DELMER ZWEYGARDT, APPELLEE, V. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, A CORPORATION, APPELLANT.

241 N. W. 2d 323

Filed April 21, 1976. No. 40257.

1. **Insurance: Contracts: Waiver.** If an insurance company has knowledge through its agent, when a contract of insurance is effected, that the premises are vacant or unoccupied, the issuance of the policy waives any provision as to vacancy or unoccupancy, at least so far as the existing vacancy is concerned.
2. **Insurance: Damages.** An award of damages must be based on evidence and not on speculation and conjecture.
3. **Trial: Judgments.** The findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury and will not be disturbed on appeal unless clearly wrong.

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

Van Steenberg, Brower, Chaloupka & Mullin, for appellant.

Holtorf, Hansen, Kovarik & Nuttleman, for appellee.

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

BRODKEY, J.

Farmers Mutual Insurance Company of Nebraska, hereinafter referred to as "Farmers Mutual" or as "Insurance Company," appeals from a judgment rendered against it in the District Court for Scotts Bluff County in an action brought by the plaintiff, Delmer Zweygardt, on a fire insurance policy issued by Farmers Mutual, to recover the fair and reasonable value of an insured dwelling house completely destroyed by fire. A trial by jury having been waived, the matter was tried to the court, which entered a judgment against the defendant Insurance Company for $5,000 and also awarded the plaintiff an attorney's fee of $500 to be taxed as costs.

Motion for a new trial was overruled, and Farmers Mutual perfected its appeal. We affirm.

The issues in this appeal are the effect of a prior vacancy of the premises upon the liability of Farmers Mutual under its policy, and the sufficiency of the evidence adduced at the trial to sustain the damages awarded by the court.

It appears that sometime prior to the fire in question, the plaintiff, Delmer Zweygardt, a resident of Colorado, purchased 240 acres of land near Mitchell, Nebraska, upon which were located two houses. One of these houses, known as Labor House #2, was the house involved in this action which was destroyed by fire. The 240 acres were "custom farmed" for Zweygardt by one Chuck Meyer, who acted as Zweygardt's agent to obtain insurance on the house, and also to attempt to rent it. Meyer went to the City & Country Insurance Agency in Scottsbluff, with whom he had previously done business, to arrange for the insurance. Robert Hall was the owner of the insurance agency and was an agent of Farmers Mutual. He testified at the trial that Chuck Meyer had come to his office and advised him that his father had sold the farm to Zweygardt and that he was to get insurance on it immediately. Robert Hall was familiar with the farm and improvements, having insured them for Chuck Meyer's father, the previous owner. Hall testified that Meyer at that time told him that the tenant house was vacant. Hall told Meyer that he didn't think the house was in very good shape and that there were a lot of problems in insuring a building. Meyer then told him that that was no problem, and that: "We are in the process of remodeling and we got a tenant lined up." Hall replied: "Fine, when you get it done come in and we will revalue it." Hall put a valuation of $3,000 on the house at that time. The insurance policy in question was issued on April 2, 1971, and insured Labor House #2 for $3,000.

Both Zweygardt and Meyer testified that sometime in

March a young couple planning to be married had agreed to do repair work upon the house in return for a reduction in rent. However, the tentative arrangement fell through after the house was severely vandalized by unknown persons about May 1971, a month or two before the house was destroyed by fire.

On April 27, 1971, approximately 3 weeks after the issuance of the policy, plaintiff Zweygardt personally came to Hall's insurance agency to discuss the revaluation for insurance purposes of some buildings, including Labor House #2. Hall was reluctant to increase the coverage on that house when he learned that it was still vacant. According to Hall, Zweygardt then told him: "No problem. We got it remodeled, we got a tenant lined up. We are in the process." Hall further testified that, relying on the foregoing assurances, he did not execute any forms or permits normally required when Farmers Mutual insures vacant buildings. Zweygardt, however, contradicted Hall's version of what had transpired at that time. According to Zweygardt, there was no discussion about the nature or duration of the vacancy, although he testified that Hall had asked him whether there was anybody living in the house; and that Zweygardt had said, "No, not at this time." He stated there was no further discussion about renting the house then and that Hall stated that he would increase the coverage on the house to $5,000. Hall further testified that the first time they discovered the buildings had never been remodeled and were still vacant was when they received the report of the vandalism, but that he did not go out and check it. He also stated that he had no discussion with either Chuck Meyer or Zweygardt regarding the occupancy of the house after the day in April when they changed the values on the property. He testified: "* * * I just assumed that it was going along according to our original conversation." On July 18, 1971, the house was totally destroyed by fire.

The policy in question has three separate provisions

relative to the issue of vacancy and unoccupancy. The first is the standard provision contained in all New York Standard Fire Insurance Policies, reading as follows: "Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring * * * (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; * * *." The second appears as one of the general provisions of the reverse side of the broad form endorsement, being section VI C, which reads: "Vacancy and Unoccupancy. Permission is granted to remain vacant for not more than 60 days at any one time or unoccupied for not more than 120 days at any one time, except as respects Perils 5, 6, 7, 15, 16, 17 and 18 as provided in paragraphs C and E of Section II, and except as provided in any endorsement attached to this policy." The third appears on the reverse side of the extended coverage endorsement which is made a part of the policy. It provides: "Construction, Alterations and Repairs: Permission is granted to complete any new building insured under this policy, and to make alterations, additions and repairs to any building insured under this policy, and for such building to be vacant or unoccupied during construction or repairs for not exceeding 90 consecutive days, and the insurance on such building is extended to cover all materials on the premises to be used in the construction or repairs."

There is no dispute in the evidence and both parties agree that the house was vacant when the policy was issued, that it was not subsequently rented, and that it remained vacant until its destruction on July 18, 1971, a period of 107 days.

There is no question that provisions in fire insurance policies, such as those set out above, which void the policy in case the property is vacant and unoccupied are reasonable and valid. However, it is also well settled that such provisions are for the benefit of the insurer

and may be waived by it, or its authorized agent, or the insurer may be estopped to rely upon the condition as a defense to an action upon the policy.

The first issue for our determination is whether under the facts of this case such a waiver by, or estoppel of, the Insurance Company occurred. The weight of authority and prevailing view is that if an insurance company has knowledge through its agent, when a contract of insurance is effected, that the premises are vacant or unoccupied, the issuance of the policy waives any provision as to vacancy or unoccupancy, at least so far as the existing vacancy is concerned. See, for example, McKinney v. Providence Washington Ins. Co., 144 W. Va. 559, 109 S. E. 2d 480 (1959), and cases cited therein at pages 564 and 565. See, also, 43 Am. Jur. 2d, Insurance, § 957, p. 906. Nebraska adheres to this rule. Rochester Loan & Banking Co. v. Liberty Ins. Co., 44 Neb. 537, 62 N. W. 877 (1895); German Ins. Co. of Freeport v. Frederick, 57 Neb. 538, 77 N. W. 1106 (1899). In Rochester, the policy provided that it would be void if the policy should "be or become vacant or unoccupied and so remain for ten days." The court noted that the policy was not void but voidable at the election of the insurer. The court found that there was a waiver by the company because the agent knew at the time of the issuance of the policy that the premises were vacant, but issued the policy anyway. Later, in German, the court dealt with the situation in which the insured had told the agent that the premises were vacant, but assured him that a tenant was moving in the next day. The agent, in reliance on this assurance, indicated on the application that a tenant was residing in the premises. The tenant did not move in, and 9 days later the house burned down. The policy denied coverage in the event of any vacancy, without granting any grace period. In that case the court found a waiver, stating that the vacancy provision is for the benefit of the insurer which can waive it, and that the provision is waived if the company issues the policy

with knowledge of an existing vacancy, citing Rochester Loan & Banking Co. v. Liberty Ins. Co., *supra*. The court then stated: "It can hardly be claimed that there was a warranty that the tenant would move in the next day. It was a fact that the insured could not control. His statements, so far as they concerned facts, were true, and the agent saw fit to issue the policy, relying on the probability of early occupancy."

It should also be noted here that Farmers Mutual has not alleged in its pleadings any fraud or misrepresentation on the part of the insured to avoid liability under the policy, although there was evidence from Hall indicating that he issued the policy on the expectation of future occupancy after the completion of repairs. In later Nebraska cases on the subject, the validity of Rochester and German has not been questioned by this court. The reading of the above two cases, especially German, would clearly indicate that promises made by the insured in obtaining insurance with reference to the vacancy of the premises, and particularly the prospects for occupancy, are not a paramount consideration. In fact, in German the statement to the agent of the insurance company was to the effect that the premises were vacant, but had been leased and the tenant would move in the next day.

The facts in this case clearly indicate that Robert Hall, the agent, had knowledge of the vacancy of the premises, not only on the date the policy was issued, April 2, 1971, but also on April 27, 1971, when he increased the coverage of the policy from $3,000 to $5,000, and again in May 1971, when the vandalism occurred. Under the previously cited rule that if an insurance company has knowledge through its agent, when a contract of insurance is effected, that the premises are vacant or unoccupied, the issuance of the policy waives any provision as to the vacancy or unoccupancy, "at least so far as the existing vacancy is concerned," there is little question that the "vacancy" provisions were waived, as

"the existing vacancy" was continued during the entire period from April 2, 1971, when the policy was originally issued, until July 18, 1971, when the premises were destroyed by fire.

Farmers Mutual argues, however, it is necessary that it be shown that it had notice of the vacancy after the expiration of the 60 or 90 days permitted under the "vacancy" provisions of the policy above set out. We do not agree. The rationale of the rule as stated in the Nebraska cases, as well as in cases from other jurisdictions, is that the insurer assumes the risk of insuring vacant premises when issuing a policy on the property, and that when the fire occurs there is no increase in the risk, as the property is no more vacant than it was at the time of contracting. See McKinney v. Providence Washington Ins. Co., *supra*.

We concede that there are a minority of states which adhere to the doctrine urged by Farmers Mutual. Some of these states base their holdings on the subjective intent and knowledge of the parties about the duration of a vacancy; and others distinguish between present and future breaches under vacancy clauses. Farmers Mutual cites cases of both types in its brief in support of its argument. Cases such as Bledsoe v. Farm Bureau Mut. Ins. Co., 341 S. W. 2d 626 (Mo. App., 1960), appear to hold that knowledge of vacancy at the time of issuance is not alone sufficient ground for finding a waiver; but the agent must also be aware that the vacancy deadline will not be met, or that it is unlikely that the premises will be rented. Cases supporting the second branch of the minority rule would appear to hold that a breach on which a waiver might be based would not occur until the expiration of the grace clause period. See England v. Westchester Fire Ins. of N. Y., 81 Wis. 583, 51 N. W. 954 (1892). They hold that the situation at the time of the contract may be irrelevant unless there is knowledge of a permanent vacancy. One such case is Moore v. Niagara Fire Ins. Co., 199 Pa. St. 49, 48 A. 869 (1901).

In that case, the court criticized the Nebraska case, Rochester Loan & Banking Co. v. Liberty Ins. Co., *supra*, and similar cases, for treating the clauses allowing specified periods of vacancy in the same manner as clauses denying coverage for vacancy "at any time." As previously stated, however, cases of the above type represent only a minority of the jurisdictions, and the rule laid down in Rochester has not been overruled or questioned by this court.

In this case, plaintiff did not contract for 60 or 90 day coverage for the tenant house. He contracted for 3 years of insurance coverage and paid premiums for 3 years coverage. The vacancy of the premises was known to the Insurance Company at the time it issued its policy and on other occasions subsequent thereto, and such vacancy was continuous and uninterrupted. There was no change in the condition of the premises so far as vacancy is concerned between April 2, 1971, and the date of the fire which occurred 107 days later; nor was the risk to the company from that source increased during that period. We conclude, therefore, that under the facts of this case Farmers Mutual must be deemed to have waived the provisions of its policy relating to "vacancy" as set out above, and may not assert those provisions as a defense to this action.

We now consider the question of whether the judgment of the court awarding Zweygardt $5,000 damages is supported by evidence in the record, or whether it is based on speculation and conjecture. There is no doubt that Zweygardt's recovery in this case must be limited to the actual value of the property rather than the amount of insurance thereon. Insurance Co. of North America v. County of Hall, 188 Neb. 609, 198 N. W. 2d 490 (1972). The policy was issued and the loss occurred before the Legislature amended section 44-501, R. R. S. 1943, in 1973 reinstating the "valued policy" provisions contained in section 44-380, R. R. S. 1943, in fire insurance cases.

The court heard the testimony of five witnesses on the

issue of valuation. Wallace Stiegelmeyer, the area manager for Travelers Insurance Company's real estate investment department, testified for Zweygardt. He had appraised the house in question for loan collateral purposes on two occasions, once in 1964 and once in 1968. He testified that in 1964 the property had a practical replacement value of $7,500, with a normal depreciated value of $5,000. In 1968 he again appraised the property for his company and came to the same conclusion as to its value, stating that it had a practical replacement value of $7,500, with a depreciated value of $5,000. At that time he stated also that the increase in replacement costs balance the loss of value due to depreciation. His personal knowledge as to some aspects relating to the condition of the property were challenged on cross-examination, but the court ruled that his testimony was admissible with the objections raised only going to its credibility.

Robert Hall, the insurance agent, testified on direct examination that $5,000 looked like an adequate estimate of value, but that vacancy was definitely a factor in insurance appraisals. On recross-examination he was asked: "Q. Mr. Hall, would you agree with the valuation placed on that house by Mr. Stiegelmeyer's as being — now not taking into consideration the fact that the house is vacant — as being a fair market value of that house at the time you issued the insurance? A. Yes." Zweygardt, the owner, testified as to the value of his house, stating: "Well, in my estimation, a ball park figure, it would be worth approximately $10,000 minus a few of these repairs that were required inside." In answer to a question of what type of repairs were needed he replied that some of the walls needed a paneling covering and a few things like that, but there were no big major expenses. He testified that there were some holes in the inside walls but that the house was in generally good condition. On cross-examination, he was unable to recall if there was plumbing, running

water, or a hole burned in the livingroom floor. No specific evidence was given as to the cost of the necessary repairs. Farmers Mutual offered an exhibit, being a copy of a rural property card, into evidence showing an appraisal of $1,315 on the property, although counsel for Farmers Mutual stated this was not a tax appraisal and that it indicated the county assessor's actual valuation of the property. However, since Farmers Mutual offered no foundational testimony as to the method of preparation or purpose of the appraisal, we do not feel the evidence offered is persuasive or has much probative value. Finally, the deposition of James Costello, a former sergeant of detectives for Scotts Bluff County, was admitted into evidence for Farmers Mutual. He had investigated a vandalism report on the property in May 1971, and again in June 1971. He testified that the house was generally dirty, the wallpaper was torn, one wall was kicked in, and the picture window was broken. He valued the property at between $500 and $1,000.

The rule in insurance cases, as in other cases involving damage to property, is that the evidence must be such that damages can be determined with reasonable certainty. The judgment cannot be based on speculation or conjecture. Sherman v. Travelers Ind. Co., 193 Neb. 104, 225 N. W. 2d 547 (1975). In its argument Farmers Mutual concentrates on the testimony of the owner, Zweygardt, that the property was worth in the neighborhood of $10,000 less the cost of inside repairs which would not be major. The Insurance Company claims that since there was no evidence adduced as to the cost of repairs, the judgment of the court must have been based upon speculation and conjecture. We do not agree. As outlined above, there was other competent evidence which the court could, and undoubtedly did, consider in determining the amount of damages. The value, as testified to, ranged from $500 to approximately $10,000. Robert Hall, the agent for Farmers Mutual, testified that he agreed with the valuations placed on the property by the

witness, Stiegelmeyer, as of the date he issued the policy. Stiegelmeyer had testified that in 1964 and 1968 the house had a value of $5,000 for loan purposes, and the replacement cost of the house was $7,500. The court, sitting as a jury, was entitled to believe any credible evidence before it, notwithstanding the existence of conflicts in the evidence. The rule is that the findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury and will not be disturbed on appeal unless clearly wrong. Siefford v. Housing Authority, 192 Neb. 643, 223 N. W. 2d 816 (1974); State Farm Fire & Cas. Co. v. Muth, 190 Neb. 248, 207 N. W. 2d 364 (1973). We are unable to say that the trial court was clearly wrong and therefore affirm its decision.

AFFIRMED.

LYLE C. WINKLE, APPELLEE, V. JAMES MITERA ET AL., APPELLANTS, IMPLEADED WITH EDWARD V. KUDRON ET AL., APPELLEES.

241 N. W. 2d 329

Filed April 21, 1976. No. 40275.

1. **Trial: Evidence.** In equity cases where the trial court has made personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Property: Waters.** It is the settled law of Nebraska that erosion of a river, which cuts entirely across riparian land and into the land of an adjoining owner, operates to obliterate the title of him whose land was originally riparian, and that he may not reassert his title if the river thereafter reverses its transverse wanderings and new land is formed within what were his original boundaries.
3. **Property: Waters: Boundaries.** The ownership of an island carries with it the bed of the river to the center or thread of each surrounding channel.

4. ———: ———: ———. Where title to an island, bounded by the waters of a nonnavigable stream is in one owner, and title to the land on the other shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland.
5. **Judgments: Parties: Notice: Liens: Taxation.** A decree of foreclosure of a tax lien is of no effect as against the persons who were at the time in actual possession of and who were not made parties defendant in the action and had no notice or knowledge thereof.
6. **Adverse Possession: Time.** The general rule in this state is that in order to claim title by adverse possession one must have been in open, notorious, exclusive, and adverse possession of the property for a period of 10 years.

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

R. Steven Geshell of Roback & Geshell, for appellants.

Lyle C. Winkle and Winkle, Allphin & Brock, for appellee Winkle.

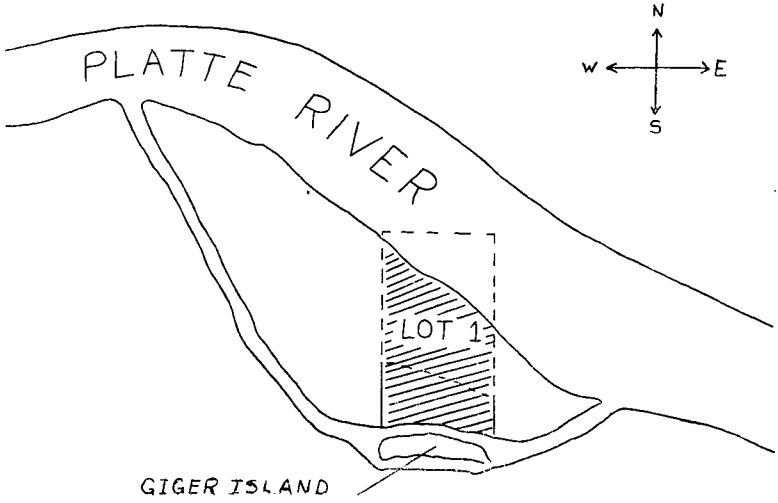
Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, NEWTON, CLINTON, and BRODKEY, JJ.

WHITE, C. J.

This is an action to quiet title to part of an island in the Platte River, located near the City of Columbus, Nebraska. The District Court quieted title in favor of the plaintiff, Winkle, and the defendants Mitera appeal. We affirm the judgment of the District Court.

Due to the complexity of the facts of this case, an unscaled sketch is provided to aid the reader of this opinion. The sketch is for illustrative purposes only, and does not purport to be accurate. The map shows the present location of the Platte River in relation to the areas which are of concern in this case. Lot 1 is the area which is enclosed in the broken lines and is partially covered by the Platte River. The disputed land in this case is darkened in with lines, and includes part of Lot 1. It should be noted that in the past 100 years, the

Platte River has moved considerably to the north. At some time prior to 1900, the north bank of the Platte River was south of Lot 1. By 1914, the Platte River had completely submerged all of Lot 1. As can be seen on the map, at present the Platte River has moved even farther north so that much of Lot 1 is once again above water.



In about 1914, Walt Giger and some of his friends started using an island in the Platte River for hunting purposes, and they constructed a cabin on the island. This island became known and is still known as Giger's Island, and is labeled as such on the map. Although the testimony is conflicting, the weight of the evidence indicates that by 1914, there were no islands between Giger's Island and the north bank of the Platte River.

At some point in time, probably around 1930, land began to appear between Giger's Island and the north bank of the Platte River.

In 1932, Platte County foreclosed a tax lien against Lot 1. The defendants bought Lot 1 for $2, and in 1935, they received a sheriff's deed to Lot 1. At the time of the tax foreclosure proceedings, Walt Giger was in pos-

session of Giger's Island, and he was not served with notice in the foreclosure action.

In 1958, Giger conveyed Giger's Island to the Hanners, who conveyed the island to the plaintiff, Winkle, in 1970. The plaintiff brought this action to quiet title to Lot 1 and the land which has accreted to it. The District Court quieted title in favor of the plaintiff, finding that the plaintiff is the owner of Giger's Island and therefore owned all the land north of Giger's Island to the middle of the channel of the Platte River. The District Court also held that the sheriff's deed which was received by the defendants was void because the plaintiff's remote grantor, Walt Giger, was not given notice of the tax foreclosure action.

The defendants Mitera appeal to this court, asking that title to the disputed land be quieted in them.

Since this is an action in equity, this court must try the issues de novo. See § 25-1925, R. R. S. 1943. However, we have stated that in equity cases where " ' '"* * * the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." ' " Thomas v. Flynn, 169 Neb. 458, 100 N. W. 2d 37. In this case, in which there is much conflicting evidence, we have kept in mind the fact that the District Court personally viewed the disputed area and its surroundings, and observed the testimony of the witnesses.

The evidence shows that Walt Giger, the plaintiff's predecessor in title, first took possession of Giger's Island in about 1914. Giger used the island and cabin extensively. It is clear that by 1924 or 1925, Giger had been in actual, continuous, notorious, and adverse possession of Giger's Island for at least 10 years. Under section

25-202, R. R. S. 1943, Giger became the owner of Giger's Island after the 10-year period. See, Beebe v. Reichert, 172 Neb. 172, 108 N. W. 2d 804; Jones v. Schmidt, 170 Neb. 351, 102 N. W. 2d 640.

It is uncertain precisely when land began reappearing north of Giger's Island. There probably was an island or two north of Giger's Island by 1930 or 1931. The first question is: Who initially had title to the land when it started reappearing as small islands? Did the prior owner, a man by the name of John Wilcynski, still have title? In Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384, this court stated: " 'It is the settled law of Nebraska that erosion of a river, which cuts entirely across riparian land and into the land of an adjoining owner, operates to obliterate the title of him whose land was originally riparian, and that he may not reassert his title if the river thereafter reverses its transverse wanderings and new land is formed within what were his original boundaries.' " Thus, the previous owner of the land, Wilcynski, lost his title when the Platte River completely submerged his land. When the land reappeared, Wilcynski had no claim to it.

Who then had title? In this state, the owner of an island has title to any land between his island and the center of each surrounding channel. In Heider v. Kautz, 165 Neb. 649, 87 N. W. 2d 226, where the court found that the owner of an island was entitled to accretion land, the court said that the ownership of an island " '* * * carries with it the bed of the river to the center or thread of each surrounding channel.' * * * 'Where title to an island, bounded by the waters of a nonnavigable stream is in one owner, and title to the land on the other shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland.' " See, also, 78 Am. Jur. 2d, Waters, § 437, p. 883. Giger, as owner of Giger's Island, owned all land from his island north to the center of the channel of the Platte River. When the land reappeared, it

formed one or more islands south of the channel of the Platte River. Thus, as the islands rose up between his island and the middle of the channel of the Platte River, those islands became the property of Giger.

By the process of accretion or reliction, those small islands which appeared in about 1930, slowly grew into a sizable land mass, part of which is the subject of this dispute. Since Giger was the owner of these islands when they reappeared, he and his grantees are entitled to all land which has been added to these islands by accretion or reliction, unless the defendants can claim title under some alternative theory of law.

The defendants base their argument that they are the owners of the disputed land on two assertions. First, the defendants contend that a sheriff's deed to Lot 1, given to the defendants in 1935, conveyed the title to them. Second, the defendants argue that they have adversely possessed Lot 1 for the statutory period of 10 years, and are therefore the lawful owners of the property. Both of the defendants' contentions are without merit.

In 1935, the defendants received a sheriff's deed to Lot 1, pursuant to a tax foreclosure action. Notice of the tax foreclosure action was given to Wilcynski, who at that time was the record title holder of Lot 1, but no notice was given to Giger. In Harris v. Heeter, 137 Neb. 905, 291 N. W. 721, the court stated: "A decree of foreclosure of a tax lien * * * is of no effect as against the persons who were at the time in actual possession of * * * and who were not made parties defendant in the action and had no notice or knowledge thereof." As discussed above, Giger was the owner of Giger's Island and all the land north of his island to the center of the channel of the Platte River. Giger was in actual possession of his land, and was therefore entitled to notice of the tax foreclosure action. Since Giger was not given notice of the tax foreclosure action, the District Court never obtained personal jurisdiction over Giger in the

1932 foreclosure action, and therefore the tax foreclosure action was void as to Giger. Thus, in 1935, Giger was still the owner of the small islands lying north of Giger's Island and south of the center of the Platte River channel. Giger, and his grantees, owned this land mass which grew from these islands unless the defendants can prove title by adverse possession.

The general rule in this state is that in order to claim title by adverse possession one must have been in open, notorious, exclusive, and adverse possession of the property for a period of 10 years. See, Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737; Lunzmann v. Yost, 182 Neb. 101, 153 N. W. 2d 294. It is clear that the defendants have adversely possessed the disputed land since 1963 when a fence was erected. However, this action was commenced in 1971, so adverse possession since 1963 would not suffice to give the defendants title. The defendants contend that they have adversely possessed the disputed property since 1935. There is conflicting evidence as to whether the defendants' possession was open and exclusive from 1935 to 1963. The weight of the evidence indicates that the defendants, while claiming the disputed property since 1935, did not claim it openly or exclusively. There was evidence that the defendants, prior to 1963, never informed Giger, or his grantees, that the defendants claimed the land. There was evidence that the defendants never posted or fenced in the disputed property until 1963. In addition, in prior court proceedings, one of the defendants stated that not only did some 500 hunters use his island, but that the defendant himself used the island only for recreational purposes until 1963. We believe that it is clear the defendants did not openly and hostilely possess the disputed land until 1963. Therefore, since prior to this proceeding, they had adversely possessed the land for only 8 years, the defendants cannot claim title to the disputed land by adverse possession.

Lastly, the defendants contend that the District Court

erred in receiving certain exhibits in evidence. This assignment of error will only be considered with reference to exhibits 5 and 7. Objections to other exhibits asserted in this appeal will not be considered because they were not raised in the defendants' motion for a new trial in the District Court. In an equity case appealed to this court, review of alleged erroneous rulings of the trial court as to the reception of the evidence must be contained in a motion for a new trial and ruled on by the trial court before it can be considered on appeal. Timmerman v. Timmerman, 163 Neb. 704, 81 N. W. 2d 135. Exhibits 5 and 7 are maps of the area prepared at various times in the past by the Burlington Railroad. These maps and exhibits show the existence or nonexistence of islands in the Platte River, the existence of which and the location of which are pertinent to the issues that have been discussed in this case. The defendants assert that these exhibits were prepared for the purpose of showing the railroad bridge with respect to the banks of the Platte River, and not to show the existence of any islands in the river. They do not assert or claim that these exhibits are not accurate portrayals of what they represent. No authority is cited, nor can we find any reason to accept the proposition that a map or exhibit must be prepared for the specific purpose of examining the issues in any particular litigation. That they were relevant is not denied. Moreover, the District Court received these exhibits subject to the limitation that the reproduction of the islands on the maps might not be entirely accurate. It is further clear from the record that the District Court did not rely on the representation of the islands on the maps in reaching its decision in the case. It is clear that exhibits 5 and 7 were relevant and show the location of the banks of the Platte River in different years and the location of the channel at different times. All this was pertinent to both an understanding of the extremely complex history and background of this case and to the issues therein.

We observe that even if exhibits 5 and 7 should not have been admitted into evidence, it must be presumed that the District Court, in an equity case, disregarded inadmissible evidence in reaching its conclusion. The defendants' contention is without merit.

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

AFFIRMED.

FIRST NATIONAL BANK IN KEARNEY, NEBRASKA, A NATIONAL BANKING ASSOCIATION, APPELLANT, V. MARLENE M. BUNN ET AL., APPELLEES.
241 N. W. 2d 127

Filed April 21, 1976. No. 40343.

1. **Evidence: Trial.** A presumption is not evidence but it may take the place of evidence unless and until evidence appears to overcome or rebut it, and when evidence sufficient in quality appears to rebut it, the presumption disappears and thereafter the party having the burden of proof on the issue must, in civil actions, sustain his position by a preponderance of the evidence.
2. **Fraudulent Conveyances.** A creditor whose debt did not exist at the date of a voluntary conveyance by the debtor cannot attack such conveyance for fraud, unless he pleads and proves that the same was made to defraud subsequent creditors whose debts were in contemplation at the time.

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

Kenneth C. Fritzler of Ross, Schroeder & Fritzler, for appellant.

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

Heard before WHITE, C. J., McCOWN, NEWTON, and BRODKEY, JJ., and KORTUM, District Judge.

KORTUM, District Judge.

This is an action to set aside a conveyance of real

estate made between the defendants as husband and wife.

The defendants Marlene M. Bunn and Charles F. Bunn, husband and wife, purchased a home in Kearney, Nebraska, on August 15, 1971. The downpayment of approximately $11,000 was borrowed on a short-term note which was a short time later paid by proceeds from a sale of separate property owned by the defendant Marlene M. Bunn. The balance of the purchase price was secured by a mortgage executed by both the defendants and the property was titled jointly in the defendants as husband and wife.

On November 20, 1972, the defendant Charles F. Bunn transferred by warranty deed his interest in the property to his wife Marlene M. Bunn, codefendant herein. At the time of the conveyance to his wife the defendant Charles F. Bunn had outstanding debts including several notes at another bank, the mortgage on the home involved here, and a prior alimony debt to his ex-wife, Celia Bunn.

On June 29, 1973, 7 months and 10 days after the property involved herein had been transferred to the defendant Marlene M. Bunn, Charles F. Bunn executed a note to the plaintiff bank herein for $14,000. The $14,000 was used to pay off two promissory notes at another bank, one of which had been given to pay off the alimony payment, and to pay off a $4,500 note at the plaintiff bank.

In October of 1974, after default on the $14,000 note, the plaintiff bank sued the defendant Charles M. Bunn and obtained an attachment on the family home which is the property involved herein. The attachment in that case was used by the plaintiff bank as the basis for this suit to have the conveyance of November 20, 1972, set aside as fraudulent.

The case was tried to the court and at the conclusion of the plaintiff's case the defendants' motion for dismissal of the plaintiff's petition for insufficiency of evi-

dence was sustained by the District Court and plaintiff's petition was dismissed. Plaintiff, First National Bank in Kearney, appeals.

Plaintiff's assignments of error relate to two areas: Rejection of certain testimony and exhibits offered by the plaintiff; and dismissal of plaintiff's petition at the conclusion of plaintiff's case.

The plaintiff does not argue or discuss its first assignment of error in its brief, but essentially contends that there was a fraudulent transfer of property between the defendants and that the trial court erred in dismissing plaintiff's petition.

The plaintiff contends that the presumption of fraud necessarily present in interspousal transfers of property supports a finding of fraud herein. It is true that a conveyance of real property in Nebraska by a husband to his wife is presumptively fraudulent as to existing creditors. This presumption is not evidence however. It may take the place of evidence unless and until evidence appears to overcome or rebut it, and when evidence sufficient in quality appears to rebut it the presumption disappears and the party having the burden of proof on the issue must, in civil actions, sustain his position by a preponderance of the evidence. In re Estate of Drake, 150 Neb. 568, 35 N. W. 2d 417.

Plaintiff itself produced no official or employee of the bank to testify as to the bank's knowledge or the circumstances surrounding the loan. The testimony of defendant Charles F. Bunn on direct examination as plaintiff's witness is explicit on this point. He testified that the bank was aware of all the circumstances surrounding the loan of June 29, 1973. There is evidence that the bank instigated the loan proceedings and knew that the defendant Charles F. Bunn had no interest in the family home at the time of the loan.

No evidence was adduced by the plaintiff bank to even suggest that the bank did not know of the conveyance of November 20, 1972, to Marlene M. Bunn, or

to any lack of knowledge by the bank concerning defendants' financial condition. The financial statement signed by Charles F. Bunn at the time of the loan on June 29, 1973, showed no security for the loan and this reinforces the position of the defendants herein. Any presumption of fraud arising from the transfer between the defendants as husband and wife has thus been rebutted if not completely overcome.

Plaintiff further contends that because there were creditors existing at the time of the interspousal conveyance and these creditors were later paid with the proceeds of the loan from the plaintiff to the defendant Charles F. Bunn that the plaintiff may now step into the shoes of and assume the rights of these prior creditors. Plaintiff thus claims that it is subrogated to the rights of these preexisting creditors.

Our law is quite clearly otherwise. A conveyance of real property between husband and wife in Nebraska is presumptively fraudulent as to existing creditors and will be set aside unless the good faith of the transaction is established by a preponderance of the evidence. Slosburg v. Hunter, 136 Neb. 324, 285 N. W. 563; Farmers Elevator Co. v. Peck, 134 Neb. 305, 278 N. W. 499. Note however that a key phrase used in these cases is "as to existing creditors," a position plaintiff now seeks to attain. Plaintiff would now attempt to take the badges of fraud and the presumptions surrounding husband and wife transfers of real property and apply them for the protection of subsequent creditors. This we cannot support.

A different standard is applied to creditors whose debts are in existence at the time of conveyance, as opposed to subsequent creditors. A creditor whose debts did not exist at the date of a voluntary conveyance by the debtor cannot attack such conveyance for fraud unless he pleads and proves that the same was made to defraud subsequent creditors whose debts were in contemplation at the time. Big Horn Collieries Co. v. Ro-

land, 116 Neb. 846, 219 N. W. 233. See, also, Jayne v. Hymer, 66 Neb. 785, 92 N. W. 1019. No such evidence was adduced by the plaintiff at the trial herein.

The pleadings of the plaintiff and proof adduced at the trial fail to establish plaintiff's theory. A careful review of the record indicates that the District Court acted correctly in sustaining the defendants' motion for dismissal at the close of plaintiff's evidence. The decision of the District Court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EARTHEL CRISP, APPELLANT.
241 N. W. 2d 129

Filed April 21, 1976. No. 40371.

Criminal Law: Sentences: Statutes. State v. Randolph (1971), 186 Neb. 297, 183 N. W. 2d 225, does not apply where the new statute does not merely amend the former statute by lessening the punishment, but repeals the old statute and defines new categories of crime. It also does not apply where the new statute taken as a whole may be said to evidence a legislative intent that the penalty provision thereof not apply retroactively.

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

Frank B. Morrison, Stanley A. Krieger, Alan Saltzman, and Earthel Crisp, for appellant.

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

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

SPENCER, J.

Defendant, Earthel Crisp, was convicted of assault

with intent to commit rape. He was sentenced to an indeterminate term of 4 to 12 years in the Nebraska Penal and Correctional Complex. Defendant prosecutes this appeal, contending under the authority of State v. Randolph (1971), 186 Neb. 297, 183 N. W. 2d 225, he should have been sentenced under the terms of L. B. 23, Laws 1975, p. 92, rather than section 28-409, R. R. S. 1943. We affirm.

Defendant was found guilty of assault with the intent to commit rape after trial by jury. The offense occurred May 16, 1975. The jury verdict was received July 25, 1975. The court entered a judgment of conviction against defendant, but deferred sentence pending a presentence investigation. Defendant filed a motion for a new trial. On August 29, 1975, the motion for a new trial was overruled, and after a sentencing arraignment, the sentence involved herein was imposed.

On August 24, 1975, or 5 days prior to the sentence, L. B. 23, passed by the 1975 Legislature, became effective. L. B. 23 repealed the former criminal statutes dealing with rape, and statutory rape, and amended section 28-409, R. R. S. 1943, to strike the word "rape." It further defined new offenses of first and second degree sexual assault and provided penalties for them.

This case is controlled by State v. Country (1975), 194 Neb. 570, 234 N. W. 2d 593, not State v. Randolph, *supra*. Country involved a sentence for rape imposed before L. B. 23 became effective. State v. Randolph does not apply where the new statute does not merely amend the former statute by lessening the punishment, but repeals the old statute and defines new categories of crime. It also does not apply where the new statute taken as a whole may be said to evidence a legislative intent that the penalty provision thereof not apply retroactively.

State v. Trowbridge (1975), 194 Neb. 582, 234 N. W. 2d 598, mandated the same result for a sentence for assault with intent to commit rape. There, also, de-

fendant was sentenced before the effective date of L. B. 23.

The only distinguishing feature of the present case is that the sentence was imposed after the effective date of L. B. 23 for an offense committed before its effective date. We hold this to be immaterial. As we held in State v. Country, *supra,* L. B. 23 is not merely an amendatory act changing the penalty for a particular offense. It defines new crimes. It contains requirements in connection with the determination of punishment which indicate that the Legislature did not contemplate retroactive application to convictions under the former statutes. Further, the primary legislative purpose in the enactment of the act was not the reduction of penalties.

We said in State v. Trowbridge, *supra*: "If we were to hold defendant's sentence should be imposed under the present statute, a new trial would be necessary. In no other way could a determination be made whether the penalty under second degree sexual assault, section 28-408.04, R. S. Supp., 1975, should be 1 year or less, or not more than 15 years." We reaffirmed our holding that the doctrine enunciated in State v. Randolph, *supra,* is not applicable to any sentence imposed under the rape statutes in existence before L. B. 23 became effective.

The judgment is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

This case extends the harsh doctrine of State v. Country, 194 Neb. 570, 234 N. W. 2d 593, one more degree and makes the injustice of that holding even more obvious. See my dissent in State v. Country, *supra,* at page 575.

L. B. 23, Laws 1975, the bill dealing with sexual offenses and punishments, was passed by the Legislature and approved by the Governor on May 1, 1975. The defendant, Earthel Crisp, committed the assault with intent to commit rape on May 16, 1975. He was found guilty on July 25, 1975. L. B. 23 became effective in all

respects on August 24, 1975, and this defendant was sentenced 5 days later on August 29, 1975.

This court now holds that even though the new statute was in effect on the actual date of sentencing, the defendant here must still be sentenced under the harsher provisions of the old law rather than under those of the new law. As I said in my dissent in Country: "If a rule is just and can properly be applied to a certain class of cases, the fact that the number of defendants involved may be small does not justify an injustice to any one of them, nor provide an adequate excuse for denying justice to all of them, however small the number. The fact that it may require a hearing to determine the relevant facts ought not to be an insurmountable roadblock in the pursuit of justice."

ARLYCE HANSON, APPELLANT AND CROSS-APPELLEE, V. LELAND HANSON, APPELLEE AND CROSS-APPELLANT.
241 N. W. 2d 131

Filed April 21, 1976. No. 40388.

1. **Judges: Jurisdiction.** A District Judge has no inherent judicial authority at chambers, and has only such authority or jurisdiction at chambers as is conferred by statute.
2. **Judges: Jurisdiction: Divorce: Parent and Child.** Over the objection of one of the parties, an application to modify an award of child support cannot be heard in a county other than the county in which the proceeding is pending.

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

Philip T. Morgan, for appellant.

Patrick A. Brock of Winkle, Allphin & Brock, for appellee.

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

BOSLAUGH, J.

This is an appeal from the District Court for Nance County, Nebraska, in a proceeding upon an application for an increase in child support. The plaintiff was granted a divorce from the defendant by a judgment of that court on September 1, 1970. The decree awarded custody of the five minor children of the parties to the plaintiff together with child support in the amount of $140 per month.

On August 6, 1975, the plaintiff filed an application for an increase in child support. Over the objection of the defendant, the matter was heard in Platte County, Nebraska, on August 29, 1975. On September 9, 1975, the trial court increased the award of child support to $225 per month. The plaintiff has appealed and the defendant has cross-appealed.

The threshhold question is the right of the trial court to hear the application in Platte County over the objection of the defendant. It is well settled that a District Judge has no inherent judicial authority at chambers, and has only such authority or jurisdiction at chambers as is conferred by statute. Art. V, § 23, Constitution of Nebraska; Vasa v. Vasa, 163 Neb. 642, 80 N. W. 2d 696.

Section 24-303, R. R. S. 1943, provides in part: "All *terms of the district court shall be held at the county seat in the courthouse,* or other place provided by the county board, but nothing herein contained shall preclude the district court, or a judge thereof, from rendering a judgment or other final order or from directing the entry thereof in any cause, in any county other than where such cause is pending, *where the trial or hearing upon which such judgment or other final order is rendered took place in the county in which such cause is pending.*" (Emphasis supplied.)

Section 24-303, R. R. S. 1943, permits a District Judge to render a judgment or final order or direct the entry thereof in a different county, but the trial or hearing

must be held in the county where the cause is pending.

The District Court possesses jurisdiction only so long as it is holding court in conformity with the law; and when, without excuse, it disregards the law and attempts to hold court in any other place than that prescribed by statute, its acts become coram non judice. Shold v. Van Treeck, 82 Neb. 99, 117 N. W. 113. See, also, George v. Dill, 83 Neb. 825, 120 N. W. 447; Mueller v. Keeley, 163 Neb. 613, 80 N. W. 2d 707.

By a written stipulation, the parties could have authorized the matter to be heard and judgment entered in Platte County. § 24-317(2)(a), R. S. Supp., 1974. There was no such stipulation in this case.

It is unnecessary to discuss the other contentions of the parties. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JAMES CHASE, APPELLANT, V. COUNTY OF DOUGLAS, NEBRASKA, ET AL., APPELLEES.
241 N. W. 2d 334

Filed April 21, 1976. No. 40407.

1. **Constitutional Law.** The credit of the state shall never be given or loaned in aid of any individual, association, or corporation. Art. XIII, § 3, Constitution of Nebraska.
2. **Taxation: Public Purpose.** It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind.
3. ———: ———. The general encouragement of growth and industry through such devices as publicity and advertising are public purposes. Appropriations for such public purposes may be expended through private concerns. The appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means.

4. **Constitutional Law: Municipal Corporations: Counties: Industrial Development.** The authority of a municipality or county to use public funds to own, acquire, develop, lease, and sell real and personal property for industrial development purposes is measured by the provisions of Article XIII, section 2, of the Nebraska Constitution, and the enabling statutes lawfully enacted by the Legislature pursuant to the foregoing provision of the Constitution.

5. ———: ———: ———: ———. Article XIII, section 2, of the Constitution of Nebraska, is the full measure of the power of the state through the cities and counties to lend the credit of the state. Article XIII, section 3, remains in the Constitution and under its terms any loan of credit made by the state, by a county, or by a municipality for a private individual, association, or corporation is unconstitutional.

6. ———: ———: ———: ———. The authorization granted in section 18-1401, R. R. S. 1943, to a city or county to purchase property for industrial development violates the provisions of Article XIII, section 3, of the Constitution, because it authorizes the use of tax money and income of the governmental entity from its proprietary functions for such purpose.

7. **Constitutional Law: Statutes.** The fact that a part of a law is invalid does not always require that the entire law be treated as void. If the part that is bad is independent of and separable from the balance of the law, or if the invalid part was not an inducement to the passage of the act, or if the remainder of the act is not so connected with the invalid portion that it cannot be upheld without doing violence to the legislative intent as a whole or result in putting into effect a law which the Legislature would not have passed had its attention been called to the invalid parts, the portion of the act that is valid may be sustained and given effect.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

August P. Ross and Bruce G. Mason, for appellant.

Donald L. Knowles, Roger R. Holthaus, Herbert M. Fitle, Verne W. Vance, and D. Nick Caporale and Michael A. Nelsen of Schmid, Ford, Mooney, Frederick & Caporale, for appellees.

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

CLINTON, J.

This is a class action by a taxpayer of the City of Omaha, County of Douglas, which challenges the constitutionality of section 18-1401, R. R. S. 1943, upon the ground that it violates Article XIII, section 3, of the Constitution of Nebraska, which in pertinent part provides: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation . . . ." After the plaintiff had filed an amended petition and the defendants, Greater Omaha Chamber of Commerce, the County of Douglas, and the City of Omaha, had filed their answers, the defendants jointly moved for judgment on the pleadings. The District Court acted upon the motion, found the statute constitutional, and granted judgment on the pleadings. The plaintiff appeals. We find the statute constitutional in part and unconstitutional in part, and reverse and remand for further proceedings.

Section 18-1401, R. R. S. 1943, is as follows: "The city commissioners or council of any city, the board of trustees of any village, and the county board of any county in the state shall have the power to appropriate or expend annually from the general funds or from revenue received from any proprietary functions of their respective political subdivision an amount not to exceed one per cent of the assessed valuation of the city, village, or county for the purpose of encouraging immigration, new industries, and investment and to conduct and carry on a publicity campaign, including a publicity campaign conducted for the purpose of acquiring from any source a municipal electrical distribution system, exploiting and advertising the various agricultural, horticultural, manufacturing, commercial, and other resources, including utility services, of the city, village, or county, purchasing real estate suitable for in-

dustrial development, acquiring options on real estate suitable for industrial development, and renewing or extending such options, paying for such real estate or options with funds provided for in this section, with the amounts paid for any such option to be taken as part payment of the purchase price of any such option if the option be exercised. Such sum may be expended directly by the city, village, or county or may be paid to the chamber of commerce or other commercial organization or a similar county organization or multicounty organization or local development corporation to be expended for the purposes herein enumerated under the direction of the board of directors of said organization; . . . ." The original version of the above section of the statute was enacted in 1921 and then pertained only to municipalities. In 1969 it was amended to include counties. In 1972 the statute was again amended and at that time the following language was introduced for the first time: "purchasing real estate suitable for industrial development, acquiring options on real estate suitable for industrial development, and renewing or extending such options, paying for such real estate or options with funds provided for in this section, with the amounts paid for any such option to be taken as part payment of the purchase price of any such option if the option be exercised." At that time also the amount authorized to be expended was increased to the present "one per cent of the assessed valuation" from the previous "one-tenth of one per cent."

The plaintiff's attack upon the constitutionality is essentially that the statute in its broadest scope authorizes public funds to be used for private purposes, and that its constitutionality must be judged on what is authorized to be done and not merely on the basis of what actually is sought to be done by the parties. City of Beatrice v. Wright, 72 Neb. 689, 101 N. W. 1039. In Summerville v. North Platte Valley Weather Control Dist., 170 Neb. 46, 101 N. W. 2d 748, we said: "In de-

termining whether any legislation is valid, it is proper to examine and ascertain what may be done or accomplished pursuant to said legislation." The plaintiff argues unconstitutionality of the provision which authorizes payment of money to the chamber of commerce and similar organizations for the purposes described in the statute. However, he lays particular stress upon the vulnerability of the provision which authorizes such organizations, wholly without any statutory guidelines or restrictions, to purchase with public funds real estate suitable for industrial development and to acquire options on real estate for industrial development.

Since the matter was determined by the trial court upon motion for judgment on the pleadings, we analyze the pleadings guided by the following principle: "A motion for judgment on the pleadings, like a demurrer, admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. The party moving for judgment on the pleadings necessarily admits, for the purpose of the motion, the untruth of his own allegations insofar as they have been controverted. Board of Trustees of York College v. Cheney, 160 Neb. 631, 71 N. W. 2d 195. A motion for judgment on the pleadings does not waive a trial on disputed issues of fact." Wittler v. Baumgartner, 180 Neb. 446, 144 N. W. 2d 62.

The amended petition alleges: The plaintiff is a resident and taxpayer of the City of Omaha and County of Douglas; the defendants city and county have in the past made gifts of public funds to the Greater Omaha Chamber of Commerce (hereinafter referred to as the chamber); the county has recently authorized a gift of $50,000 to the chamber and the donations have been purportedly made under the authority of section 18-1401, R. R. S. 1943; public funds have been commingled with other funds in the treasury of the chamber; and the county and the city have refused to take any action to recover the funds transferred. Plaintiff's amended petition fur-

ther asks that section 18-1401, R. R. S. 1943, be declared unconstitutional as being in conflict with Article XIII, section 3, of the Constitution of Nebraska; the transfer of the $50,000 by the county be restrained; and the chamber be required to account for and return all funds given by the city and county under section 18-1401, R. R. S. 1943. The answer of the chamber admits the city and the county have expended, through the chamber as their agent, funds received and have paid certain debts incurred by the chamber for the purposes of section 18-1401, R. R. S. 1943; and denies any funds received from the city or county have been commingled with other funds belonging to the chamber, but alleges that such funds have, in fact, been deposited in a separate "Economic Development Council" account and used solely for the purposes authorized by section 18-1401, R. R. S. 1943. The answer of the County of Douglas admits that on November 20, 1973, it paid $50,000 to the economic development program of the chamber for the purposes of section 18-1401, R. R. S. 1943, and on December 10, 1974, it authorized payment of $50,000 for the same purposes. The answer of the City of Omaha admits that it made an appropriation of $22,874 from the 1972 mayor's special city promotional account for payment to the chamber as agent for the city for the purposes specified in sections 18-1401 and 14-102(36), R. R. S. 1943, and that it thereafter in January of 1973 paid $14,526.40 from said appropriation to the chamber "as reimbursement to it for a portion of the sums it had expended for the aforesaid purposes"; that on March 6, 1973, the city appropriated the sum of $50,000 for the purposes described in the aforementioned statutes and on April 9, 1973, pursuant to the terms of a written agreement made on April 2, 1973, between the city and the chamber, paid $50,000 to the chamber, which sum has been expended by the chamber for the purposes set forth in the statutes; that the city had, on February 12, 1974, by ordinance, transferred to its housing and com-

munity development department the sum of $50,000 for the purposes specified in sections 18-1401 and 14-102(36), R. R. S. 1943, and further paid $32,509.25 to various entities for services and materials agreed to by the chamber and the city economic development department; that the city expended directly the sum of $10,490.75 for like purposes; that $4,500 of the $50,000 appropriated was separated for travel by the economic development division's own personnel; that the city paid $2,500 of the appropriation toward the design of the "Iowa-Nebraska Bi-Centennial Friendship Fountain"; all in furtherance of the purposes specified in sections 18-1401 and 14-102(36), R. R. S. 1943. The latter statute authorizes cities of the metropolitan class "to appropriate money for the purpose of advertising the resources and advantages of the city."

Pursuant to a request by the plaintiff for admissions, the defendants admitted that the city and the county had refused to take any action for recovery of funds from the chamber and that a demand upon those entities for such action would be of no avail.

The plaintiff filed no reply to the answers of the defendants and the well-pleaded, affirmative allegations of the answers therefore stand admitted.

Under this posture of the case the constitutionality of the statute could be determined on the pleadings. The trial court found: "(B) Generally for defendants and against plaintiff and that § 18-1401, R. R. S., 1943

"(a) is within the power of the Nebraska Legislature to enact:

"(b) contemplates expenditures for a public purpose and does not violate Sec. 3, Art. XIII of the Nebraska Constitution;

"(c) provides reasonable standards to guide expenditure of the funds; and,

"(d) is constitutional."

For reasons we hereafter discuss under the heading Publicity, we find that the provision authorizing ex-

penditures "for the purpose of encouraging immigration, new industries, and investment and to conduct and carry on a publicity campaign, including a publicity campaign conducted for the purpose of acquiring from any source a municipal electrical distribution system, exploiting and advertising the various agricultural, horticultural, manufacturing, commercial, and other resources, including utility services," is constitutional, including the provision for making such expenditures by and through chambers of commerce and the other organizations listed in the statutes. We find that the provisions of the statute authorizing expenditures, whether directly by city or county or through the chamber of commerce or other listed organizations, for the purpose of acquiring real estate or options thereon for industrial development is unconstitutional and in violation of Article XIII, section 3, of the Nebraska Constitution, because it permits the lending of the credit, as that term has been previously interpreted, of the city and the county to an individual, association, or corporation. We will develop the reasons for such holding hereafter under that part of our opinion headed Real Estate for Industrial Development. We further hold that the unconstitutional provisions of the statute are separable for reasons which we discuss under the heading Severability.

I

Publicity

Our conclusion that the particular language of section 18-1401, R. R. S. 1943, earlier referred to, describes a public purpose and authorizes a method of expenditure of public funds not in conflict with Article XIII, section 3, of the Nebraska Constitution, and rests upon two propositions already clearly established by our previous holdings and upon an additional principle approved by dicta of this court and supported by on-point authority from other jurisdictions.

The first proposition is that it is for the Legislature to decide in the first instance what is and what is not

a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. State ex rel. Douglas County v. Cornell, 53 Neb. 556, 74 N. W. 59. The second proposition is that the general encouragement of growth and industry through such devices as publicity and advertising are public purposes. State ex rel. Douglas County v. Cornell, *supra;* Power Oil Co. v. Cochran, 138 Neb. 827, 295 N. W. 805. In the case first cited, a statute authorizing the issuance of bonds by a county for the purpose of participating in the Trans-Mississippi and International Exposition of 1898 was held a public purpose. The court in that case indicated that municipal publicity and the general encouragement of growth and industry were public purposes. In Power Oil Co. v. Cochran, *supra,* we, in upholding as a valid exercise of legislative power the establishment of an "Advertising Commission," said: ". . . legislative power exists to make expenditures for advertising which is for the public benefit." We therefore hold that the language of section 18-1401, R. R. S. 1943, which we are now discussing, describes a public purpose.

The next question to be answered is whether the purpose may be accomplished by expending the funds through the private organizations specified in the statute. In United Community Services v. Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576, this court had before it the constitutionality of sections 14-1106 and 14-1107, R. R. S. 1943, which authorized public power districts to make contributions to a community chest provided certain conditions were met. The court held the statute unconstitutional on grounds other than Article XIII, section 3, but went on to answer other objections of unconstitutionality and to hold that the purposes served by such donations were public purposes and did not violate Article XIII, section 3, saying "'". . .

authorities clearly settle that the vital point in all such appropriations [by governmental subdivisions to private concerns] is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means." . . . .'" There we also said: " 'No hard and fast rule can be laid down, for in determining whether a proposed expenditure of public funds is valid as devoted to a "public use or purpose" each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.' "

The language describing purposes in section 18-1401, R. R. S. 1943, is quite specific. It is readily apparent that the benefit of the broad scope of these purposes redounds to the public generally and not to particular organizations or individuals. Benefit which may result to the latter is only the incidental benefit which generally attaches in most public welfare legislation. Cases from other jurisdictions which support the accomplishment of such public purposes through private organizations are Sacramento Chamber of Commerce v. Stephens, 212 Cal. 607, 299 P. 728 (entertainment of public guests, encouraging immigration, exhibition of products, and printing and distribution of pamphlets advertising the city); and Davis v. City of Taylor, 123 Tex. 39, 67 S. W. 2d 1033 (expenditures through a board of city development to promote "growth, advertisement, development, improvement and increase of the taxable values of said city").

The plaintiff argues that once the funds are paid to the organization the city loses control. As the trial court appropriately found, the purposes of the statute are specific and control of the expenditures by the city may be assured through contract and accounting, suit for refund, or other appropriate means, if the organiza-

tion should use the money for an unauthorized purpose.

II

Real Estate for Industrial Development

When we consider the provisions of the statute authorizing the expenditure of funds for the acquisition of real estate for industrial development, we are confronted with a quite different set of circumstances. Before real estate can be effectively used for industrial development, it must first in some way come into the use and possession of the private persons or entities which may engage in industry. A municipal corporation has only those powers which are granted in express words, those which are necessarily or fairly implied in or incidental to powers expressly granted; and those which are essential to the objects and purposes of the corporation. Jacobs v. City of Omaha, 181 Neb. 101, 147 N. W. 2d 160. We have been directed by the defendants to no statutes which authorize cities or counties to engage generally in operation of an industry.

Our conclusion is that the authority of a municipality or county to use public funds to own, acquire, develop, lease, and sell real and personal property for industrial development purposes is measured by the provisions of Article XIII, section 2, of the Nebraska Constitution, and the enabling statutes lawfully enacted by the Legislature pursuant to the foregoing provision of the Constitution. State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N. W. 2d 63; State ex rel. Beck v. City of York, 164 Neb. 223, 82 N. W. 2d 269; §§ 18-1614 to 18-1623, R. R. S. 1943 (Industrial Development Act).

In State ex rel. Beck v. City of York, *supra,* we held that the original Industrial Development Act, sections 18-1601 to 18-1613, R. R. S. 1943 (Reissue 1954), which authorized the issuance of revenue bonds by certain governmental subdivisions for the purposes of industrial development violated Article XIII, section 3, of the Constitution, because it permitted the loan of the credit of the state to an individual, association, or corporation.

Following our opinion in that case, Article XV, section 16, now Article XIII, section 2, was enacted by vote of the people. This provision of the Constitution specifically authorizes the Legislature to give counties and cities authority to acquire real and personal property for industrial development and to issue revenue bonds supported by a mortgage on the property and pledges of rentals from the property for the purpose of paying the principal and interest of the bonds. Section 2 specifically provides that the bonds shall not become general obligations of the city or county. That constitutional amendment further provides: "No such governmental subdivision shall have the power to operate any such property as a business or in any manner except as the lessor thereof." Pursuant thereto the Legislature, in 1961, enacted the present Industrial Development Act. This act, with one exception not pertinent here, was held to be constitutional in State ex rel. Meyer v. County of Lancaster, *supra*.

The constitutionality of section 18-1401, R. R. S. 1943, either in its original form or as amended in 1972, has not been heretofore challenged. Section 18-1401, R. R. S. 1943, clearly purports to authorize the acquisition of real estate for industrial development purposes by the use of tax money and income from proprietary functions. For reasons already noted, it is evident that the use of the property for industrial development purposes cannot be accomplished so long as the use and possession of the property remains in the municipality.

It needs very little elaboration to demonstrate that under the procedure of section 18-1401, R. R. S. 1943, the credit of the municipality is loaned to some individual, association, or corporation. This results in capital being furnished by the city or county for private use. The real estate so acquired may decrease in value, and the loss is that of the municipality because funds or proprietary income are the sources of the capital.

If the property increases in value the benefit of the increase and thus of the capital furnished will pass to the private person. Even if title is held by the city or county, this would still be true.

When the Legislature submitted to the people the constitutional amendment which became Article XIII, section 2, of the Constitution, and when the people voted thereon, they were, of course, aware of the scope of the holding of this court in State ex rel. Beck v. City of York, *supra*. It seems clear, therefore, that Article XIII, section 2, is the full measure of the power of the state through the cities and counties to lend the credit of the state. Article XIII, section 3, remains in the Constitution and under its terms any loan of credit made by the state, by a county, or by a municipality to a private individual, association, or corporation is unconstitutional. State ex rel. Beck v. City of York, *supra*. The one exception to the above principle is that a loan of credit may be made by a county or municipality if the loan of credit is made under enabling legislation that complies with the requirements of Article XIII, section 2, of the Constitution. State ex rel. Meyer v. County of Lancaster, *supra*. The purchase by a municipality of property for industrial development under the provisions of section 18-1401, R. R. S. 1943, clearly does not comply with the provisions of Article XIII, section 3, of the Constitution, because it authorizes the use of tax money and income of the subdivision from its proprietary functions for the purposes.

Defendants argue that the constitutional provision just mentioned expressly provides that the acquisition of real and personal property for industrial development is a public purpose. They say, therefore, that this ratifies the provisions of section 18-1401, R. R. S. 1943, here being discussed. They overlook, however, the fact that Article XIII, section 2, does not authorize the use of tax or proprietary funds for the purpose of extending

credit and that this section, when construed with section 3, constitutes, in effect, a prohibition against such use.

III

Severability

The plaintiff urges that if any part of the statute is unconstitutional the whole statute must fall. We have had occasion many times to consider the principles under which portions of the statute may be held unconstitutional and yet the remainder of the statute stand. In State ex rel. Meyer v. County of Lancaster, *supra,* we were called upon to determine the severability of a portion of the Industrial Development Act relating to the partial exemption from taxation of property acquired by a city or a county for industrial development purposes. We there held that the exemption provision was unconstitutional, but that since it was severable, the remainder of the act was constitutional. The applicable principles were stated in the following language: "Does this invalidity void the entire act? The fact that a part of a law is invalid does not always require that the entire law be treated as void. If the part that is bad is independent of and separable from the balance of the law, or if the invalid part was not an inducement to the passage of the act, or if the remainder of the act is not so connected with the invalid portion that it cannot be upheld without doing violence to the legislative intent as a whole or result in putting into effect a law which the Legislature would not have passed had its attention been called to the invalid parts, the portion of the act that is valid may be sustained and given effect. Wilson v. Marsh, 162 Neb. 237, 75 N. W. 2d 723." In that case, however, the statute in question contained a severability clause as follows: " 'If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions thereof.' " The Industrial Development Act does not contain a legis-

lative declaration of severability. Where such a clause is not present, we have held: ". . . a severability clause is merely an aid to construction and not an inexorable command. A severability clause in a statute is not a condition precedent to a determination of the question of severability." Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, 183 Neb. 410, 160 N. W. 2d 232. See, also, 2 Sands, Sutherland Statutory Construction (4th Ed., 1973), § 44.09, p. 353, where it is said: "The presumption against separability in absence of a separability clause is a weak one. On the side of separability even in such cases, the Supreme Court has noted that 'the cardinal principle of statutory construction is to save and not to destroy.' " See, also, Tilton v. Richardson, 403 U. S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790. In Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, *supra,* we said: "Where it appears that an unconstitutional portion of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portion did not constitute such an inducement to the passage of the valid parts that they would not have passed without them, the former may be rejected and the latter upheld."

It is self-evident that the provisions of the 1972 amendment to the statute which authorized acquisition of real estate for industrial development could have constituted no part of the inducement for the provisions we have already discussed under the heading Publicity since the latter provisions were already in existence. The plaintiff, however, makes an argument more difficult to answer. He points out that when section 18-1401, R. R. S. 1943, was amended in 1972 to permit the purchase of real estate for industrial development, the Legislature also raised the amount of money that was authorized to be used by increasing it from one-tenth of one percent to one percent of the assessed valuation. He

further argues that the reason the additional funds were authorized was for the specific purpose of the acquisition of land for industrial development. He also states that clearly the industrial development purpose was the inducement behind the provision for increased funding and thus the funding provision must fail because the Legislature clearly would not have enacted the industrial development language at all if there were no provision for funding. The next step in his argument is that under the principles governing the determination of severability there is no way the court can restore the one-tenth of one percent provision and therefore the whole statute must fall.

There are some indications contained in the committee discussion of the 1972 amendment that the increase in funding was authorized to make more practicable the acquisition of real estate for industrial development. On the other hand, the 1972 amendment placed no restriction (other than the overall limitation) on what can be used for publicity and what can be used for industrial land acquisition. In other words, the municipality was free to use all for publicity, or all for land acquisition, or to divide it any way it saw fit. Floor discussion immediately prior to final enactment seems to make this reasonably clear. As we have already noted in connection with our previous discussion of the canons of construction, "the cardinal principle of statutory construction is to save and not to destroy." It seems to us that we can "without doing violence to legislative intent" hold the provision for funding separable from that of real estate acquisition. We hold, therefore, the provision for real estate acquisition was not the exclusive inducement for the increased funding provision and that they are therefore severable.

The record in this case does not disclose whether any of the funds transferred to the defendant chamber by the city and county have, in fact, been used for the un-

constitutional purpose of land acquisition for industrial development. We cannot therefore determine whether the plaintiff is entitled to any further relief. This will have to be determined on remand.

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

INDEX

Abatement and Revival.

1. When the pendency of a prior suit is pleaded in abatement, the case must be the same, or it will not be sustained. There must be the same parties or such as represent the same interest; the same rights must be asserted and the same relief prayed for. This relief must be founded on the same facts, and the essential basis of the relief must be the same in both actions. National Bank of Commerce T. & S. Assn. v. Shull ---------- 590
2. As a general rule, where a judgment in a prior suit would be a bar to a judgment in the second suit brought in the same or another court of concurrent jurisdiction, the plea in abatement should be sustained. National Bank of Commerce T. & S. Assn. v. Shull ---------- 590
3. A plea in abatement is a dilatory and technical plea. It is not, as a rule, favored by the courts. Generally, it will not be sustained unless the party interposing it can clearly show he is within the reason for its enforcement. National Bank of Commerce T. & S. Assn. v. Shull ---------- 590

Access.

1. The right of direct access to an existing street or highway is a property right of which an abutting owner cannot be deprived without due process of law and compensation for his loss. Morehead v. State ---------- 31
2. There is no right of direct access to a highway constructed upon a new right-of-way where no highway previously existed if the new highway is designated as a controlled access facility from the beginning. Morehead v. State ---------- 31

Actions.

1. A court of general jurisdiction may exercise in personam jurisdiction over a nonresident defendant when legislation has been enacted to specifically provide the court with jurisdiction, provided such exercise of jurisdiction does not violate the due process clause of the United States Constitution. Tiedeman v. Tiedeman ---------- 15

2. The right of a party to sue as representative of a class may be determined on motion for summary judgment. Blankenship v. Omaha P. P. Dist. ------ 170
3. The statutes of this state authorize a partial summary judgment. Whether a partial summary judgment is a final and appealable order depends upon its effect. Blankenship v. Omaha P. P. Dist. ----- 170
4. A party having an interest adverse to the interests of the parties sought to be represented may not sue as representative of a class under the provisions of section 25-319, R. R. S. 1943. Blankenship v. Omaha P. P. Dist. ---------- 170
5. Potentially conflicting interests within the class are incompatible with the maintenance of a true class action. Blankenship v. Omaha P. P. Dist. ---------- 170
6. Where, on motion for summary judgment, the record demonstrates the potentiality of conflict, either within the class or between the person who seeks to represent the class and the class, it is appropriate to dispose of the class aspect of the case upon motion for summary judgment. Blankenship v. Omaha P. P. Dist. ---------- 170
7. The general rule is that where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie. Growney v. C M H Real Estate Co. ---------- 398
8. Where legislation creates a right of action, the Legislature has absolute power to determine the conditions under which the action must be brought. Campbell v. City of Lincoln ---------- 703
9. Neither the United States nor the Nebraska Constitution forbids the creation of new rights nor the abolition of old ones recognized by the common law to attain a permissible legislative object. Campbell v. City of Lincoln ---------- 703
10. Ordinarily a demand upon the responsible officers of a governmental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity. Sesemann v. Howell --- 798
11. Tax money received by one school district from personal property taxed in that district but which should have, under the pertinent statutes, been taxed in another district cannot be recovered by the district within which the property should have been taxed where no levy was made on the property for its

uses and purposes, where both districts involved obtained the amount of money for which the budget called, and where neither district obtained any money intended for the other. Sesemann v. Howell ------ 798

12. Taxpayers, whose right to sue to protect the interests of the school district arising out of the failure or refusal of the officers to do so, have no greater right to sue to protect such interests than the designated officials have. Sesemann v. Howell 798

Adjoining Landowners.

1. The owner of property in its natural state has a right of lateral support from adjoining owners, irrespective of any questions of care or negligence. McKamy v. Bonanza Sirloin Pit, Inc. ---------- 325
2. The right of lateral support is mutual and reciprocal between adjoining property owners, nondelegable and constituting a servitude as to each. McKamy v. Bonanza Sirloin Pit, Inc. ---------- 325
3. An owner of property, entitled to lateral support, has a right of action against the servient owner at the time of the removal of such lateral support; he does not have a cause of action against subsequent owners or tenants, except for negligence. McKamy v. Bonanza Sirloin Pit, Inc. ---------- 325

Administrative Law.

1. Article IV, section 1, of the Constitution of the State of Nebraska, provides in part: "Subject to the provisions of this Constitution, the heads of the various executive or civil departments shall have power to appoint and remove all subordinate employees in their respective departments." American Fed. of S., C. & M. Emp. v. Department of Public Institutions 253
2. Article IV, section 19, of the Constitution of the State of Nebraska, provides: "The general management, control and government of all state charitable, mental, reformatory, and penal institutions shall be vested as determined by the Legislature." American Fed. of S., C. & M. Emp. v. Department of Public Institutions ---------- 253
3. Equipment furnished by a wholesale distributor of beer licensee to a retail package liquor licensee, and used only for display purposes, does not thereby become an advertising sign under the provisions of section 53-169, R. R. S. 1943. Tri-City Beer Co. v. Nebraska Liquor Control Commission ---------- 278

4. A prior written statement of a witness, not a party, contrary to a statement made before an administrative tribunal, may be admitted by the tribunal for impeachment purposes, although not substantive evidence of the fact declared in the written statement. Tri-City Beer Co. v. Nebraska Liquor Control Commission ---------- 278

Adopted Children.

Under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other. This applies equally to lawfully adopted children. Young v. Young ---------- 163

Adverse Possession.

1. A claim of title by adverse possession must be proved by a preponderance of the evidence showing actual, open, exclusive, and continuous possession under a claim of ownership for a period of 10 years. Mousel v. ten Bensel ---------- 456
2. When there is common ownership of two contiguous tracks of land, subsequently conveyed to different grantees, one of the grantees cannot, for the purpose of establishing title by adverse possession against the other grantee, tack his possession to that of the common grantor. Bartlett v. Kloepping 755
3. Generally, possession of real estate by one cotenant is possession of all and such possession is presumed friendly as to all cotenants. Bartlett v. Kloepping 755
4. Before a cotenant can hold adversely to other cotenants, there must be an ouster of possession of the latter by the former, with notice or knowledge of the acts causing the ouster being brought home to such other cotenants in a plain and unequivocal manner and be shown by acts of such notorious and hostile character as would put a man of ordinary prudence on guard. Acts which are reasonably consistent with the existence of title in other cotenants are insufficient. Bartlett v. Kloepping ---------- 755
5. The general rule in this state is that in order to claim title by adverse possession one must have been in open, notorious, exclusive, and adverse possession of the property for a period of 10 years. Winkle v. Mitera ---------- 821

Affidavits.

Mere conclusionary allegations of "tender" stated in an affidavit do not suffice to establish the fact of "tender." Caha v. Nelson ---------- 333

Agency.

1. Ordinarily, an agent having authority to solicit insurance, receive and forward applications, deliver policies, and collect premiums is a general agent of the insurance company and notice to him will satisfy a requirement that notice must be sent to the company. Zukaitis v. Aetna Cas. & Sur. Co. ------ 59
2. The revocation of an agent's authority does not become effective as between the principal and third persons until they receive notice of the termination. Zukaitis v. Aetna Cas. & Sur. Co. ---------- 59

Aliens.

1. Section 76-408, R. R. S. 1943, applies to sections 76-401 and 76-402, R. R. S. 1943. Wilson v. State 228
2. An alien may hold and convey the title to land acquired by purchase if no proceedings have been brought by the State to declare an escheat. Wilson v. State ---------- 228
3. Where no proceedings to declare an escheat are commenced during the life of an alien, upon his death his interest passes to his heirs or devisees subject to the restrictions imposed by statute. Wilson v. State ---------- 228

Alimony.

1. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Olson v. Olson 8
2. The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Olson v. Olson -------- 8
Lynch v. Lynch ---------- 804
3. Where, in an action for dissolution of marriage, the wife is awarded a judgment for alimony the court should, if possible, divide the property in such a manner as to permit the husband the means of pay-

ing the judgment awarded the wife. Olson v. Olson 8
4. In this jurisdiction, provisions for support money should be certain and definite, based upon present conditions, and not made to depend upon uncertain and speculative contingencies of hypothetical earnings or income. Breiner v. Breiner ---------- 143
5. A formula providing for calculation of additional support money at the end of every year based on a variable amount of bonus is disapproved by this court. Breiner v. Breiner ---------- 143
6. In determining the amount of child support the status, situation, and character of the parties, and all attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be noted. Breiner v. Breiner ---------- 143
7. The question of alimony and division of property may be considered together; in determining the same, the court shall have regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the abilities of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Grummert v. Grummert ---------- 148
8. Upon dissolving a marriage, the trial court has legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, title to which is held jointly by them, as the equities require. Grummert v. Grummert ---- 148
9. In an action for dissolution of marriage, the property should be divided, if possible, in such manner as to permit the husband to retain the means for payment of any judgment awarded to the wife. Hanisch v. Hanisch ---------- 204
10. The rules for determining alimony or division of property in an action for dissolution of a marriage provide no mathematical formula by which such awards can be precisely determined. Hanisch v. Hanisch ---------- 204
11. Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown, but when alimony is not allowed in the

original decree dissolving a marriage, such decree may not be modified to award alimony. § 42-365, R.S. Supp., 1974. Haug v. Haug ---------- 377

12. The rule in this state is that the fixing of alimony or distribution of property rests in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Essex v. Essex ---------- 385

13. Under section 42-365, R. S. Supp., 1974, a court may, upon dissolution of a marriage, 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. Essex v. Essex ---------- 385

14. Generally, assets held in trusts, established by third persons, for the benefit of one of the spouses or the children are not marital assets, even though under some circumstances an indigent spouse may reach them to satisfy a support obligation. Essex v. Essex ---------- 385

15. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. § 42-365, R. S. Supp., 1974. Browers v. Browers ---------- 743

16. An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification. Kasper v. Kasper ---------- 754

17. 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. In determining those circumstances, the financial position of the husband, the earning capacity of each parent, and the estimated costs of sup-

port of the children must be taken into account. Lynch v. Lynch ---------- 804

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. Lee v. Weaver ---------- 194
2. Evidence that at some previous time a house cat bit its owner, without any evidence as to the circumstances present when the biting occurred, is not sufficient to sustain a finding that the cat was a vicious or dangerous animal or that the owner had notice of its vicious or dangerous nature. Lee v. Weaver ---------- 194

Appeal and Error.

1. While an action for dissolution of marriage is heard de novo in this court, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Olson v. Olson ---------- 8
2. Questions not presented to or passed on by the trial court will not be considered on appeal. Village of Springfield v. Hevelone ---------- 37
3. In all appeals from the District Court to the Supreme Court in suits in equity, wherein review of some or all of the findings of fact of the District Court is asked by the appellant, it shall be the duty of the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and, upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the District Court or the fact that there may be some evidence in support thereof. Haller v. Chiles, Heider & Co., Inc. ---------- 65
4. A party on appeal may not properly assign the admission of evidence as error where no objection was made thereto in the trial. Breiner v. Olson -- 120
5. The inclusion of evidence in a bill of exceptions is the only vehicle for bringing evidence before this court on appeal. Evidence not included in the bill

of exceptions may not be considered. Elm Creek State Bank v. Johnson ---------- 131

6. While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Grummert v. Grummert ---------- 148

7. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. Credit Bureau Services, Inc. v. Moylan ---------- 197

8. In an appeal from a decree of dissolution of a marriage, this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Hanisch v. Hanisch ---------- 204

9. The principle that on appeal the case will be considered upon the theory upon which the case was tried below, even though not pleaded, has application only where both parties acquiesce in the theory and the case was submitted to the trial court on that basis. Timmerman v. Hertz ---------- 237

10. The Supreme Court, on an appeal from the District Court in a workmen's compensation case, may set aside the judgment of the District Court only upon the grounds provided by statute which include "(3) the findings of fact are not supported by the evidence as disclosed by the record." Cain v. La Grange Steel Erectors, Inc. ---------- 272

11. When the record in a workmen's compensation case reflects nothing more than a resolution of conflicting medical testimony, this court will not substitute its judgment of facts for the judgment of the Workmen's Compensation Court. Cain v. La Grange Steel Erectors, Inc. ---------- 272

12. Sections 30-1601, 30-1602, 30-1604, 30-1605, and 30-1606, R. R. S. 1943, and 30-1603, R. S. Supp., 1974, concerning appeals in probate matters, require that a transcript of the probate proceedings be filed in the District Court within 40 days from the date of the order which appellant challenges. Caha v. Nelson ---------- 333

13. Section 30-1605, R. R. S. 1943, requires the county judge to transmit a certified transcript to the District Court within 10 days of the perfection of appeal, if the transcript fees have been paid. Caha v. Nelson ---------- 333
14. Prepayment of transcript fees may be waived by the county judge. Caha v. Nelson ---------- 333
15. Late filing of the transcript in District Court may, under certain circumstances, be excused if caused by the fault or negligence of county court officials or employees. Caha v. Nelson ---------- 333
16. A proffer of payment to a county court employee at time of ordering a transcript for appeal does not constitute a legal tender, since no payment was then due nor would the cost of said transcript be then ascertainable. Caha v. Nelson ---------- 333
17. In a law action tried to the court without a jury, it is not within the province of this court to weigh or resolve conflicts in the evidence. The credibility of the witnesses and the weight to be given to their testimony are for the trier of fact. Snay v. Snarr - 375
18. Issues of fact in will contest cases are determined in this court by the sufficiency of the evidence under the law to sustain the verdict of the jury or the findings of the District Court and, where the evidence in a case tried to the jury is conflicting, issues of fact are questions for its determination. Minor v. Bickford ---------- 402
19. In the appeal of an equity case, the appellate court will give consideration to the fact that the trial court inspected the premises. Steffen v. County of Cuming ---------- 442
20. The appeal procedure in habeas corpus actions is the same as that required for a like purpose in civil actions. Nebraska Children's Home Soc. v. Collins ---------- 531
21. In a law action, where no motion for a new trial is filed, this court on appeal will examine the record only for the purpose of determining whether or not the judgment is supported by the pleadings. Nebraska Children's Home Soc. v. Collins ---------- 531
22. An order affecting a substantial right made in a special proceeding is a final order which may be appealed to this court. State v. Loomis ---------- 552
23. An appeal shall be deemed perfected, and the Supreme Court shall have jurisdiction of the cause when notice of appeal shall have been filed, and

the docket fee deposited in the office of the clerk of the District Court, and after being so perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional. State v. Allen ---------- 560

24. Any order made by the District Court subsequent to the vesting of jurisdiction in this court is void and of no effect. State v. Allen ---------- 560

25. Alleged errors not brought to the attention of the trial judge in any way in a motion for new trial are not entitled to be considered or reviewed by this court. State v. Allen ---------- 560

26. On appeal from a county or municipal court to the District Court, notice of appeal and bond must be filed within 10 days after the rendition of judgment and this period cannot be prolonged by filing a motion for new trial. Edward Frank Rozman Co. v. Keillor ---------- 587

27. In the absence of a bill of exceptions, prepared and filed in accordance with applicable statutory provisions and rules of practice, review on appeal is limited to whether the pleadings support the judgment entered by the lower court. Phillippe v. Barbera ---------- 727

28. On appeal to the District Court in civil matters, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county court. Phillippe v. Barbera -- 727

29. Actions in equity on appeal to this court are subject to the rule that when credible evidence on material questions of fact is in irreconcilable 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. Booth v. Wilkinson ---------- 730

30. When a case is tried in the District Court upon the record from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the Revised Rules of the Supreme Court, 1974, before it can be considered on appeal to this court. Tunks v. O'Brien ---------- 735

31. In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is

the sufficiency of the pleadings to sustain the judgment of the trial court. Tunks v. O'Brien 735

32. On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. Scott v. Young Men's Christian Assn. 746

33. In determining the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and he must have the benefit of every inference that can reasonably be drawn from the evidence. Torstenson v. Melcher 764
Piccolo-Lynam Drug Co. v. Omaha Nat. Bank .. 772

34. Alleged errors of the trial court in an action at law which are not referred to in a motion for new trial will not be considered on appeal in this court. Torstenson v. Melcher 764

35. Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Magdaleno v. Nebraska Panhandle Community Action Agency 783

36. In a workmen's compensation proceeding a District Court finding against a party will only be set aside if the evidence compels a finding for that party. Magdaleno v. Nebraska Panhandle Community Action Agency 783

37. Section 24-541, R. S. Supp., 1974, providing for review "de novo on the record" intends that the District Court exercise independent judgment, which must be based on the issues, pleadings, and evidence presented in the lower court unless additional evidence is adduced pursuant to that statute. Von Seggern v. Kassmeier Implement 791

38. In reviewing orders affecting procedural matters this court will presume in the absence of evidence to the contrary that the District Court has not abused its discretion, and the burden of showing an abuse of discretion is upon the party adversely affected by the District Court's order. Von Seggern v. Kassmeier Implement 791

Arrest.

1. Where probable cause exists for the arrest of an

accused in his motor vehicle upon a public highway and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a short time later at a different location while the vehicle is still in police custody is not unreasonable even though made without a warrant. State v. Wood 353

2. Probable cause justifying an arrest without a warrant exists if the facts and circumstances within the knowledge of the arresting officers, and of which they had reasonably trustworthy information, are sufficient to warrant a prudent man in believing that a felony has been committed and that the person arrested committed it. State v. McDonald ---------- 625

Assault.

It is the general rule that in a homicide or assault case a defendant may show the dangerous and turbulent character of the victim, but may do so only after laying a foundation by evidence tending to show self-defense. State v. Escamilla ---------- 558

Attorney and Client.

Communications between attorney and client made in the presence of others do not constitute privileged communications with the meaning of former sections 25-1201 and 25-1206, R. R. S. 1943. Dunmire v. Cool ---------- 247

Attorneys at Law.

1. Section 48-118, R. R. S. 1943, provides in part: "If the employee or his personal representative or the employer or his compensation insurer join in the prosecuting of such claim and are represented by counsel, the reasonable expenses and the attorney's fees shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought." Schulz v. General Wholesale Coop. Co., Inc. ---------- 410

2. That portion of section 48-118, R. R. S. 1943, involved here, ordinarily does not apply to require a division of attorneys' fees where the subrogation interest of the employer or its insurance carrier is fully and adequately represented by its own counsel and where the services of the employee's attorney were not re-

lied upon to effect the subrogation recovery. Schulz v. General Wholesale Coop. Co., Inc. ---------- 410
3. In an action on a performance bond where the surety admits execution of the bond but does not admit defective performance by the contractor, the plaintiff is entitled to recover an attorney's fee under section 44-359, R. R. S. 1943. Omaha Home for Boys v. Stitt Constr. Co., Inc. ---------- 422
4. A trial court's award of attorney's fees will not be reversed on appeal unless an abuse of discretion is shown. Ward v. Nebraska Electric G. & T. Coop., Inc. ---------- 641
5. Statements constituting alleged misconduct of counsel in argument to the jury must be taken by the court reporter at the trial, together with the objection made thereto and the court's ruling thereon. State v. Sanders ---------- 789

Bonds.

1 The cash bond required by section 30-1603, R. S. Supp., 1974, is not available for payment of the county judge's transcript fees. Caha v. Nelson -- 333
2. In an action on a performance bond where the surety admits execution of the bond but does not admit defective performance by the contractor, the plaintiff is entitled to recover an attorney's fee under section 44-359, R. R. S. 1943. Omaha Home for Boys v. Stitt Constr. Co., Inc. ---------- 422

Boundaries.

1. When there is common ownership of two contiguous tracts of land, subsequently conveyed to different grantees, one of the grantees cannot, for the purpose of establishing title by adverse possession against the other grantee, tack his possession to that of the common grantor. Bartlett v. Kloepping -- 755
2. The ownership of an island carries with it the bed of the river to the center or thread of each surrounding channel. Winkle v. Mitera ---------- 821
3. Where title to an island, bounded by the waters of a nonnavigable stream is in one owner, and title to the land on the other shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland. Winkle v. Mitera - 821

Brokers.

1. 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 customer. A listing by the owner does not constitute an offer to any third party, but is merely an employment contract between owner and broker. Brezina v. Hill 481

2. To the extent that Seberger v. Wood (1921), 106 Neb. 272, 183 N. W. 363, may permit a broker to sign a sales agreement for the owner without express authorization, it is hereby overruled. Brezina v. Hill ---------- 481

3. If the parties intend that an agent shall have authority to execute a sales contract, it should be expressly so stated. It should not be left to the construction of vague statements or ambiguous circumstances. The authorization should be specifically spelled out in a definite written statement. Brezina v. Hill ---------- 481

Cancellation of Instruments.

Section 44-516, R. R. S. 1943, requires registered or certified mail for every cancellation notice regardless of the period the policy has been in force. Saunders v. Mittlieder ---------- 232

Civil Matters.

On appeal to the District Court in civil matters, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county court. Phillippe v. Barbera -- 727

Confessions.

1. To be admissible, a confession must be free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. Barajas 502

2. An illegally obtained confession may be used to impeach a defendant's testimony and if he elects not to testify he has not been deprived of his constitutional right to testify. State v. Escamilla -- 558

3. In the absence of a request for a hearing to determine voluntariness of a confession, a defendant cannot complain of the failure to hold a Jackson v. Denno-type hearing. State v. Escamilla ---------- 558

4. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by

any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. McDonald ---------- 625

5. The determination of whether a statement was voluntarily made necessarily turns on the consideration of the totality of the circumstances in any particular case. State v. McDonald ---------- 625

6. The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. State v. McDonald 625

Conspiracy.

A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must be, proved by a number of indefinite acts, conditions, and circumstances, which vary according to the purpose to be accomplished. If it be proved that defendants, by their acts, pursued the same object, although by different means, one performing one part and another another part, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object. Piccolo-Lynam Drug Co. v. Omaha Nat. Bank ---------- 772

Constitutional Law.

1. This court will not declare a statute or ordinance unconstitutional at the suit of one who is not injuriously affected thereby. Bali Hai', Inc. v. Nebraska Liquor Control Commission ---------- 1

2. The right to engage in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations or even a suppression of the traffic do not deprive persons of property without due process of law, violate the privileges or immunities clause, the due process clause, the uniformity provisions, nor, unless they contain irrational classifications or invidious discriminations, the equal protection of the law as prohibited by the state and federal Constitutions. Bali Hai', Inc. v. Nebraska Liquor Control Commission ---------- 1

3. A decree of divorce rendered in another state may be collaterally attacked by showing that the court was without jurisdiction, either of the subject matter of the suit or of the person of the defendant,

without violating the full faith and credit clause of the federal Constitution. Tiedeman v. Tiedeman 15

4. A court of general jurisdiction may exercise in personam jurisdiction over a nonresident defendant when legislation has been enacted to specifically provide the court with jurisdiction, provided such exercise of jurisdiction does not violate the due process clause of the United States Constitution. Tiedeman v. Tiedeman ---------- 15

5. The right of direct access to an existing street or highway is a property right of which an abutting owner cannot be deprived without due process of law and compensation for his loss. Morehead v. State ---------- 31

6. Article V, section 9, Constitution of Nebraska, grants chancery or equity jurisdiction to the District Court. Village of Springfield v. Hevelone ---------- 37

7. The equity jurisdiction of the District Court conferred by the Constitution cannot be legislatively limited or controlled. Village of Springfield v. Hevelone ---------- 37

8. Notwithstanding section 24-517 (5), R. S. Supp., 1974, the District Court retains jurisdiction in injunction actions brought to enforce zoning ordinances. Village of Springfield v. Hevelone ------ 37

9. All acts of the Legislature are presumed to be constitutional. American Fed. of S., C. & M. Emp. v. Department of Public Institutions ---------- 253

10. In construing an act of the Legislature, all reasonable doubts must be resolved in favor of its constitutionality. American Fed. of S., C. & M. Emp. v. Department of Public Institutions ---------- 253

11. The Legislature has plenary legislative authority except as limited by the state and federal Constitutions. American Fed. of S., C. & M. Emp. v. Department of Public Institutions ---------- 253

12. 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. American Fed. of S., C. & M. Emp. v. Department of Public Institutions 253

13. Article IV, section 1, of the Constitution of the State of Nebraska, provides in part: "Subject to the provisions of this Constitution, the heads of

the various executive or civil departments shall have power to appoint and remove all subordinate employees in their respective departments." American Fed. of S., C. & M. Emp. v. Department of Public Institutions ---------- 253

14. Article IV, section 19, of the Constitution of the State of Nebraska, provides: "The general management, control and government of all state charitable, mental, reformatory, and penal institutions shall be vested as determined by the Legislature." American Fed. of S., C. & M. Emp. v. Department of Public Institutions ---------- 253

15. The provisions of the Constitution of the State of Nebraska must be taken in their ordinary and common acceptation in such manner as to express the intent of its framers. American Fed. of S., C. & M. Emp. v. Department of Public Institutions ---- 253

16. The extent to which the Legislature may exercise the police power, an attribute of state sovereignty, is primarily a matter of legislative judgment, but the purpose of the regulatory matter must be legitimate and the means employed to effect it must be reasonable. Bridgeford v. U-Haul Co. ---------- 308

17. If, in this court's opinion, a reasonable basis exists for legislative enactments, this court will not ordinarily substitute its judgment for that of the Legislature. Bridgeford v. U-Haul Co. ---------- 308

18. A classification created by legislation need not be all-inclusive so long as the class subject to the law is differentiated from other classes upon some rational basis. Bridgeford v. U-Haul Co. ---------- 308

19. A statute is not vague unless men of normal intelligence would necessarily have to guess at its meaning or would usually differ as to its application. Bridgeford v. U-Haul Co. ---------- 308

20. The legislative imposition of strict liability does not per se constitute a deprivation of due process under the federal and state Constitutions. Bridgeford v. U-Haul Co. ---------- 308

21. Section 39-6,193, R. R. S. 1943, imposing vicarious liability on owners-lessors of trucks for the damages caused by lessees and operators of the leased trucks is not a violation of either state or federal due process or equal protection of the law. Bridgeford v. U-Haul Co. ---------- 308

22. 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. A brief stop of an 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. Brown ---------- 321

23. Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it. State v. Banks ---------- 340

24. Even though an identification procedure may have been suggestive, the in-court identification may be allowed to go to the jury if under the totality of the circumstances it is determined to be reliable because it has an origin independent of the taint. State v. Banks ---------- 340

25. If identification procedures are such as to violate due process, the denial of a proper and timely motion to suppress and the admission of the in-court identification constitutes reversible error unless this court can say beyond a reasonable doubt that the error was harmless. State v. Banks ---------- 340

26. Bolstering of an eyewitness identification of an accused by reference to a pretrial identification of the accused is prohibited only where the pretrial identification procedures violate due process standards. State v. Banks ---------- 340

27. The general rule is that in a prosecution for a crime, where there is other evidence of the guilt of the accused and the crime is of such a nature that the acquisition of money may be regarded as a natural or ordinary result of its perpetration, evidence is admissible of the sudden acquisition of money by the defendant, or the marked improvement in his financial condition at or subsequent to the time the offense was committed, even though the source of the money is not definitely traced or identified by the prosecution. However, under some circumstances testimony as to possession of such money may be admissible without the foundation of showing the accused's previous financial condition. State v. Banks ---------- 340

28. Where it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former,

and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld. State v. Padley ---------- 358

29. The Legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend. State v. Padley ---------- 358

30. Section 39-662, R. S. Supp., 1974, is not unconstitutional. State v. Padley ---------- 358

31. The constitutionality of a legislative act must be raised at the trial or it will be considered to be waived. State v. Lewis ---------- 408

32. The word "resist" as used in section 28-729, R. S. Supp., 1974, is not so vague as to make the statute unconstitutional. State v. Boss ---------- 467

33. The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. State v. McDonald 625

34. It is the province of the Legislature to make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relationship to the legitimate objectives and purposes of the legislation. Campbell v. City of Lincoln ---------- 703

35. Public agencies, generally speaking, afford a proper subject for legislative classification. Campbell v. City of Lincoln ---------- 703

36. The Nebraska Political Subdivisions Tort Claims Act, in creating a special class of tort-feasors consisting of all political subdivisions as defined, does not violate Article III, section 18, of the Nebraska Constitution. Campbell v. City of Lincoln ---------- 703

37. The classification of persons and corporations as created in the Nebraska Political Subdivisions Tort Claims Act constitutes a reasonable classification for purposes of the act, operates uniformly upon all members of the class, and is not constitutionally defective. Campbell v. City of Lincoln ---------- 703

38. Neither the United States nor the Nebraska Con-

stitution forbids the creation of new rights nor the abolition of old ones recognized by the common law to attain a permissible legislative object. Campbell v. City of Lincoln ---------- 703

39. The notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act is a condition precedent to the institution of suit against a political subdivision and neither that notice requirement nor the limitation of time for suit as set out in section 23-2416, R. R. S. 1943, violate constitutional guaranties of equal protection or uniformity under state or federal Constitutions. Campbell v. City of Lincoln ---------- 703

40. The credit of the state shall never be given or loaned in aid of any individual, association, or corporation. Art. XIII, § 3, Constitution of Nebraska. Chase v. County of Douglas ---------- 838

41. The authority of a municipality or county to use public funds to own, acquire, develop, lease, and sell real and personal property for industrial development purposes is measured by the provisions of Article XIII, section 2, of the Nebraska Constitution, and the enabling statutes lawfully enacted by the Legislature pursuant to the foregoing provision of the Constitution. Chase v. County of Douglas ---------- 838

42. Article XIII, section 2, of the Constitution of Nebraska, is the full measure of the power of the state through the cities and counties to lend the credit of the state. Article XIII, section 3, remains in the Constitution and under its terms any loan of credit made by the state, by a county, or by a municipality for a private individual, association, or corporation is unconstitutional. Chase v. County of Douglas ---------- 838

43. The authorization granted in section 18-1401, R. R. S. 1943, to a city or county to purchase property for industrial development violates the provisions of Article XIII, section 3, of the Constitution, because it authorizes the use of tax money and income of the governmental entity from its proprietary functions for such purpose. Chase v. County of Douglas ---------- 838

44. The fact that a part of a law is invalid does not always require that the entire law be treated as void. If the part that is bad is independent of and separable from the balance of the law, or if

the invalid part was not an inducement to the passage of the act, or if the remainder of the act is not so connected with the invalid portion that it cannot be upheld without doing violence to the legislative intent as a whole or result in putting into effect a law which the Legislature would not have passed had its attention been called to the invalid parts, the portion of the act that is valid may be sustained and given effect. Chase v. County of Douglas ---------- 838

Contempt.

1. A civil contempt proceeding has for its purpose the preservation and enforcement of the rights of private parties. Village of Springfield v. Hevelone - 37
2. In a civil contempt proceeding willfulness is an essential element. Village of Springfield v. Hevelone 37
3. A jury is not ordinarily required in a civil contempt proceeding. Village of Springfield v. Hevelone 37

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. Village of Springfield v. Hevelone -------- 37
2. A trial court may, in a proper case, order a continuance on its own motion. State v. Lee -------- 348
3. 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. State v. Lee -------- 348

Contracts.

1. Under the Uniform Commercial Code, any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22
2. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U.C.C., an implied war-

ranty that the goods shall be fit for such purpose. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

3. If instructions given in connection with the sale of the product were part of the basis of the bargain, and were inaccurate, and were relied on by the purchaser to his detriment, the breach of warranty may be based upon the inaccurate instructions. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

4. A quasi-contract is a contract implied in law and usually has its origin in the principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Haggard Drilling, Inc. v. Greene ---------- 136

5. The law will not imply a promise against the express declaration of the party to be charged, made at the time of the supposed undertaking, unless such party is under legal obligation paramount to his will to perform some duty, and he is not under such legal obligation unless there is a demand in equity and good conscience that he should perform the duty. Haggard Drilling, Inc. v. Greene ------ 136

6. The mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract or unjust enrichment. Haggard Drilling, Inc. v. Greene ---- 136

7. Where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third party. Haggard Drilling, Inc. v. Greene ---------- 136

8. Section 21-2016, R. R. S. 1943, restricting forfeitures of subscription agreements, is applicable to a subscription agreement of additional authorized capital stock made after the organization of the corporation. Sweeney v. Bridal Fair, Inc. ---------- 166

9. An accident insurance policy, providing for the payment of stipulated sums for accidental injury or death of the insured, where such injury or death is from violent and accidental means alone, resulting directly, independently, and exclusively of all other causes and also providing that there shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect, or bodily infirmity is a contributing cause of death or injury, means that recovery may be had

when the accident is the active, efficient, and precipitating cause which sets in motion the agencies which resulted in the injury or death without the intervention of any other independent force, even though existing infirmities of the insured may be necessary conditions to the result. Brown v. Inter-Ocean Ins. Co. ---------- 189

10. Where a total disability clause, purporting to make physical and mental helplessness essential to liability of insurer, if enforced literally, would result in an unreasonable and unjust forfeiture of accident insurance, it should be liberally construed to mean such a disability as renders insured unable to perform the substantial and material acts of his business or occupation in the usual way. Brown v. Inter-Ocean Ins. Co. ---------- 189

11. In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance. § 25-836, R. R. S. 1943. Timmerman v. Hertz ---------- 237

12. Where by statute plaintiff is authorized to plead a general performance of all conditions precedent, defendant must, if he relies on the fact that any of the conditions precedent have not been performed, set out specially the condition and the breach, thus confining the issue to be tried to such particular condition or conditions precedent as he may indicate as unperformed. A mere general denial, therefore, is insufficient to raise the issue. Timmerman v. Hertz ---------- 237

13. The purpose of section 25-836, R. R. S. 1943, is to simplify pleading, and only by requiring defendant to set forth the particular condition which is relied on as a defense may the plaintiff be advised of the exact defense he will be required to meet, and the trial court informed as to the exact issue to be determined. Timmerman v. Hertz ---------- 237

14. It is ordinarily incumbent upon one who relies upon a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto. Timmerman v. Hertz ------ 237

15. One who claims under an oral contract a portion of decedent's estate for services rendered has no stand-

ing to contest decedent's will in county court, and his remedy is restricted to the District Court for equitable relief. Dunmire v. Cool ---------- 247

16. Equity will grant specific performance of a parol agreement to leave property to another under an oral contract, if it is proved by evidence convincing and satisfactory, and if it has been wholly performed by one party and its nonperformance would be a fraud on him. Dunmire v. Cool ---------- 247

17. Each action for specific performance or suit to impress a trust on certain property is to be determined from the facts, circumstances, and conditions presented by the evidence. Dunmire v. Cool ------ 247

18. In an action for the recovery of amounts due upon a severable contract, judgment may be rendered for the items established by the evidence, but not for any claim not proved as alleged. Breiner v. Olson -- 290

19. In a contract upon a form prepared and regularly used by one of the parties, disputed provisions of doubtful or ambiguous meaning should be construed against the party preparing such document. Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc. ---------- 292

20. A guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control, and, in the absence of assent, waiver, or estoppel, he is generally released by an act of the creditor which deprives him of such right. Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc. ---------- 292

21. Where the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor (a) surrenders or releases the security, or (b) willfully or negligently harms it, or (c) fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action. Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc. ---------- 292

22. Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. Olds v. Jamison ---------- 388

23. A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous. Olds v. Jamison ---------- 388

24. Conflicting evidence relating to ambiguity and contradictory provisions in a written contract is for the finder of fact. Olds v. Jamison ---------- 388
25. The fact that one of the parties to a contract denies that a mistake was made does not prevent a finding of mutual mistake nor prevent reformation. Olds v. Jamison ---------- 388
26. Where a written contract is the basis of an action and neither party asks for a reformation thereof, it is the duty of the court to ascertain its meaning and enforce it accordingly. Olds v. Jamison ---------- 388
27. An essential element of actionable false representation is justifiable reliance on the representation. Growney v. C M H Real Estate Co. ---------- 398
28. The question of whether a stipulated sum is for a penalty or for liquidated damages is answered by the application of one or more aspects of the following rule: A stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness *or* uncertainty, and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach. Growney v. C M H Real Estate Co. ---------- 398
29. Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages. Growney v. C M H Real Estate Co. ---------- 398
30. In an action on a performance bond where the surety admits execution of the bond but does not admit defective performance by the contractor, the plaintiff is entitled to recover an attorney's fee under section 44-359, R. R. S. 1943. Omaha Home for Boys v. Stitt Constr. Co., Inc. ---------- 422
31. Where negotiations between parties result in an agreement and that agreement is reduced to writing, executed, and delivered, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract. Frank McGill, Inc. v. Nucor Corp. ---------- 448
32. Where a contract is ambiguous, the court must determine the intent of the parties and the ambiguity

must be resolved so as to give effect to that intent. Frank McGill, Inc. v. Nucor Corp. ---------- 448

33. A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. Frank McGill, Inc. v. Nucor Corp. ------ 448

34. In the absence of agreement to the contrary, liquidated demands bear interest whereas unliquidated demands do not. Frank McGill, Inc. v. Nucor Corp. 448

35. 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 customer. A listing by the owner does not constitute an offer to any third party, but is merely an employment contract between owner and broker. Brezina v. Hill -- 481

36. To the extent that Seberger v. Wood (1921), 106 Neb. 272, 183 N. W. 363, may permit a broker to sign a sales agreement for the owner without express authorization, it is hereby overruled. Brezina v. Hill ---------- 481

37. If the parties intend that an agent shall have authority to execute a sales contract, it should be expressly so stated. It should not be left to the construction of vague statements or ambiguous circumstances. The authorization should be specifically spelled out in a definite written statement. Brezina v. Hill ---------- 481

38. Section 9-402, U.C.C., provides that a security agreement will suffice as a financing statement if it meets the requirements for a financing statement. It is evident that one instrument may qualify for both purposes and it follows that a financing statement may also constitute a security agreement if it qualifies as such. Crete State Bank v. Lauhoff Grain Co. ---------- 605

39. To constitute a security agreement there must be a written instrument, signed by the debtor, evidencing that such an agreement existed. Crete State Bank v. Lauhoff Grain Co. ---------- 605

40. At any time before breach, the parties to an executory agreement may change its terms by subsequent agreement without a new consideration. Campbell v. Kirby ---------- 610

41. An "uninsured motor vehicle" within the meaning of section 60-509.01, R. R. S. 1943, includes one which does not have accident liability insurance affording the coverage for personal injury and death in the

limits of liability specified by section 60-509, R. R. S. 1943. Emery v. State Farm Mut. Auto. Ins. Co. 619
42. A motor vehicle which is covered by liability insurance for personal injury and death in the limits specified by section 60-509, R. R. S. 1943, does not become an uninsured motor vehicle when, because of multiple claims made, that insurance is insufficient to satisfy the legal liability of the insured to each individual claimant to the limits specified for individual claims under section 60-509, R. R. S. 1943. Emery v. State Farm Mut. Auto. Ins. Co. ---------- 619
43. In the resolution of a controversy concerning the meaning of an insurance contract and the coverage therein, the contract must be viewed as a whole. Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co. ---------- 658
44. An insurance contract must be construed so as to give effect to the intent of the parties at the time the contract was made. Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co. ---------- 658
45. Insurance companies have the same right as individuals to limit their liability. Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co. -- 658
46. The parties to an insurance contract may contract for any lawful coverage and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. Pettid v. Edwards ---------- 713
47. An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. Pettid v. Edwards ---------- 713
48. The purpose of the uninsured motorist statute is to give a person injured by an uninsured motorist the same protection he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Pettid v. Edwards ---------- 713
49. The Nebraska uninsured motorist statute does not prohibit a limitation of liability to the minimum limits required by statute in each policy issued even though a single policy may insure more than one automobile. Pettid v. Edwards ---------- 713
50. If an insurance company has knowledge through its agent, when a contract of insurance is effected, that

the premises are vacant or unoccupied, the issuance of the policy waives any provision as to vacancy or unoccupancy, at least so far as the existing vacancy is concerned. Zweygardt v. Farmers Mut. Ins. Co. - 811

Controlled Substances.

1. In the absence of a legislative declaration to the contrary, a quantity with a potential for abuse is not an essential element of the offense of unlawful possession of a controlled substance. State v. Brown 321
2. In section 28-4,117, R. S. Supp., 1974, Schedule II(c), listing as a controlled substance: "Any material, compound, mixture, or preparation which contains any quantity of the following substances *having a potential for abuse associated with a stimulant effect on the central nervous system*: (1) Amphetamine, its salts, optical isomers, and salts of its optical isomers" the italicized words modify the word "substances," not "quantity." State v. Jennings ---------- 434
3. In a prosecution brought under section 28-4,125(3), R. S. Supp., 1974, for possession of amphetamine, it is not necessary that the State prove that the defendant possessed a *quantity* of amphetamine having a potential for abuse associated with a stimulant effect on the central nervous system. State v. Jennings ---------- 434
4. Intent to distribute may be inferred from the equipment and quantity of controlled substance seized, the manner of packaging, the form of drug, and testimony of knowledgeable witnesses. State v. Rathburn ---------- 485
5. Section 28-4,115 (13), R. S. Supp., 1974, provides that deliver or delivery shall mean the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. State v. Guyott -- 593
6. To sustain a conviction under section 28-4,125 (1) (a), R. S. Supp., 1974, it is not necessary for the State to show actual physical transfer of a controlled substance from the defendant. State v. Guyott ---------- 593

Conveyances.

When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Campbell v. Kirby ------ 610

Corporations.

Section 21-2016, R. R. S. 1943, restricting forfeitures of subscription agreements, is applicable to a subscription agreement for additional authorized capital stock made after the organization of the corporation. Sweeney v. Bridal Fair, Inc. ---------- 166

Counties.

1. The authority of a municipality or county to use public funds to own, acquire, develop, lease, and sell real and personal property for industrial development purposes is measured by the provisions of Article XIII, section 2, of the Nebraska Constitution, and the enabling statutes lawfully enacted by the Legislature pursuant to the foregoing provision of the Constitution. Chase v. County of Douglas -- 838
2. Article XIII, section 2, of the Constitution of Nebraska, is the full measure of the power of the state through the cities and counties to lend the credit of the state. Article XIII, section 3, remains in the Constitution and under its terms any loan of credit made by the state, by a county, or by a municipality for a private individual, association, or corporation is unconstitutional. Chase v. County of Douglas - 838
3. The authorization granted in section 18-1401, R. R. S. 1943, to a city or county to purchase property for industrial development violates the provisions of Article XIII, section 3, of the Constitution, because it authorizes the use of tax money and income of the governmental entity from its proprietary functions for such purpose. Chase v. County of Douglas ---------- 838

Courts.

1. Article V, section 9, Constitution of Nebraska, grants chancery or equity jurisdiction to the District Court. Village of Springfield v. Hevelone ---------- 37
2. The equity jurisdiction of the District Court conferred by the Constitution cannot be legislatively limited or controlled. Village of Springfield v. Hevelone ---------- 37
3. Where a contract is ambiguous, the court must determine the intent of the parties and the ambiguity must be resolved so as to give effect to that intent. Frank McGill, Inc. v. Nucor Corp. -- 448
4. A judgment will not be reversed because the trial court failed to set forth findings for the reason

for its decision to overrule a motion to transfer the case to juvenile court where no record of the hearing upon the motion in the trial court is filed in this court. State v. Highly ---------- 498
5. Any order made by the District Court subsequent to the vesting of jurisdiction in this court is void and of no effect. State v. Allen ---------- 560
6. On appeal to the District Court in civil matters, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county court. Phillippe v. Barbera -- 727

Criminal Conversation.

1. In an action for criminal conversation the plaintiff is entitled to recover only for such damages as are the natural, probable consequence of the act or acts complained of, or such as are the direct probable consequence of the particular tort. Breiner v. Olson ---------- 120
2. In the absence of evidence of some special element of damage for which the law provides a specific means of measurement, it is the general rule that in an action for criminal conversation damages are incapable of precise measurement and there is no fixed rule for determining the amount thereof. Breiner v. Olson ---------- 120
3. Verdicts of juries in actions for interference with the marriage relationship should be set aside as excessive only where it clearly appears that the award was the result of passion and prejudice. Breiner v. Olson ---------- 120

Criminal Law.

1. Separate offenses must be set out in separate counts in an information. State v. French ---------- 88
2. Where the several offenses charged in a multicount indictment or information involve factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other. State v. French ---------- 88
3. Work release is a privilege that may be granted by the sentencing court. It is not a right which must must be granted to all prisoners. State v. Temple - 91
4. The sentencing court has a broad discretion in ruling on petitions for work release. State v. Temple -- 91
5. A denial of the privilege of work release should not

be subject to review except where there has been a clear abuse of discretion. State v. Temple ---------- 91

6. The determination of whether to grant probation to one convicted of a crime is a matter within the sound discretion of the trial court; and the denial of probation will not be disturbed on appeal in the absence of a showing of abuse of judicial discretion. State v. Kolzow ---------- 93

7. Where the punishment of an offense is left to the discretion of a court to be exercised within certain statutorily prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Kolzow ---------- 93

8. In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible, and which the exercise of due diligence could not have discovered and produced at trial. State v. Crawford ---------- 181

9. 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 that court's determination will not be disturbed on appeal. State v. Crawford ---------- 181

10. While it is advisable to do so, the trial court is not required to specifically inquire of the defendant as to the factual basis for a plea of guilty. Inquiry of the county attorney or examination of the presentence report, if before the court, are alternative methods. State v. Painter ---------- 183

11. Unless an abuse of discretion appears, a sentence within the statutory limits will not be disturbed on appeal. State v. Painter ---------- 183

12. Evidence showing a course of conduct, scheme, design, or intent relevant to an element of the offense charged is admissible, even though it also tends to show the commission of other criminal offenses. State v. Hoffman ---------- 200

13. Evidence is admissible to show conduct by the defendant both before and after the date charged in the complaint in support of an allegation that defendant engaged in gambling for a livelihood. State v. Hoffman ---------- 200

14. The foundation for the admission of a tape recording taken from the possession of defendant is sufficient if the evidence shows the circumstances of

the seizure and that the exhibit is in the same condition as at the time of seizure. State v. Hoffman 200

15. A sentence imposed within the statutory limits will not be disturbed by this court on appeal, in the absence of an abuse of discretion. State v. Keller 209

16. Section 29-2261, R. S. Supp., 1974, makes the inspection of a presentence report by the defendant's attorney discretionary with the trial court. However, this is a discretion which may be reviewed in this court. State v. Keller 209

17. In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Lacy 299

18. 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. Lacy 299

19. Common purpose to commit a crime may be inferred from the circumstances surrounding the act and from the defendant's subsequent conduct. State v. Lacy 299

20. A more severe punishment cannot be exacted in order to punish a convicted person for exercising his right to trial. However, sentence concessions are proper when a defendant pleads guilty to an offense. State v. Lacy 299

21. The time requirements of section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day. State v. Lacy 299
State v. Wood 353

22. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausability of explanations, or weigh the evidence. State v. Brown 321

23. In the absence of a legislative declaration to the contrary, a quantity with a potential for abuse is not an essential element of the offense of unlawful possession of a controlled substance. State v. Brown 321

24. 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. A brief stop of an 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. Brown ---------- 321
25. If a sentence is invalid or erroneous and beyond the power of the trial court to pronounce, it is of no effect and the court may then impose a lawful sentence. State v. Blankenship ---------- 329
26. The rule that the penalty of a sentence cannot be increased after the sentence is being served is applicable only when the sentence is legal and valid and within the minimum and maximum statutory sanctions. State v. Blankenship ---------- 329
27. A sentence within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Blankenship ---------- 329
28. Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it. State v. Banks ---------- 340
29. Even though an identification procedure may have been suggestive, the in-court identification may be allowed to go to the jury if under the totality of the circumstances it is determined to be reliable because it has an origin independent of the taint. State v. Banks ---------- 340
30. If identification procedures are such as to violate due process, the denial of a proper and timely motion to suppress and the admission of the in-court identification constitutes reversible error unless this court can say beyond a reasonable doubt that the error was harmless. State v. Banks ---------- 340
31. Bolstering of an eyewitness identification of an accused by reference to a pretrial identification of the accused is prohibited only where the pretrial identification procedures violate due process standards. State v. Banks ---------- 340
32. The general rule is that in a prosecution for a crime, where there is other evidence of the guilt of the accused and the crime is of such a nature that the acquisition of money may be regarded as a natural or ordinary result of its perpetration, evidence is

admissible of the sudden acquisition of money by the defendant, or the marked improvement in his financial condition at or subsequent to the time the offense was committed, even though the source of the money is not definitely traced or identified by the prosecution. However, under some circumstances testimony as to possession of such money may be admissible without the foundation of showing the accused's previous financial condition. State v. Banks 340

33. Evidence of possession of a revolver or gun of prohibited description, which is in apparently good condition and has the characteristics and appearance commonly understood to be those of the firearm it purports to be, is prima facie evidence sufficient to go to the jury in a prosecution under section 28-1011.15, R. S. Supp., 1974. State v. Lee ---------- 348

34. A trial court may, in a proper case, order a continuance on its own motion. State v. Lee -------- 348

35. 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. State v. Lee ---------- 348

36. Where conviction of a previous felony is an essential element of the crime charged, proof of such prior conviction is properly made by offering in evidence authenticated copies of the complaint or information, and the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that the defendant is the same person presently before the court. State v. Lee ------ 348

37. A consent to search may be valid even though the subject of the search is unaware that he has a right to refuse consent. State v. Wood ---------- 353

38. Where probable cause exists for the arrest of an accused in his motor vehicle upon a public highway and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a short time later at a different location while the vehicle is still in police custody is not unreasonable even though made without a warrant. State v. Wood 353

39. When, subsequent to a stop of a camper, by the use of his senses, a trooper became aware of the presence of marijuana, at that time, under our law, he had probable cause to search the camper for marijuana without the necessity of relying on consent. State v. Wood ---------- 353

40. A defendant charged with assaulting and resisting a law enforcement officer in the performance of his

official duties may be found guilty upon proof of either an assault or a resisting where the statute is worded in the disjunctive and in such a case it is not error for the trial court to instruct the jury as to the elements of the offense in the language of the statute. § 28-729.01, R. S. Supp., 1974. State v. Davis ---------- 361

41. When the literal enforcement of a statute would result in absurdity, the courts will assume that such consequences were not intended. State v. Black -- 366

42. A thief has no legitimate interest in a stolen car and does not have standing to challenge a search of the automobile. State v. McFarland ---------- 394

43. Where a probation revocation hearing is a judicial proceeding, a written statement as to the evidence relied on and the reasons for revoking probation is not required. State v. McFarland ---------- 394

44. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Swails -- 406

45. In a post conviction proceeding, the defendant has the burden of establishing a basis for relief. State v. Halsey ---------- 432

46. In section 28-4,117, R. S. Supp., 1974, Schedule II(c), listing as a controlled substance: "Any material, compound, mixture, or preparation which contains any quantity of the following substances *having a potential for abuse associated with a stimulant effect on the central nervous system*: (1) Amphetamine, its salts, optical isomers, and salts of its optical isomers" the italicized words modify the word "substances," not "quantity." State v. Jennings -- 434

47. In a prosecution brought under section 28-4,125(3), R. S. Supp., 1974, for possession of amphetamine, it is not necessary that the State prove that the defendant possessed a *quantity* of amphetamine having a potential for abuse associated with a stimulant effect on the central nervous system. State v. Jennings ---------- 434

48. When the State calls a witness to challenge defendant's claim of truth and veracity, a line of inquiry directed toward the defendant's previous character is firmly forbidden the State on direct examination. State v. 'Boss ---------- 467

49. When a defendant testifies on his own behalf, the prosecuting attorney may question him as to his previous convictions for felony and the number there-

of, but no details as to the nature of the charges or other details may be elicited or received. State v. Boss ---------- 467

50. A defendant is entitled to offer evidence of his reputation for truth and veracity. The prosecution is entitled to dispute that evidence only by evidence of bad reputation for truth and veracity. State v. Boss ---------- 467

51. A prosecutor in his argument is entitled to refer to previous convictions of felony only for the purpose of arguing the defendant's credibility. He is not entitled to use the conviction for the purpose of inferring the probability of the defendant's guilt of the crime charged. State v. Boss ---------- 467

52. Ordinarily a party who does not object to an argument of the prosecutor which is alleged to constitute misconduct will be held to have waived his right to complain. State v. Boss ---------- 467

53. A consent, freely and intelligently given, validates a search even if the suspect was not under arrest or if the officer did not have a search warrant. State v. Rathburn ---------- 485

54. The voluntariness of a consent to search is a question of fact to be determined by the totality of the circumstances. State v. Rathburn ---------- 485

55. Suspension of sentence and granting of probation is discretionary with the trial court. State v. Milligan ---------- 493

56. In the absence of an abuse of discretion the trial court's determination will not be disturbed on appeal. State v. Milligan ---------- 493

57. To be admissible, a confession must be free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. Barajas 502

58. In a criminal case, the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion. State v. Isley -- 539

59. In an information containing three counts, a verdict of guilty on two of the counts and an acquittal on the other is not inconsistent, although the evidence would have justified the conviction on all the counts. State v. Steinmark ---------- 545

60. It is the general rule that in a homicide or assault case a defendant may show the dangerous and tur-

bulent character of the victim, but may do so only after laying a foundation by evidence tending to show self-defense. State v. Escamilla ---------- 558
61. An illegally obtained confession may be used to impeach a defendant's testimony and if he elects not to testify he has not been deprived of his constitutional right to testify. State v. Escamilla ---- 558
62. In the absence of a request for a hearing to determine voluntariness of a confession, a defendant cannot complain of the failure to hold a Jackson v. Denno-type hearing. State v. Escamilla ---------- 558
63. A sentence imposed within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. State v. Allen ---------- 560
State v. McMullen ---------- 796
64. Section 28-4,115 (13), R. S. Supp., 1974, provides that deliver or delivery shall mean the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. State v. Guyott -- 593
65. To sustain a conviction under section 28-4,125 (1) (a), R. S. Supp., 1974, it is not necessary for the State to show actual physical transfer of a controlled substance from the defendant. State v. Guyott ---------- 593
66. Probable cause justifying an arrest without a warrant exists if the facts and circumstances within the knowledge of the arresting officers, and of which they had reasonably trustworthy information, are sufficient to warrant a prudent man in believing that a felony has been committed and that the person arrested committed it. State v. McDonald ------- 625
67. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. McDonald ---------- 625
68. The determination of whether a statement was voluntarily made necessarily turns on the consideration of the totality of the circumstances in any particular case. State v. McDonald ---------- 625
69. The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. State v. McDonald 625
70. Where an information charges a defendant with a

killing committed in the perpetration of a robbery, it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of manslaughter, even though such an instruction is requested. State v. McDonald ---------- 625

71. Miranda rules are not applicable to a consent search. State v. Clouse ---------- 671

72. A sentence denying probation and imposing a period of imprisonment within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. State v. Wade ---------- 761

73. State v. Randolph (1971), 186 Neb. 297, 183 N. W. 2d 225, does not apply where the new statute does not merely amend the former statute by lessening the punishment, but repeals the old statute and defines new categories of crime. It also does not apply where the new statute taken as a whole may be said to evidence a legislative intent that the penalty provision thereof not apply retroactively. State v. Crisp ---------- 833

Crops.

1. In case of the destruction of a perennial crop the measure of damages is the difference between the value of the land immediately before the injury, with the crop growing thereon, and the value of the land immediately after the destruction of the crop. Steffen v. County of Cuming ---------- 442

2. As to any crop that may have been injured, but not entirely destroyed, the measure of damages is the difference between the value at maturity of the probable crop if there had been no injury, and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing. Steffen v. County of Cuming ---------- 442

Customs and Usages.

It is ordinarily incumbent upon one who relies upon a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto. Timmerman v. Hertz ---- 237

Damages.

1. Where the seller of goods has breached a warranty with respect thereto the purchaser may recover con-

sequential damages proximately resulting from the seller's breach. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

2. Where the seller of goods has breached a warranty with respect thereto the purchaser has the burden of proving both the cause of the loss and the extent thereof. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

3. Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact to estimate with a reasonable degree of certainty and exactness the actual damages. Shotkoski v. Standard Chemical Manuf. Co. _ 22

4. It is the duty of the District Court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture. Shotkoski v. Standard Chemical Manuf. Co. __ 22

5. In an action for criminal conversation the plaintiff is entitled to recover only for such damages as are the natural, probable consequence of the act or acts complained of, or such as are the direct probable consequence of the particular tort. Breiner v. Olson 120

6. In the absence of evidence of some special element of damage for which the law provides a specific means of measurement, it is the general rule that in an action for criminal conversation damages are incapable of precise measurement and there is no fixed rule for determining the amount thereof. Breiner v. Olson ---------- 120

7. Verdicts of juries in actions for interference with the marriage relationship should be set aside as excessive only where it clearly appears that the award was the result of passion and prejudice. Breiner v. Olson ---------- 120

8. The question of whether a stipulated sum is for a penalty or for liquidated damages is answered by the application of one or more aspects of the following rule: A stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty, and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach *or* is reasonably proportionate to the damages which have actually

been caused by the breach. Growney v. C M H Real Estate Co. ---------- 398

9. Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages. Growney v. C M H Real Estate Co. ---------- 398

10. In case of the destruction of a perennial crop the measure of damages is the difference between the value of the land immediately before the injury, with the crop growing thereon, and the value of the land immediately after the destruction of the crop. Steffen v. County of Cuming ---------- 442

11. As to any crop that may have been injured, but not entirely destroyed, the measure of damages is the difference between the value at maturity of the probable crop if there had been no injury, and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing. Steffen v. County of Cuming ---------- 442

12. Loss of past earnings is an item of special damage and must be specifically pleaded and proved. Impairment of earning capacity is an item of general damage and proof may be had under general allegations of injury and damage. Wortman v. Northwestern Bell Tel. Co. ---------- 637

13. It is unnecessary to plead or establish an actual loss of earnings to recover for loss of earning capacity. Wortman v. Northwestern Bell Tel. Co. ---- 637

14. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. Wortman v. Northwestern Bell Tel. Co. -- 637

15. The measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement. Ward v. Nebraska Electric G. & T. Coop., Inc. ---------- 641

16. 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. Ward v. Nebraska Electric G. & T. Coop., Inc. ---------- 641
17. A verdict may be set aside as excessive only where it is so clearly exorbitant as to indicate that it was a result of passion, prejudice, or mistake or that it is clear that the jury disregarded the evidence or controlling rules of law. Ward v. Nebraska Electric G. & T. Coop., Inc. ---------- 641
18. In an action where permanent, personal injury is claimed, the defendant may show as affecting damages that the plaintiff was a person of intemperate habits. Rawlings v. Andersen ---------- 686
19. An award of damages must be based on evidence and not on speculation and conjecture. Zweygardt v. Farmers Mut. Ins. Co. ---------- 811

Decedents' Estates.
1. Sections 30-1601, 30-1602, 30-1604, 30-1605, and 30-1606, R. R. S. 1943, and 30-1603, R. S. Supp., 1974, concerning appeals in probate matters, require that a transcript of the probate proceedings be filed in the District Court within 40 days from the date of the order which appellant challenges. Caha v. Nelson ---------- 333
2. Prepayment of transcript fees may be waived by the county judge. Caha v. Nelson ---------- 333
3. The cash bond required by section 30-1603, R. S. Supp., 1974, is not available for payment of the county judge's transcript fees. Caha v. Nelson -- 333

Deeds.
1. An alien may hold and convey the title to land acquired by purchase if no proceedings have been brought by the State to declare an escheat. Wilson v. State ---------- 228
2. A court of equity will reform the description contained in a deed of conveyance where it is established by clear and convincing evidence that the instrument fails to express the real intention of the parties. Booth v. Wilkinson ---------- 730
3. Where there is no mistake as to the identity of the land intended to be conveyed, but there is a mistake in the description of it, equity may reform the instrument to conform to the true intention of the parties. Booth v. Wilkinson ---------- 730
4. To justify reformation the mistake must be proven by clear and convincing evidence, but a mere denial

by one party that a mistake has been made, or the fact that testimony is conflicting, will not preclude reformation. Booth v. Wilkinson ---------- 730

Demand.

Ordinarily a demand upon the responsible officers of a governmental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity. Sesemann v. Howell -------- 798

Demurrer.

Where a record discloses that an action was not commenced within the time allowed by statute, the petition is subject to demurrer. Although a specific statement in the demurrer that the petition is barred by the statute of limitations would be more appropriate, a general allegation that the petition does not state facts sufficient to constitute a cause of action is adequate to raise the defense of the statute of limitations. George P. Rose Sodding & Grading Co. v. Dennis ---------- 221

Descent and Distribution.

1. Section 76-408, R. R. S. 1943, applies to sections 76-401 and 76-402, R. R. S. 1943. Wilson v. State -- 228
2. Where no proceedings to declare an escheat are commenced during the life of an alien, upon his death his interest passes to his heirs or devisees subject to the restrictions imposed by statute. Wilson v. State ---------- 228

Discovery.

1. In a criminal case, the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion. State v. Isley -- 539
2. In the absence of a showing of good cause the trial court may refuse to compel the production of documents for inspection by the adverse party. Hadenfeldt v. State Farm Mut. Auto. Ins. Co. ---------- 578
3. Under the provisions of section 27-612, R. S. Supp., 1975, a precondition to the production of and use by an adverse party of a witness' prior written statement is that the statement has been used by the witness to refresh his recollection. Rawlings v. Andersen ---------- 686

Dismissal and Nonsuit.

1. The right of a plaintiff to dismiss a cause of action before submission to the court is a statutory right and is not a matter of judicial grace or discretion. Miller v. Harris ---------- 75
2. A final submission of an action, within the purview of section 25-601, R. R. S. 1943, contemplates its submission upon both law and fact. Miller v. Harris ---------- 75
3. A plaintiff cannot dismiss his action without prejudice after there has been a final submission of it either to the court or jury. Miller v. Harris --- 75
4. When a case has been submitted upon a motion for directed verdict, plaintiff's absolute right to dismiss without prejudice is lost. Miller v. Harris -------- 75
5. When a motion for directed verdict has been overruled, there is no longer a final submission to the court where issues remain to be determined by the jury and have not been submitted to it. Miller v. Harris ---------- 75
6. Where a dismissal by the plaintiff is intended as a retraxit or abandonment of his cause, the facts supporting that conclusion must be affirmatively and clearly shown by the record. Miller v. Harris ---- 75
7. Good practice would indicate that when a plaintiff dismisses his petition he specify whether the dismissal is "with" or "without" prejudice. Miller v. Harris ---------- 75

Divorce.

1. While an action for dissolution of marriage is heard de novo in this court, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Olson v. Olson ---------- 8
2. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Olson v. Olson ---------- 8
3. The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will

not be disturbed on appeal. Olson v. Olson ------ 8
Lynch v. Lynch ---------- 804
4. Where, in an action for dissolution of marriage, the wife is awarded a judgment for alimony the court should, if possible, divide the property in such a manner as to permit the husband the means of paying the judgment awarded the wife. Olson v. Olson ---------- 8
5. A decree of divorce rendered in another state may be collaterally attacked by showing that the court was without jurisdiction, either of the subject matter of the suit or of the person of the defendant, without violating the full faith and credit clause of the federal Constitution. Tiedeman v. Tiedeman -- 15
6. In this jurisdiction, provisions for support money should be certain and definite, based upon present conditions, and not made to depend upon uncertain and speculative contingencies of hypothetical earnings or income. Breiner v. Breiner ---------- 143
7. A formula providing for calculation of additional support money at the end of every year based on a variable amount of bonus is disapproved by this court. Breiner v. Breiner ---------- 143
8. In determining the amount of child support the status, situation, and character of the parties, and all attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be noted. Breiner v. Breiner ---------- 143
9. While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Grummert v. Grummert _ 148
10. The question of alimony and division of property may be considered together; in determining the same, the court shall have regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the abilities of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Grummert v. Grummert ---------- 148
11. Upon dissolving a marriage, the trial court has

legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, title to which is held jointly by them, as the equities require. Grummert v. Grummert ---------- 148

12. The judgment of the trial judge is entitled to great weight in determining the best interests of children in custody proceedings. Young v. Young ---------- 163

13. Under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other. This applies equally to lawfully adopted children. Young v. Young ---------- 163

14. In an appeal from a decree of dissolution of a marriage, this court, in reaching its own findings, will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Hanisch v. Hanisch ---------- 204

15. In an action for dissolution of marriage, the property should be divided, if possible, in such manner as to permit the husband to retain the means for payment of any judgment awarded to the wife. Hanisch v. Hanisch ---------- 204

16. The rules for determining alimony or division of property in an action for dissolution of a marriage provide no mathematical formula by which such awards can be precisely determined. Hanisch v. Hanisch ---------- 204

17. Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown, but when alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony. § 42-365, R. S. Supp., 1974. Haug v. Haug ---------- 377

18. The rule in this state is that the fixing of alimony or distribution of property rests in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Essex v. Essex ---------- 385

19. Under section 42-365, R. S. Supp., 1974, a court may, upon dissolution of a marriage, 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. Essex v. Essex ---------- 385

20. Generally, assets held in trusts, established by third persons, for the benefit of one of the spouses or the children are not marital assets, even though under some circumstances an indigent spouse may reach them to satisfy a support obligation. Essex v. Essex ---------- 385

21. Under section 42-364, R. S. Supp., 1974, the trial court on its own motion may make subsequent changes or modifications in a decree of dissolution of a marriage in relation to any minor children and their maintenance when required, but only after notice to the parties and an opportunity to be heard. Francis v. Francis ---------- 417

22. In the absence of an abuse of discretion the amount of an award of child support will not be disturbed on appeal. Sutton v. Sutton ---------- 495

23. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. § 42-365, R. S. Supp., 1974. Browers v. Browers ---------- 743

24. An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification. Kasper v. Kasper ---------- 754

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. In determining those circumstances, the financial position of the husband, the earning capacity of each parent, and the estimated costs of support of the children must be taken into account. Lynch v. Lynch ---------- 804

26. The decision of a trial court in awarding child sup-

port will not be disturbed on appeal unless it appears that the court abused its discretion. Lynch v. Lynch 804

27. Over the objection of one of the parties, an application to modify an award of child support cannot be heard in a county other than the county in which the proceeding is pending. Hanson v. Hanson ---- 836

Docket Fee.

An appeal shall be deemed perfected, and the Supreme Court shall have jurisdiction of the cause when notice of appeal shall have been filed, and the docket fee deposited in the office of the clerk of the District Court, and after being so perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional. State v. Allen ---------- 560

Elections.

1. Failure of a disabled voter to sign the statement required of such voter on the disabled voter's envelope, and absence of the signature of a person knowing of the voter's disability as also required thereon, is not substantial compliance with the disabled voters' statutes, and the ballot of such voter should not be counted. Dugan v. Vlach ---------- 81
2. When a voter marks a ballot for a candidate in such manner that it cannot be determined whether the voter was voting for such candidate or had done so and then deleted or canceled such vote, the ballot should not be counted for such candidate. Dugan v. Vlach ---------- 81
3. A ballot signed by a voter should be rejected and not counted. Dugan v. Vlach ---------- 81
4. In an election contest, the burden of proving facts which may make the vote illegal is upon the party so contending; and when such vote has been counted, such party also has the burden of proving how it was cast. Dugan v. Vlach ---------- 81

Eminent Domain.

1. General benefits are those which arise from the fulfillment of the public object which justified the taking. Special benefits are those which arise from the particular relation of the land in question to the public improvement. Morehead v. State ------ 31
2. If the effect of the taking is to increase the value

of the remainder, or some of it, or not diminish the value at all, the condemner is entitled to introduce valuation testimony from which these inferences may be drawn. Morehead v. State ------ 31

3. The trial court has a wide discretion in determining whether evidence of a particular sale may be admitted. Morehead v. State ---------- 31

4. The questioning of a witness in a condemnation proceeding concerning the possibility of locating a transmission line at an alternative site is not proper, but does not necessarily constitute prejudicial error, particularly where objections to questions are immediately sustained before the witness answers. Ward v. Nebraska Electric G. & T. Coop., Inc. --- 641

5. The measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement. Ward v. Nebraska Electric G. & T. Coop., Inc. ---------- 641

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. Ward v. Nebraska Electric G. & T. Coop., Inc. ---------- 641

7. Where one appears and actively participates before a city council hearing where the city council is to vote to acquire land, he cannot afterward complain that he did not receive notice in a legal manner. M.R.D. Corp. v. City of Bellevue ---------- 722

Equity.

1. Article V, section 9, Constitution of Nebraska, grants chancery or equity jurisdiction to the District Court. Village of Springfield v. Hevelone -- 37

2. The equity jurisdiction of the District Court conferred by the Constitution cannot be legislatively limited or controlled. Village of Springfield v. Hevelone ---------- 37

3. In all appeals from the District Court to the Supreme Court in suits in equity, wherein review of some or all of the findings of fact of the District Court is asked by the appellant, it shall be the duty of the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the

bill of exceptions, and, upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the District Court or the fact that there may be some evidence in support thereof. Haller v. Chiles, Heider & Co., Inc. ---------- 65

4. The law will not imply a promise against the express declaration of the party to be charged, made at the time of the supposed undertaking, unless such party is under legal obligation paramount to his will to perform some duty, and he is not under such legal obligation unless there is a demand in equity and good conscience that he should perform the duty. Haggard Drilling, Inc. v. Greene ---------- 136

5. The mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract or unjust enrichment. Haggard Drilling, Inc. v. Greene ------ 136

6. Where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third party. Haggard Drilling, Inc. v. Greene ---------- 136

7. One who claims under an oral contract a portion of decedent's estate for services rendered has no standing to contest decedent's will in county court, and his remedy is restricted to the District Court for equitable relief. Dunmire v. Cool ---------- 247

8. Equity will grant specific performance of a parol agreement to leave property to another under an oral contract, if it is proved by evidence convincing and satisfactory, and if it has been wholly performed by one party and its nonperformance would be a fraud on him. Dunmire v. Cool ---------- 247

9. In the appeal of an equity case, the appellate court will give consideration to the fact that the trial court inspected the premises. Steffen v. County of Cuming ---------- 442

10. Equity aids the vigilant, not those who slumber on their rights. Campbell v. Kirby ---------- 610

11. Equitable conduct requires that a person should make timely assertion of his rights against another known

to be acting in ignorance of his claim. Campbell v. Kirby ---------- 610
12. Although ordinarily one has an undoubted right to bring an action within the statutory period, courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute when not to do so would work injustice in the particular case. Campbell v. Kirby ---------- 610
13. What constitutes laches is to be determined in the light of the circumstances of the particular case. Campbell v. Kirby ---------- 610
14. Actions in equity on appeal to this court are subject to the rule that when credible evidence on material questions of fact is in irreconcilable 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. Booth v. Wilkinson ------ 730
15. The principle prohibiting a party from mending his hold after commencement of litigation is ordinarily applicable only if some previous conduct on his part would render present assertion of the right unjust. Schwartz v. Riekes & Sons ---------- 737

Escheat.

1. Section 76-408, R. R. S. 1943, applies to sections 76-401 and 76-402, R. R. S. 1943. Wilson v. State - 228
2. Where no proceedings to declare an escheat are commenced during the life of an alien, upon his death his interest passes to his heirs or devisees subject to the restrictions imposed by statute. Wilson v. State ---------- 228

Estoppel.

The principle prohibiting a party from mending his hold after commencement of litigation is ordinarily applicable only if some previous conduct on his part would render present assertion of the right unjust. Schwartz v. Riekes & Sons ---------- 737

Evidence.

1. In reviewing the correctness of a trial court's action in directing a verdict, the party against whom the motion was directed is entitled to have the evidence, and every reasonable inference that can be drawn therefrom, construed in the light most favor-

able to him. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22
2. If the effect of the taking is to increase the value of the remainder, or some of it, or not diminish the value at all, the condemner is entitled to introduce valuation testimony from which these inferences may be drawn. Morehead v. State ---------- 31
3. The trial court has a wide discretion in determining whether evidence of a particular sale may be admitted. Morehead v. State ---------- 31
4. Speculation and conjecture are not sufficient to establish causation. Plaintiff's evidence must be sufficient to make the theory of causation reasonable and not merely possible. Pendleton Woolen Mills v. Vending Associates, Inc. ---------- 46
5. In determining the sufficiency of evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Daniels v. Andersen ---------- 95
6. In determining whether a party is entitled to a directed verdict the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. Treffer v. Seevers - 114
7. Error cannot be predicated on the admission of testimony when testimony of the same nature was previously admitted without objection. Breiner v. Olson ---------- 120
8. A motion for a mistrial because of the erroneous admission of evidence must be timely made. Breiner v. Olson ---------- 120
9. In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible, and which the exercise of due diligence could not have discovered and produced at trial. State v. Crawford ---------- 181
10. 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 that court's determination will not be disturbed on appeal. State v. Crawford --- 181
11. Evidence that at some previous time a house cat bit its owner, without any evidence as to the cir-

cumstances present when the biting occurred, is not sufficient to sustain a finding that the cat was a vicious or dangerous animal or that the owner had notice of its vicious or dangerous nature. Lee v. Weaver ---------- 194

12. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. Credit Bureau Services, Inc. v. Moylan ---------- 197

13. Evidence showing a course of conduct, scheme, design, or intent relevant to an element of the offense charged is admissible, even though it also tends to show the commission of other criminal offenses. State v. Hoffman ---------- 200

14. Evidence is admissible to show conduct by the defendant both before and after the date charged in the complaint in support of an allegation that defendant engaged in gambling for a livelihood. State v. Hoffman ---------- 200

15. The foundation for the admission of a tape recording taken from the possession of defendant is sufficient if the evidence shows the circumstances of the seizure and that the exhibit is in the same condition as at the time of seizure. State v. Hoffman 200

16. In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance. § 25-836, R. R. S. 1943. Timmerman v. Hertz ---------- 237

17. The right to introduce evidence depends upon there being an issue of fact as to which it is relevant. The issues are made by the pleadings; and unless there is an issue of fact before the court, there is no right to introduce evidence to prove or disprove the fact. Where the answer does not state a defense, the trial court should direct a verdict for the plaintiff. Timmerman v. Hertz ---------- 237

18. Before this court can consider evidence bearing upon an issue of fact, the evidence must have been offered in the trial court and embodied in a bill of exceptions. Timmerman v. Hertz ---------- 237

19. Proof of medical negligence (malpractice) requires

two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing *both* these essential elements rests upon the plaintiff's introduction of expert medical testimony. Kortus v. Jensen ---------- 261

20. The Supreme Court, on an appeal from the District Court in a workmen's compensation case, may set aside the judgment of the District Court only upon the grounds provided by statute which include "(3) the findings of fact are not supported by the evidence as disclosed by the record." Cain v. La Grange Steel Erectors, Inc. ---------- 272

21. When the record in a workmen's compensation case reflects nothing more than a resolution of conflicting medical testimony, this court will not substitute its judgment of facts for the judgment of the Workmen's Compensation Court. Cain v. La Grange Steel Erectors, Inc. ---------- 272

22. Where pain is sufficiently severe to prevent a normal function of a body member, a partial loss of use of that member results within the purview of section 48-121(3), R. R. S. 1943. Cain v. La Grange Steel Erectors, Inc. ---------- 272

23. A prior written statement of a witness, not a party, contrary to a statement made before an administrative tribunal, may be admitted by the tribunal for impeachment purposes, although not substantive evidence of the fact declared in the written statement. Tri-City Beer Co. v. Nebraska Liquor Control Commission ---------- 278

24. Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence. McGinty v. McGinty ---------- 281

25. In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Lacy 299

26. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favor-

able to the State, to support it. State v. Lacy ------ 299
State v. Isley ---------- 539

27. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausability of explanations, or weigh the evidence. State v. Brown ---------- 321

28. Even though an identification procedure may have been suggestive, the in-court identification may be allowed to go to the jury if under the totality of the circumstances it is determined to be reliable because it has an origin independent of the taint. State v. Banks ---------- 340

29. If identification procedures are such as to violate due process, the denial of a proper and timely motion to suppress and the admission of the in-court identification constitutes reversible error unless this court can say beyond a reasonable doubt that the error was harmless. State v. Banks ---------- 340

30. Bolstering of an eyewitness identification of an accused by reference to a pretrial identification of the accused is prohibited only where the pretrial identification procedures violate due process standards. State v. Banks ---------- 340

31. The general rule is that in a prosecution for a crime, where there is other evidence of the guilt of the accused and the crime is of such a nature that the acquisition of money may be regarded as a natural or ordinary result of its perpetration, evidence is admissible of the sudden acquisition of money by the defendant, or the marked improvement in his financial condition at or subsequent to the time the offense was committed, even though the source of the money is not definitely traced or identified by the prosecution. However, under some circumstances testimony as to possession of such money may be admissible without the foundation of showing the accused's previous financial condition. State v. Banks ---------- 340

32. Evidence of possession of a revolver or gun of prohibited description, which is in apparently good condition and has the characteristics and appearance commonly understood to be those of the firearm it purports to be, is prima facie evidence sufficient to go to the jury in a prosecution under section 28-1011.15, R. S. Supp., 1974. State v. Lee -------- 348

33. Where conviction of a previous felony is an essential element of the crime charged, proof of such prior conviction is properly made by offering in evidence authenticated copies of the complaint or information, and the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that the defendant is the same person presently before the court. State v. Lee ---------- 348

34. Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. Olds v. Jamison ---------- 388

35. A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous. Olds v. Jamison ---------- 388

36. Conflicting evidence relating to ambiguity and contradictory provisions in a written contract is for the finder of fact. Olds v. Jamison ---------- 388

37. The fact that one of the parties to a contract denies that a mistake was made does not prevent a finding of mutual mistake nor prevent reformation. Olds v. Jamison ---------- 388

38. Where a written contract is the basis of an action and neither party asks for a reformation thereof, it is the duty of the court to ascertain its meaning and enforce it accordingly. Olds v. Jamison -- 388

39. Issues of fact in will contest cases are determined in this court by the sufficiency of the evidence under the law to sustain the verdict of the jury or the findings of the District Court and, where the evidence in a case tried to the jury is conflicting, issues of fact are questions for its determination. Minor v. Bickford ---------- 402

40. Where negotiations between parties result in an agreement and that agreement is reduced to writing, executed, and delivered, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract. Frank McGill, Inc. v. Nucor Corp. ---------- 448

41. Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. Frank McGill, Inc. v. Nucor Corp. ---------- 448

42. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the

amount, without reliance upon opinion or discretion. Frank McGill, Inc. v. Nucor Corp. ---------- 448

43. A claim of title by adverse possession must be proved by a preponderance of the evidence showing actual, open, exclusive, and continuous possession under a claim of ownership for a period of 10 years. Mousel v. ten Bensel ---------- 456

44. Expert evidence is not ordinarily required to lay a foundation for the introduction of an aerial photograph. It is sufficient that some witness familiar with the subject matter can testify that it is an accurate and true representation of the scene depicted. Mousel v. ten Bensel ---------- 456

45. When the State calls a witness to challenge defendant's claim of truth and veracity, a line of inquiry directed toward the defendant's previous character is firmly forbidden the State on direct examination. State v. Boss ---------- 467

46. When a defendant testifies on his own behalf, the prosecuting attorney may question him as to his previous convictions for felony and the number thereof, but no details as to the nature of the charges or other details may be elicited or received. State v. Boss ---------- 467

47. A defendant is entitled to offer evidence of his reputation for truth and veracity. The prosecution is entitled to dispute that evidence only by evidence of bad reputation for truth and veracity. State v. Boss ---------- 467

48. Jurors are judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their duty to determine the truth. State v. Boss ---------- 467

49. Resolutions of conflicts in evidence and credibility of witnesses are not for the reviewing court, but for the jury. State v. Boss ---------- 467

50. The voluntariness of a consent to search is a question of fact to be determined by the totality of the circumstances. State v. Rathburn ---------- 485

51. The State has the burden of proving that a consent to search was freely and voluntarily given. State v. Rathburn ---------- 485

52. An officer's statement that he will obtain a search warrant is not per se coercive and will not alone

vitiate the voluntariness of a consent. State v. Rathburn ---------- 485
53. Intent to distribute may be inferred from the equipment and quantity of controlled substance seized, the manner of packaging, the form of drug, and testimony of knowledgeable witnesses. State v. Rathburn ---------- 485
54. The admission of irrelevant evidence will be considered "harmless error," not requiring reversal of a judgment, unless it affects the "substantial rights of the adverse party," when considered in connection with other evidence properly adduced. § 29-2308, R. R. S. 1943. State v. Rathburn ---------- 485
55. Proof of contradictory statements of a witness is received not as evidence of the facts declared, but for the purpose only of aiding the jury in estimating the credibility of the witness. State v. Isley ---- 539
56. A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to matters relative to the issues. Such declarations are not substantive evidence of the fact declared. State v. Isley ---------- 539
57. The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated in the impeaching testimony. State v. Isley ---------- 539
58. The polygraph, commonly known as a lie detector, used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory. State v. Steinmark ---------- 545
59. It is the general rule that in a homicide or assault case a defendant may show the dangerous and turbulent character of the victim, but may do so only after laying a foundation by evidence tending to show self-defense. State v. Escamilla ---------- 558
60. An illegally obtained confession may be used to impeach a defendant's testimony and if he elects not to testify he has not been deprived of his constitutional right to testify. State v. Escamilla -- 558
61. In the absence of a request for a hearing to determine voluntariness of a confession, a defendant cannot complain of the failure to hold a Jackson v. Denno-type hearing. State v. Escamilla ------ 558

62. In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565
63. Section 25-12,109, R. S. Supp., 1974, provided: A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission. Bobbie Brooks, Inc. v. Hyatt ---------- 596
64. The purpose of section 25-12,109, R. S. Supp., 1974, was to permit admission of systematically entered records without the necessity of identifying, locating, and producing as witnesses the individuals who made entries in the records in the regular course of the business. Bobbie Brooks, Inc. v. Hyatt ---------- 596
65. The Uniform Business Records As Evidence Act was intended to bring the realities of business and professional practice into the courtroom and the act should not be interpreted narrowly to destroy its obvious usefulness. Bobbie Brooks, Inc. v. Hyatt - 596
66. In order to establish a trust by parol evidence, the proof must be clear, unequivocal, and convincing. Campbell v. Kirby ---------- 610
67. The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. State v. McDonald ---------- 625
68. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. Wortman v. Northwestern Bell Tel. Co. - 637
69. The questioning of a witness in a condemnation proceeding concerning the possibility of locating a transmission line at an alternative site is not proper, but does not necessarily constitute prejudicial error, particularly where objections to questions are immedi-

ately sustained before the witness answers. Ward v. Nebraska Electric G. & T. Coop., Inc. ---------- 641

70. A verdict may be set aside as excessive only where it is so clearly exorbitant as to indicate that it was a result of passion, prejudice, or mistake or that it is clear that the jury disregarded the evidence or controlling rules of law. Ward v. Nebraska Electric G. & T. Coop., Inc. ---------- 641

71. This court will not, unless justice requires it, reverse a decision of the trial court refusing to apply legislative changes in rules of evidence, which changes were not law at the time of trial only because the effective date of the legislative act had not been reached. Rawlings v. Andersen ---------- 686

72. In an action where permanent, personal injury is claimed, the defendant may show as affecting damages that the plaintiff was a person of intemperate habits. Rawlings v. Andersen ---------- 686

73. A witness may testify as to the posted speed limit at a particular location if appropriate foundation is laid. Rawlings v. Andersen ---------- 686

74. Under the provisions of section 27-612, R. S. Supp., 1975, a precondition to the production of and use by an adverse party of a witness' prior written statement is that the statement has been used by the witness to refresh his recollection. Rawlings v. Andersen ---------- 686

75. Photographs, accurately depicting the matters shown therein, are not admissible in evidence unless the matters shown are relevant to the issues in the case. Glass v. Harper ---------- 722

76. To justify reformation the mistake must be proven by clear and convincing evidence, but a mere denial by one party that a mistake has been made, or the fact that testimony is conflicting, will not preclude reformation. Booth v. Wilkinson ---------- 730

77. Actions in equity on appeal to this court are subject to the rule that when credible evidence on material questions of fact is in irreconcilable 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. Booth v. Wilkinson ---------- 730

78. In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is

the sufficiency of the pleadings to sustain the judgment of the trial court. Tunks v. O'Brien ------- 735

79. On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. Scott v. Young Men's Christian Assn. ---- 746

80. In determining the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and he must have the benefit of every inference that can reasonably be drawn from the evidence. Torstenson v. Melcher ---------- 764
Piccolo-Lynam Drug Co. v. Omaha Nat. Bank --- 772

81. The verdict of a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Torstenson v. Melcher ---------- 764
Piccolo-Lynam Drug Co. v. Omaha Nat. Bank ----- 772

82. A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must be, proved by a number of indefinite acts, conditions, and circumstances, which vary according to the purpose to be accomplished. If it be proved that defendants, by their acts, pursued the same object, although by different means, one performing one part and another another part, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object. Piccolo-Lynam Drug Co. v. Omaha Nat. Bank ------ 772

83. Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Magdaleno v. Nebraska Panhandle Community Action Agency ---------- 783

84. In a workmen's compensation proceeding a District Court finding against a party will only be set aside if the evidence compels a finding for that party. Magdaleno v. Nebraska Panhandle Community Action Agency ---------- 783

85. Section 24-541, R. S. Supp., 1974, providing for review "de novo on the record" intends that the District Court exercise independent judgment, which must be based on the issues, pleadings, and evidence presented in the lower court unless additional evi-

dence is adduced pursuant to that statute. Von Seggern v. Kassmeier Implement ---------- 791

86. In equity cases where the trial court has made personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Winkle v. Mitera ---------- 821

87. A presumption is not evidence but it may take the place of evidence unless and until evidence appears to overcome or rebut it, and when evidence sufficient in quality appears to rebut it, the presumption disappears and thereafter the party having the burden of proof on the issue must, in civil actions, sustain his position by a preponderance of the evidence. First Nat. Bank in Kearney v. Bunn ---------- 829

Expert Witnesses.

A specialist from one medical community is competent to testify as an expert witness in a medical malpractice case as to the standard of care or skill required in another community, if the witness has knowledge of and familiarity with the practice and standard of the locality in question or in similar or like communities. Kortus v. Jensen ---------- 261

Fees.

1. The cash bond required by section 30-1603, R. S. Supp., 1974, is not available for payment of the county judge's transcript fees. Caha v. Nelson --- 333

2. Section 48-118, R. R. S. 1943, provides in part: "If the employee or his personal representative or the employer or his compensation insurer join in the prosecuting of such claim and are represented by counsel, the reasonable expenses and the attorney's fees shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought." Schulz v. General Wholesale Coop. Co., Inc. ---------- 410

3. That portion of section 48-118, R. R. S. 1943, involved here, ordinarily does not apply to require a division of attorney's fees where the subrogation

interest of the employer or its insurance carrier is fully and adequately represented by its own counsel and where the services of the employee's attorney were not relied upon to effect the subrogation recovery. Schulz v. General Wholesale Coop. Co., Inc. 410

4. In an action on a performance bond where the surety admits execution of the bond but does not admit defective performance by the contractor, the plaintiff is entitled to recover an attorney's fee under section 44-359, R. R. S. 1943. Omaha Home for Boys v. Stitt Constr. Co., Inc. ---------- 422

5. A trial court's award of attorney's fees will not be reversed on appeal unless an abuse of discretion is shown. Ward v. Nebraska Electric G. & T. Coop., Inc. ---------- 641

Fixtures.

1. Section 9-401, U. C. C., requires that in regard to goods which are to become fixtures to perfect a security interest, it must be filed in the office where a real estate mortgage would be filed or recorded. Tillotson v. Stephens ---------- 104

2. Section 9-313, U. C. C., provides that a security interest on goods which become fixtures does not take priority over a subsequent purchaser for value of an interest in the real estate if the subsequent purchase is made without knowledge of the security interest and before it is perfected. Tillotson v. Stephens ---------- 104

3. Where property is subject to a mortgage and can be legally sold and conveyed, it is immaterial whether or not a purchaser had notice of plaintiff's interest in the property. Tillotson v. Stephens ---------- 104

Foreclosure.

1. Section 9-313, U. C. C., provides that anyone, other than the mortgage holder, purchasing at a foreclosure sale is a subsequent purchaser. Tillotson v. Stephens ---------- 104

2. A bona fide mortgagee is entitled to the same protection as a bona fide purchaser or grantee. Tillotson v. Stephens ---------- 104

3. Where property is subject to a mortgage and can be legally sold and conveyed, it is immaterial whether or not a purchaser had notice of plaintiff's interest in the property. Tillotson v. Stephens ---------- 104

Foreign Jurisdictions.

The exclusionary rule does not apply to evidence seized in a search made by Mexican authorities in Mexico at the request of a police officer of this state. State v. Barajas ---------- 502

Forfeitures.

1. Section 21-2016, R. R. S. 1943, restricting forfeitures of subscription agreements, is applicable to a subscription agreement for additional authorized capital stock made after the organization of the corporation. Sweeney v. Bridal Fair, Inc. ---------- 166
2. Where a total disability clause, purporting to make physical and mental helplessness essential to liability of insurer, if enforced literally, would result in an unreasonable and unjust forfeiture of accident insurance, it should be liberally construed to mean such a disability as renders insured unable to perform the substantial and material acts of his business or occupation in the usual way. Brown v. Inter-Ocean Ins. Co. ---------- 189

Fraud.

1. To maintain an action for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them, or else were made without knowledge as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby. McGinty v. McGinty ---------- 281
2. Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence. McGinty v. McGinty ---------- 281
3. Fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity or things to be done or performed in the future. McGinty v. McGinty ---------- 281
4. An essential element of actionable false representation is justifiable reliance on the representation. Growney v. C M H Real Estate Co. ---------- 398
5. The general rule is that where ordinary prudence would have prevented the deception, an action for

the fraud perpetrated by such deception will not lie. Growney v. C M H Real Estate Co. ---------- 398

Fraudulent Conveyances.

A creditor whose debt did not exist at the date of a voluntary conveyance by the debtor cannot attack such conveyance for fraud, unless he pleads and proves that the same was made to defraud subsequent creditors whose debts were in contemplation at the time. First Nat. Bank in Kearney v. Bunn ------ 829

Governmental Powers.

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. American Fed. of S., C. & M. Emp. v. Department of Public Institutions ---------- 253

Guaranty.

1. A guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control, and, in the absence of assent, waiver, or estoppel, he is generally released by an act of the creditor which deprives him of such right. Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc. ---------- 292
2. Where the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor (a) surrenders or releases the security, or (b) willfully or negligently harms it, or (c) fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action. Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc. ---------- 292

Guilty Plea.

1. While it is advisable to do so, the trial court is not required to specifically inquire of the defendant as to the factual basis for a plea of guilty. Inquiry of the county attorney or examination of the presentence report, if before the court, are alternative methods. State v. Painter ---------- 183
2. A more severe punishment cannot be exacted in order

to punish a convicted person for exercising his right to trial. However, sentence concessions are proper when a defendant pleads guilty to an offense. State v. Lacy ---------- 299

Habeas Corpus.

The appeal procedure in habeas corpus actions is the same as that required for a like purpose in civil actions. Nebraska Children's Home Soc. v. Collins - 531

Highways.

1. The right of direct access to an existing street or highway is a property right of which an abutting owner cannot be deprived without due process of law and compensation for his loss. Morehead v. State ---------- 31
2. There is no right of direct access to a highway constructed upon a new right-of-way where no highway previously existed if the new highway is designated as a controlled access facility from the beginning. Morehead v. State ---------- 31
3. One entering a highway from a private road must yield the right-of-way to all vehicles approaching on such highway. Laux v. Robinson ---------- 601
4. A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way. Laux v. Robinson ------- 601
5. If the driver of an automobile entering a highway from a private road looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence. Laux v. Robinson ---------- 601
6. The duty to look for approaching vehicles implies the duty to see that which is in plain sight. Laux v. Robinson ---------- 601
7. An automobile driver is required to see only those approaching vehicles which relative to speed and distance are within the radius which denotes the limit of danger. Laux v. Robinson ---------- 601
8. One having the right-of-way may not on that account proceed in disregard of the surrounding circumstances and potential dangers. One having a right-of-way is not thereby relieved from the duty

of exercising ordinary care to avoid accidents. Laux v. Robinson ---------- 601

Homicide.

1. It is the general rule that in a homicide or assault case a defendant may show the dangerous and turbulent character of the victim, but may do so only after laying a foundation by evidence tending to show self-defense. State v. Escamilla ---------- 558
2. Where an information charges a defendant with a killing committed in the perpetration of a robbery, it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of manslaughter, even though such an instruction is requested. State v. McDonald ---------- 625

Indictments and Informations.

1. Separate offenses must be set out in separate counts in an information. State v. French ---------- 88
2. Where the several offenses charged in a multicount indictment or information involve factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other. State v. French ---------- 88
3. A defendant charged with assaulting and resisting a law enforcement officer in the performance of his official duties may be found guilty upon proof of either an assault or a resisting where the statute is worded in the disjunctive and in such a case it is not error for the trial court to instruct the jury as to the elements of the offense in the language of the statute. § 28-729.01, R. S. Supp., 1974. State v. Davis ---------- 361
4. In an information containing three counts, a verdict of guilty on two of the counts and an acquittal on the other is not inconsistent, although the evidence would have justified the conviction on all the counts. State v. Steinmark ---------- 545
5. Where an information charges a defendant with a killing committed in the perpetration of a robbery, it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of manslaughter, even though such an instruction is requested. State v. McDonald ---------- 625

Industrial Development.

1. The authority of a municipality or county to use public funds to own, acquire, develop, lease, and sell real and personal property for industrial development purposes is measured by the provisions of Article XIII, section 2, of the Nebraska Constitution, and the enabling statutes lawfully enacted by the Legislature pursuant to the foregoing provision of the Constitution. Chase v. County of Douglas ---- 838
2. Article XIII, section 2, of the Constitution of Nebraska, is the full measure of the power of the state through the cities and counties to lend the credit of the state. Article XIII, section 3, remains in the Constitution and under its terms any loan of credit made by the state, by a county, or by a municipality for a private individual, association, or corporation is unconstitutional. Chase v. County of Douglas ---------- 838
3. The authorization granted in section 18-1401, R. R. S. 1943, to a city or county to purchase property for industrial development violates the provisions of Article XIII, section 3, of the Constitution, because it authorizes the use of tax money and income of the governmental entity from its proprietary functions for such purpose. Chase v. County of Douglas 838

Infants.

1. The judgment of the trial judge is entitled to great weight in determining the best interests of children in custody proceedings. Young v. Young ---------- 163
2. Under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other. This applies equally to lawfully adopted children. Young v. Young ---------- 163
3. In a proceeding to terminate parental rights a physician may be required to testify concerning his examination and treatment of the parent of a dependent and neglected child. State v. Lewis ------ 408
4. In the absence of an abuse of discretion the amount of an award of child support will not be disturbed on appeal. Sutton v. Sutton ---------- 495
5. The first and primary consideration in any case involving the custody of a child is the best interest of the child. State v. Loomis ---------- 552

Injunction.

1. Notwithstanding section 24-517 (5), R. S. Supp., 1974, the District Court retains jurisdiction in injunction actions brought to enforce zoning ordidinances. Village of Springfield v. Hevelone ---- 37
2. The exercise of due care by the owner of a business in its operation is not a defense to an action to enjoin its operation as a nuisance. Botsch v. Leigh Land Co. ---------- 54
3. A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proved that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly. Botsch v. Leigh Land Co. ----------54, 509
4. A party seeking injunction must establish by competent evidence every controverted fact necessary to entitle him to relief, and an injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. Steffen v. County of Cuming -- 442

Instructions.

1. The correctness of a ruling of the District Court in giving or refusing instructions cannot be considered by the Supreme Court unless such ruling is first challenged in the District Court by a motion for new trial. Breiner v. Olson ---------- 120
2. An assignment in a motion for a new trial that errors of law occurred at the trial does not present the correctness of giving or refusing instructions. Breiner v. Olson ---------- 120
3. In a case where it becomes necessary to give further instructions to a jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel. Breiner v. Olson ---------- 120
4. It is error to give an instruction to a jury after it has retired to deliberate out of the presence of the parties and their counsel, but if it clearly appears that prejudice did not and could not flow therefrom,

this is error without prejudice and not ground for reversal. Breiner v. Olson ---------- 120
5. Generally, it is error to give the jury instructions which contain inconsistent and conflicting paragraphs relating to the burden of proof. Kaspar v. Schack ---------- 215
6. The giving of an instruction which places the burden of proof to establish some of the facts put in issue by the pleadings on the wrong party is reversible error. Kaspar v. Schack ---------- 215
7. Where, in order to fairly and intelligibly present all the issues in a case to the jury by the instructions, it becomes necessary to repeat a proposition, its repetition, in proper connection with other facts or principles involved, is not erroneous. Kasper v. Schack ---------- 215
8. A defendant charged with assaulting and resisting a law enforcement officer in the performance of his official duties may be found guilty upon proof of either an assault or a resisting where the statute is worded in the disjunctive and in such a case it is not error for the trial court to instruct the jury as to the elements of the offense in the language of the statute. § 28-729.01, R. S. Supp., 1974. State v. Davis ---------- 361
9. Alleged errors in instructions given by the trial court will not be considered on appeal when they were not raised in the motion for new trial. Omaha Home for Boys v. Stitt Constr. Co., Inc. ---------- 422
10. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Omaha Home for Boys v. Stitt Constr. Co., Inc. ---------- 422
11. Error may not be predicated on the refusal to give an instruction which either erroneously or only partially covers the applicable law. State v. Boss ---------- 467
12. Instructions to the jury should be considered as a whole and if they fairly submit the case, they are not erroneous. Hadenfeldt v. State Farm Mut. Auto. Ins. Co. ---------- 578
13. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence. Laux v. Robinson ---------- 601
14. Where an information charges a defendant with a killing committed in the perpetration of a robbery, it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of

manslaughter, even though such an instruction is requested. State v. McDonald ---------- 625
15. A party may not complain that correct instructions are not sufficiently specific when no request is made for more specific instructions. Rawlings v. Andersen ---------- 686

Insurance.

1. The word "immediate" in referring to the notice required in an insurance policy means with reasonable celerity, with reasonable and proper diligence; and what is a reasonable time depends upon all the facts and circumstances of each particular case. Zukaitis v. Aetna Cas. & Sur. Co. ---------- 59
2. Ordinarily, an agent having authority to solicit insurance, receive and forward applications, deliver policies, and collect premiums is a general agent of the insurance company and notice to him will satisfy a requirement that notice must be sent to the company. Zukaitis v. Aetna Cas. & Sur. Co. - 59
3. The revocation of an agent's authority does not become effective as between the principal and third persons until they receive notice of the termination. Zukaitis v. Aetna Cas. & Sur. Co. ---------- 59
4. An accident insurance policy, providing for the payment of stipulated sums for accidental injury or death of the insured, where such injury or death is from violent and accidental means alone, resulting directly, independently, and exclusively of all other causes and also providing that there shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect, or bodily infirmity is a contributing cause of death or injury, means that recovery may be had when the accident is the active, efficient, and precipitating cause which sets in motion the agencies which resulted in the injury or death without the intervention of any other independent force, even though existing infirmities of the insured may be necessary conditions to the result. Brown v. Inter-Ocean Ins. Co. ---------- 189
5. Where a total disability clause, purporting to make physical and mental helplessness essential to liability of insurer, if enforced literally, would result in an unreasonable and unjust forfeiture of accident insurance, it should be liberally construed to mean such a disability as renders insured unable to per-

form the substantial and material acts of his business or occupation in the usual way. Brown v. Inter-Ocean Ins. Co. ---------- 189

6 Section 44-516, R. R. S. 1943, requires registered or certified mail for every cancellation notice regardless of the period the policy has been in force. Saunders v. Mittlieder ---------- 232

7. In an action on a performance bond where the surety admits execution of the bond but does not admit defective performance by the contractor, the plaintiff is entitled to recover an attorney's fee under section 44-359, R. R. S. 1943. Omaha Home for Boys v. Stitt Constr. Co., Inc. ---------- 422

8. The liability of an insurer to pay in excess of the face of the policy accrues when the insurer, having exclusive control of settlement, in bad faith refuses to compromise a claim for an amount within the policy limit. Hadenfeldt v. State Farm Mut. Auto. Ins. Co. ---------- 578

9. An insurer is obligated to use due care and reasonable diligence to ascertain the facts surrounding a claim and obtain competent legal advice concerning the claim. Hadenfeldt v. State Farm Mut. Auto. Ins. Co. ---------- 578

10. An "uninsured motor vehicle" within the meaning of section 60-509.01, R. R. S. 1943, includes one which does not have accident liability insurance affording the coverage for personal injury and death in the limits of liability specified by section 60-509, R. R. S. 1943. Emery v. State Farm Mut. Auto. Ins. Co. ---------- 619

11. A motor vehicle which is covered by liability insurance for personal injury and death in the limits specified by section 60-509, R. R. S. 1943, does not become an uninsured motor vehicle when, because of multiple claims made, that insurance is insufficient to satisfy the legal liability of the insured to each individual claimant to the limits specified for individual claims under section 60-509, R. R. S. 1943. Emery v. State Farm Mut. Auto. Ins. Co. - 619

12. In the resolution of a controversy concerning the meaning of an insurance contract and the coverage therein, the contract must be viewed as a whole. Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co. ---------- 658

13. An insurance contract must be construed so as to give effect to the intent of the parties at the time

the contract was made. Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co. ---------- 658
14. Insurance companies have the same right as individuals to limit their liability. Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co. -------- 658
15. The parties to an insurance contract may contract for any lawful coverage and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. Pettid v. Edwards ---------- 713
16. An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. Pettid v. Edwards -------- 713
17. The purpose of the uninsured motorist statute is to give a person injured by an uninsured motorist the same protection he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Pettid v. Edwards ---------- 713
18. The Nebraska uninsured motorist statute does not prohibit a limitation of liability to the minimum limits required by statute in each policy issued even though a single policy may insure more than one automobile. Pettid v. Edwards ---------- 713
19. If an insurance company has knowledge through its agent, when a contract of insurance is effected, that the premises are vacant or unoccupied, the issuance of the policy waives any provision as to vacancy or unoccupancy, at least so far as the existing vacancy is concerned. Zweygardt v. Farmers Mut. Ins. Co. - 811
20. An award of damages must be based on evidence and not on speculation and conjecture. Zweygardt v. Farmers Mut. Ins. Co. ---------- 811

Intent.

1. When the literal enforcement of a statute would result in absurdity, the courts will assume that such consequences were not intended. State v. Black -- 366
2. Where a contract is ambiguous, the court must determine the intent of the parties and the ambiguity must be resolved so as to give effect to that intent. Frank McGill, Inc. v. Nucor Corp. -- 448
3. Intent to distribute may be inferred from the equipment and quantity of controlled substance seized,

the manner of packaging, the form of drug, and testimony of knowledgeable witnesses. State v. Rathburn ---------- 485

Interest.

1. In the absence of agreement to the contrary, liquidated demands bear interest whereas unliquidated demands do not. Frank McGill, Inc. v. Nucor Corp. - 448
2. Where a reasonable controversy exists as to the plaintiff's right to recover and the amount of such recovery, a claim is generally considered to be unliquidated and prejudgment interest is not allowed. Frank McGill, Inc. v. Nucor Corp. ---------- 448
3. Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. Frank McGill, Inc. v. Nucor Corp. ---------- 448
4. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount, without reliance upon opinion or discretion. Frank McGill, Inc. v. Nucor Corp. ---------- 448

Intoxicated Persons.

In the case of an intoxicated prisoner the police officer is impelled to use a higher degree of care for his safety and protection than is necessary or expected in the case of one who has control of his physical and mental faculties and able to protect himself. Daniels v. Andersen ---------- 95

Intoxicating Liquors.

1. Regulating the traffic in liquors involves not just prescribing who may sell liquor and under what conditions, but conversely, who may not, and under what circumstances the right to sell liquors may be forfeited. Bali Hai', Inc. v. Nebraska Liquor Control Commission ---------- 1
2. The power to regulate and control traffic in liquors necessarily confers the powers to refuse a license or limit the number of licenses to be granted. Bali Hai', Inc. v. Nebraska Liquor Control Commission - 1
3. The right to engage in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations or even a suppression of the traffic do not deprive persons of property without due process of law, violate the privileges or immunities clause, the due process clause, the uniformity provisions, nor, un-

less they contain irrational classifications or invidious discriminations, the equal protection of the law as prohibited by the state and federal Constitutions. Bali Hai', Inc. v. Nebraska Liquor Control Commission ---------- 1

4. Equipment furnished by a wholesale distributor of beer licensee to a retail package liquor licensee, and used only for display purposes, does not thereby become an advertising sign under the provisions of section 53-169, R. R. S. 1943. Tri-City Beer Co. v. Nebraska Liquor Control Commission ---------- 278

Inviter and Invitee.

1. Individuals who come upon premises for the purpose of making a delivery of merchandise or goods or for the purpose of picking up goods from the premises are generally held to be invitees. Collins v. Herman Nut & Supply Co. ---------- 665
2. The duty of a storekeeper to an invitee is to use reasonable care to keep the premises reasonably safe for the use of the invitee, but he is not the insurer against accident. Collins v. Herman Nut & Supply Co. ---------- 665
3. Generally, the liability of an owner or occupant of the premises is predicated on proof of his superior knowledge, actual or constructive, of dangers to which an invitee is subjected and of which the invitee is unaware. Collins v. Herman Nut & Supply Co. ---------- 665

Jails and Jailers.

1. It is a basic principle of law that a jailer has a duty to exercise that degree of care necessary to provide reasonably adequate protection for his prisoners. Daniels v. Andersen ---------- 95
2. In the case of an intoxicated prisoner the police officer is impelled to use a higher degree of care for his safety and protection than is necessary or expected in the case of one who has control of his physical and mental faculties and able to protect himself. Daniels v. Andersen ---------- 95

Judges.

1. A District Judge has no inherent judicial authority at chambers, and has only such authority or jurisdiction at chambers as is conferred by statute. Hanson v. Hanson ---------- 836

2. Over the objection of one of the parties, an application to modify an award of child support cannot be heard in a county other than the county in which the proceeding is pending. Hanson v. Hanson --- 836

Judgments.

1. In an action to register the judgment of a foreign court of general jurisdiction, there is generally a presumption that said foreign court had jurisdiction to enter said decree. Tiedeman v. Tiedeman ------ 15
2. A decree of divorce rendered in another state may be collaterally attacked by showing that the court was without jurisdiction, either of the subject matter of the suit or of the person of the defendant, without violating the full faith and credit clause of the federal Constitution. Tiedeman v. Tiedeman 15
3. In a jury-waived action, the judgment of the District Court on the facts has the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it. Elm Creek State Bank v. Johnson ---------- 131
4. In an action for the recovery of amounts due upon a severable contract, judgment may be rendered for the items established by the evidence, but not for any claim not proved as alleged. Breiner v. Olson ---------- 290
5. The judgment of the trial court in an action at law in which a jury has been waived has the effect of the verdict of a jury and will not be set aside unless clearly wrong. Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc. ---------- 292
6. Under section 42-364, R. S. Supp., 1974, the trial court on its own motion may make subsequent changes or modifications in a decree of dissolution of a marriage in relation to any minor children and their maintenance when required, but only after notice to the parties and an opportunity to be heard. Francis v. Francis ---------- 417
7. A judgment will not be reversed because a lower court gave an incorrect reason for its decision if the result reached was correct. State v. Highly -- 498
8. A judgment will not be reversed because the trial court failed to set forth findings for the reason for its decision to overrule a motion to transfer the case to juvenile court where the defendant failed to direct the attention of the trial court to the require-

ment of the statute at any time by motion for new trial or otherwise. State v. Highly ---------- 498
9. In the absence of a motion for a new trial, where a judgment is sustained by the pleadings, it will ordinarily be affirmed. Nebraska Children's Home Soc. v. Collins ---------- 531
10. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565
11. In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565
12. It shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it. § 25-1127, R. R. S. 1943. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565
13. Where no section 25-1127, R. R. S. 1943, request has been made, the correct rule is: If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565
14. A general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. Henkle & Joyce Hardware Co. v. Maco, Inc. ------ 565
15. The rules stated in the three immediately preceding syllabi are not made inapplicable merely because in addition to the general finding the trial court also mentioned certain matters specifically. Henkle & Joyce Hardware Co. v. Maco, Inc. ------ 565
16. Where an action at law is tried to the court without a jury, the findings of the court have the same effect as a jury verdict, and will not be disturbed on appeal unless clearly wrong. L. Robert Kimball Consulting Engineers, Inc. v. Ryan ---------- 677
17. The judgment of a trial court in an action at law where a jury has been waived has the effect of a

verdict of a jury and should not be set aside on appeal unless clearly wrong. Glass v. Harper ---- 724
Zweygardt v. Farmers Mut. Ins. Co. ---------- 811

18. An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification. Kasper v. Kasper ---------- 754
19. In determining the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and he must have the benefit of every inference that can reasonably be drawn from the evidence. Torstenson v. Melcher ---------- 764
Piccolo-Lynam Drug Co. v. Omaha Nat. Bank ---- 772
20. In reviewing orders affecting procedural matters this court will presume in the absence of evidence to the contrary that the District Court has not abused its discretion, and the burden of showing an abuse of discretion is upon the party adversely affected by the District Court's order. Von Seggern v. Kassmeier Implement ---------- 791
21. The decision of a trial court in awarding child support will not be disturbed on appeal unless it appears that the court abused its discretion. Lynch v. Lynch ---------- 804
22. The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Lynch v. Lynch ------ 804
23. A decree of foreclosure of a tax lien is of no effect as against the persons who were at the time in actual possession of and who were not made parties defendant in the action and had no notice or knowledge thereof. Winkle v. Mitera ---------- 821

Juries.

In order for jury misconduct to be the basis for a new trial, the misconduct must be prejudicial to the defendant. State v. Isley ---------- 539

Jurisdiction.

1. Section 48-118, R. R. S. 1943, provides in part: "If the employee or his personal representative or the employer or his compensation insurer join in the prosecuting of such claim and are represented

by counsel, the reasonable expenses and the attorney's fees shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought." Schulz v. General Wholesale Coop. Co., Inc. ---------- 410

2. Any order made by the District Court subsequent to the vesting of jurisdiction in this court is void and of no effect. State v. Allen ---------- 560
3. A District Judge has no inherent judicial authority at chambers, and has only such authority or jurisdiction at chambers as is conferred by statute. Hanson v. Hanson ---------- 836
4. Over the objection of one of the parties, an application to modify an award of child support cannot be heard in a county other than the county in which the proceeding is pending. Hanson v. Hanson 836

Jury.

1. A jury is not ordinarily required in a civil contempt proceeding. Village of Springfield v. Hevelone --- 37
2. In jury cases, the jurors are the judges of the credibility of the witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment. State v. French ---------- 88
3. In a case where it becomes necessary to give further instructions to a jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel. Breiner v. Olson ---------- 120
4. It is error to give an instruction to a jury after it has retired to deliberate out of the presence of the parties and their counsel, but if it clearly appears that prejudice did not and could not flow therefrom, this is error without prejudice and not ground for reversal. Breiner v. Olson ---------- 120
5. In the absence of a showing of prejudice, a method of drawing and empaneling a jury substantially complying with the statute will be upheld. State v. Hoffman ---------- 200
6. Jurors are judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit

or reject the whole or any part of the testimony of a witness in the exercise of their duty to determine the truth. State v. Boss ---------- 467
7. Resolutions of conflicts in evidence and credibility of witnesses are not for the reviewing court, but for the jury. State v. Boss ---------- 467
8. The validity of an objection to the taking of notes by jurors depends on the subsequent use of those notes resulting in prejudice to the objector. Ward v. Nebraska Electric G. & T. Coop., Inc. -------- 641
9. 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. Ward v. Nebraska Electric G. & T. Coop., Inc. ---------- 641

Laches.

1. Although ordinarily one has an undoubted right to bring an action within the statutory period, courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute when not to do so would work injustice in the particular case. Campbell v. Kirby ---------- 610
2. What constitutes laches is to be determined in the light of the circumstances of the particular case. Campbell v. Kirby ---------- 610

Legislature.

1. The Legislature has plenary legislative authority except as limited by the state and federal Constitutions. American Fed. of S., C. & M. Emp. v. Department of Public Institutions ---------- 253
2. Article IV, section 19, of the Constitution of the State of Nebraska, provides: "The general management, control and government of all state charitable, mental, reformatory, and penal institutions shall be vested as determined by the Legislature." American Fed. of S., C. & M. Emp. v. Department of Public Institutions ---------- 253
3. The extent to which the Legislature may exercise the police power, an attribute of state sovereignty, is primarily a matter of legislative judgment, but the purpose of the regulatory matter must be legitimate and the means employed to effect it must be reasonable. Bridgeford v. U-Haul Co. ---------- 308

4. If, in this court's opinion, a reasonable basis exists for legislative enactments, this court will not ordinarily substitute its judgment for that of the Legislature. Bridgeford v. U-Haul Co. ---------- 308
5. A classification created by legislation need not be all-inclusive so long as the class subject to the law is differentiated from other classes upon some rational basis. Bridgeford v. U-Haul Co. ---------- 308
6. The Legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend. State v. Padley -- 358
7. It is the province of the Legislature to make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relationship to the legitimate objectives and purposes of the legislation. Campbell v. City of Lincoln ---------- 703
8. Where legislation creates a right of action, the Legislature has absolute power to determine the conditions under which the action must be brought. Campbell v. City of Lincoln ---------- 703
9. Public agencies, generally speaking, afford a proper subject for legislative classification. Campbell v. City of Lincoln ---------- 703

Lessors and Lessees.

Section 39-6,193, R. R. S. 1943, imposing vicarious liability on owners-lessors of trucks for the damages caused by lessees and operators of the leased trucks is not a violation of either state or federal due process or equal protection of the law. Bridgeford v. U-Haul Co. ---------- 308

Licenses and Permits.

1. The mere fact that the state, in the exercise of the public power, has made certain regulations does not prohibit a municipality from exacting additional requirements so long as there is no conflict between the two, and if the requirements of the municipal bylaw are not in themselves pernicious, as being unreasonable or discriminatory, both will stand.

Bali Hai', Inc. v. Nebraska Liquor Control Commission ---------- 1
2. Regulating the traffic in liquors involves not just prescribing who may sell liquor and under what conditions, but conversely, who may not, and under what circumstances the right to sell liquors may be forfeited. Bali Hai', Inc. v. Nebraska Liquor Control Commission ---------- 1
3. The power to regulate and control traffic in liquors necessarily confers the powers to refuse a license or limit the number of licenses to be granted. Bali Hai', Inc. v. Nebraska Liquor Control Commission -- 1
4. Equipment furnished by a wholesale distributor of beer licensee to a retail package liquor licensee, and used only for display purposes, does not thereby become an advertising sign under the provisions of section 53-169, R. R. S. 1943. Tri-City Beer Co. v. Nebraska Liquor Control Commission ---------- 278
5. The revocation of a license to operate a motor vehicle is not a penalty. Brown v. Sullivan ------- 729

Liens.

1. An agreement creating a lien upon real estate must meet the requirements of section 76-211, R. R. S. 1943, to be valid against subsequent purchasers. Marechale v. Burr ---------- 306
2. A decree of foreclosure of a tax lien is of no effect as against the persons who were at the time in actual possession of and who were not made parties defendant in the action and had no notice or knowledge thereof. Winkle v. Mitera ---------- 821

Limitations of Actions.

1. Where a record discloses that an action was not commenced within the time allowed by statute, the petition is subject to demurrer. Although a specific statement in the demurrer that the petition is barred by the statute of limitations would be more appropriate, a general allegation that the petition does not state facts sufficient to constitute a cause of action is adequate to raise the defense of the statute of limitations. George P. Rose Sodding & Grading Co. v. Dennis ---------- 221
2. An action is deemed commenced within the meaning of Chapter 25, R. R. S. 1943, on the date of the summons which is properly served on the defendant. George P. Rose Sodding & Grading Co. v. Dennis -- 221

3. The fact that funds are not available to pay a claim does not toll the statute of limitations. The statute commences to run upon a contract with a governmental subdivision, which raises its money by tax levy and assessment, at the same time as upon other contracts when the right to payment accrues and not when funds become available to pay the debt. George P. Rose Sodding & Grading Co. v. Dennis ---------- 221
4. The Legislature, by enacting section 25-222, R. S. Supp., 1974, did not intend that the various aspects of the whole professional relationship should be separated and a 2-year statute of limitations be applicable to those acts performed directly by the doctor or head of the professional unit, and a 4-year statute of limitations be applicable to acts performed, during the course of the professional relationship, by employees of the professional unit upon specific direction of the professional master. Swassing v. Baum ---------- 651
5. The special statute of limitations controls over a general one because the special statute is the one that expresses the legislative will, providing the acts complained of come within the meaning therein expressed. Swassing v. Baum ---------- 651

Malpractice.

The Legislature, by enacting section 25-222, R. S. Supp., 1974, did not intend that the various aspects of the whole professional relationship should be separated and a 2-year statute of limitations be applicable to those acts performed directly by the doctor or head of the professional unit, and a 4-year statute of limitations be applicable to acts performed, during the course of the professional relationship, by employees of the professional unit upon specific direction of the professional master. Swassing v. Baum ---------- 651

Master and Servant.

1. Conduct of a servant is within the scope of employment if, but only if, it is of the kind he is employed to perform; it occurred substantially within the authorized time and space limits; and it is actuated, at least in part, by a purpose to serve the master. Johnson v. Evers ---------- 426
2. A corporation is liable for the negligent operation

of an automobile by its agent or servant only when such agent or servant is engaged in the employer's or principal's business with its knowledge and direction. Johnson v. Evers ---------- 426

3. In an action against an employer for personal injuries inflicted by an employee upon a third person by the negligent use of an automobile owned and operated by the employee, the burden is on the plaintiff to prove that the employee was acting within the scope of his employment at the time of the injury. Johnson v. Evers ---------- 426

4. The doctrine of respondeat superior is applicable only when the employment relation can be found to exist at the time and with respect to the conduct giving rise to the injury. Johnson v. Evers ---------- 426

5. The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there has been a change in relationship and he has become, for the time being, the employee of another person. In such case, whether the right of control, or want of it, existed, is ordinarily a question of fact for the jury; but where the pertinent facts pertaining to the contract and relationship of the persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court. Schwartz v. Riekes & Sons ---- 737

Mortgages.

1. A bona fide mortgagee is entitled to the same protection as a bona fide purchaser or grantee. Tillotson v. Stephens ---------- 104

2. It is ordinarily held that a subsequent purchaser or mortgagee of the land without notice is not bound by an agreement between the annexer and the landowner that the property retain its status as personalty. Tillotson v. Stephens ---------- 104

3. Where property is subject to a mortgage and can be legally sold and conveyed, it is immaterial whether or not a purchaser had notice of plaintiff's interest in the property. Tillotson v. Stephens ---------- 104

Motions, Rules, and Orders.

1. When a case has been submitted upon a motion for directed verdict, plaintiff's absolute right to dismiss without prejudice is lost. Miller v. Harris -------- 75

2. When a motion for directed verdict has been overruled, there is no longer a final submission to the court where issues remain to be determined by the jury and have not been submitted to it. Miller v. Harris ---------- 75
3. A motion for a mistrial because of the erroneous admission of evidence must be timely made. Breiner v. Olson ---------- 120
4. The correctness of a ruling of the District Court in giving or refusing instructions cannot be considered by the Supreme Court unless such ruling is first challenged in the District Court by a motion for new trial. Breiner v. Olson ---------- 120
5. An assignment in a motion for a new trial that errors of law occurred at the trial does not present the correctness of giving or refusing instructions. Breiner v. Olson ---------- 120
6. A motion for directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Laux v. Robinson ---------- 601

Motor Vehicles.

1. Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position. Treffer v. Seevers ---------- 114
2. Section 39-6,193, R. R. S. 1943, imposing vicarious liability on owners-lessors of trucks for the damages caused by lessees and operators of the leased trucks is not a violation of either state or federal due process or equal protection of the law. Bridgeford v. U-Haul Co. ---------- 308
3. Section 39-662, R. S. Supp., 1974, is not unconstitutional. State v. Padley ---------- 358
4. A thief has no legitimate interest in a stolen car and does not have standing to challenge a search of the automobile. State v. McFarland ---------- 394
5. A corporation is liable for the negligent operation of an automobile by its agent or servant only when such agent or servant is engaged in the employer's or principal's business with its knowledge and direction. Johnson v. Evers ---------- 426

6. In an action against an employer for personal injuries inflicted by an employee upon a third person by the negligent use of an automobile owned and operated by the employee, the burden is on the plaintiff to prove that the employee was acting within the scope of his employment at the time of the injury. Johnson v. Evers ---------- 426
7. The doctrine of respondeat superior is applicable only when the employment relation can be found to exist at the time and with respect to the conduct giving rise to the injury. Johnson v. Evers ------ 426
8. It is not required that one suing the "head of a family" as an individual under the family purpose doctrine for personal injuries received in an automobile accident must first file his claim in the estate of the member of the family driving the vehicle who was killed in the accident; and neither section 24-517, R. S. Supp., 1974, nor Mueller v. Shacklett, 156 Neb. 881, 58 N. W. 2d 344 (1953), is applicable to that situation. Marcus v. Everett ---------- 518
9. The family purpose doctrine may be applied in an action by an injured third party to impose liability upon a husband who is head of the family for negligence of the wife in driving an automobile titled in both of their names as coowners, which automobile was purchased with funds contributed by both husband and wife, and both of whom have the right to use the automobile. Marcus v. Everett ---------- 518
10. One entering a highway from a private road must yield the right-of-way to all vehicles approaching on such highway. Laux v. Robinson ---------- 601
11. A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way. Laux v. Robinson ---------- 601
12. If the driver of an automobile entering a highway from a private road looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence. Laux v. Robinson ---------- 601
13. The duty to look for approaching vehicles implies the duty to see that which is in plain sight. Laux v. Robinson ---------- 601
14. An automobile driver is required to see only those approaching vehicles which relative to speed and

distance are within the radius which denotes the limit of danger. Laux v. Robinson ---------- 601

15. One having the right-of-way may not on that account proceed in disregard of the surrounding circumstances and potential dangers. One having a right-of-way is not thereby relieved from the duty of exercising ordinary care to avoid accidents. Laux v. Robinson ---------- 601

16. There is no presumption or inference as to the negligence of a driver of an automobile arising from the mere fact that it collided with another vehicle. Laux v. Robinson ---------- 601

17. An "uninsured motor vehicle" within the meaning of section 60-509.01, R. R. S. 1943, includes one which does not have accident liability insurance affording the coverage for personal injury and death in the limits of liability specified by section 60-509, R. R. S. 1943. Emery v. State Farm Mut. Auto. Ins. Co. ---------- 619

18. A motor vehicle which is covered by liability insurance for personal injury and death in the limits specified by section 60-509, R. R. S. 1943, does not become an uninsured motor vehicle when, because of multiple claims made, that insurance is insufficient to satisfy the legal liability of the insured to each individual claimant to the limits specified for individual claims under section 60-509, R. R. S. 1943. Emery v. State Farm Mut. Auto. Ins. Co. -------- 619

19. A benefit removing an occupant riding in the motor vehicle of another from the provisions of the guest statute must be a tangible and substantial one to the owner and a motivating influence for his furnishing the transportation. Luther v. Pawling ---- 679

20. Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Luther v. Pawling ---------- 679

21. 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 in the determination of gross negligence. Luther v. Pawling ---------- 679

22. Negligence that is purely momentary in nature generally does not constitute gross negligence. Luther v. Pawling ---------- 679
23. The purpose of the uninsured motorist statute is to give a person injured by an uninsured motorist the same protection he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Pettid v. Edwards ---------- 713
24. The Nebraska uninsured motorist statute does not prohibit a limitation of liability to the minimum limits required by statute in each policy issued even though a single policy may insure more than one automobile. Pettid v. Edwards ---------- 713
25. The revocation of a license to operate a motor vehicle is not a penalty. Brown v. Sullivan ---------- 729

Municipal Corporations.

1. The mere fact that the state, in the exercise of the public power, has made certain regulations does not prohibit a municipality from exacting additional requirements so long as there is no conflict between the two, and if the requirements of the municipal bylaw are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. Bali Hai', Inc. v. Nebraska Liquor Control Commission ---------- 1
2. Regulating the traffic in liquors involves not just prescribing who may sell liquor and under what conditions, but conversely, who may not, and under what circumstances the right to sell liquors may be forfeited. Bali Hai', Inc. v. Nebraska Liquor Control Commission ---------- 1
3. The power to regulate and control traffic in liquors necessarily confers the powers to refuse a license or limit the number of licenses to be granted. Bali Hai', Inc. v. Nebraska Liquor Control Commission ---------- 1
4. The fact that funds are not available to pay a claim does not toll the statute of limitations. The statute commences to run upon a contract with a governmental subdivision, which raises its money by tax levy and assessment, at the same time as upon other contracts when the right to payment accrues and not when funds become available to pay the debt. George P. Rose Sodding & Grading Co. v. Dennis ---------- 221
5. Where one appears and actively participates before a city council hearing where the city council is to

vote to acquire land, he cannot afterward complain that he did not receive notice in a legal manner. M.R.D. Corp. v. City of Bellevue ---------- 722

6. The term "street" as used in section 19-709, R. R. S. 1943, is a generic term and includes the portion of the street for vehicular traffic, the parkway, and the sidewalk. M.R.D. Corp. v. City of Bellevue -- 722

7. The authority of a municipality or county to use public funds to own, acquire, develop, lease, and sell real and personal property for industrial development purposes is measured by the provisions of Article XIII, section 2, of the Nebraska Constitution, and the enabling statutes lawfully enacted by the Legislature pursuant to the foregoing provision of the Constitution. Chase v. County of Douglas 838

8. Article XIII, section 2, of the Constitution of Nebraska, is the full measure of the power of the state through the cities and counties to lend the credit of the state. Article XIII, section 3, remains in the Constitution and under its terms any loan of credit made by the state, by a county, or by a municipality for a private individual, association, or corporation is unconstitutional. Chase v. County of Douglas ---------- 838

9. The authorization granted in section 18-1401, R. R. S. 1943, to a city or county to purchase property for industrial development violates the provisions of Article XIII, section 3, of the Constitution, because it authorizes the use of tax money and income of the governmental entity from its proprietary functions for such purpose. Chase v. County of Douglas ---------- 838

Negligence.

1. In an action based on negligence, the plaintiff, in order to recover, must establish not only the negligence of defendant but also that such negligence was the proximate cause of the occurrence and the resulting damages. Pendleton Woolen Mills v. Vending Associates, Inc. ---------- 46

2. Proximate cause is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. Pendleton Woolen Mills v. Vending Associates, Inc. ---- 46

3. Negligence is not the cause in fact of an occurrence unless it is a "substantial factor" in causing

the occurrence or "but for" the negligence, the occurrence would not have happened. Pendleton Woolen Mills v. Vending Associates, Inc. ---------- 46
4. An essential element in any negligence action is a duty recognized by law which the defendant owes to the plaintiff. Daniels v. Andersen ---------- 95
5. It is a basic principle of law that a jailer has a duty to exercise that degree of care necessary to provide reasonably adequate protection for his prisoners. Daniels v. Andersen ---------- 95
6. In the case of an intoxicated prisoner the police officer is impelled to use a higher degree of care for his safety and protection than is necessary or expected in the case of one who has control of his physical and mental faculties and able to protect himself. Daniels v. Andersen ---------- 95
7. Proximate cause, as used in the law of negligence is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. Daniels v. Andersen ---- 95
8. If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence. Daniels v. Andersen ---------- 95
9. Generally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position. Treffer v. Seevers ---------- 114
10. Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury. Treffer v. Seevers 114
11. 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. Lee v. Weaver ---------- 194
12. Evidence that at some previous time a house cat bit its owner, without any evidence as to the circumstances present when the biting occurred, is not sufficient to sustain a finding that the cat was a vicious or dangerous animal or that the owner had

notice of its vicious or dangerous nature. Lee v. Weaver ---------- 194
13. Contributory negligence is an affirmative defense and the burden is upon the defendant to establish such defense. Kaspar v. Schack ---------- 215
14. Where the defendant pleads that the plaintiff is guilty of contributory negligence, the defendant has the burden to prove that defense, and this burden does not shift during the trial. Kaspar v. Schack - 215
15. 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. Kortus v. Jensen ---------- 261
16. 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. Kortus v. Jensen ---------- 261
17. Proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing *both* these essential elements rests upon the plaintiff's introduction of expert medical testimony. Kortus v. Jensen 261
18. A specialist from one medical community is competent to testify as an expert witness in a medical malpractice case as to the standard of care or skill required in another community, if the witness has knowledge of and familiarity with the practice and standard of the locality in question or in similar or like communities. Kortus v. Jensen -------- 261
19. The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish neg-

ligence. It is not enough merely to present the testimony of a doctor who would have acted differently, or who is willing to express the opinion that an operation should have been performed differently. Kortus v. Jensen ---------- 261

20. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Properly used it can accomplish that purpose. It can, however, have the opposite effect. In tort cases of the kind where reasonable minds may differ as to whether an inference of negligence is to be drawn from the given set of facts, it can have no application. Pfeifer v. Pfeifer ---------- 369

21. Conduct of a servant is within the scope of employment if, but only if, it is of the kind he is employed to perform; it occurred substantially within the authorized time and space limits; and it is actuated, at least in part, by a purpose to serve the master. Johnson v. Evers ---------- 426

22. A corporation is liable for the negligent operation of an automobile by its agent or servant only when such agent or servant is engaged in the employer's or principal's business with its knowledge and direction. Johnson v. Evers ---------- 426

23. In an action against an employer for personal injuries inflicted by an employee upon a third person by the negligent use of an automobile owned and operated by the employee, the burden is on the plaintiff to prove that the employee was acting within the scope of his employment at the time of the injury. Johnson v. Evers ---------- 426

24. The doctrine of respondeat superior is applicable only when the employment relation can be found to exist at the time and with respect to the conduct giving rise to the injury. Johnson v. Evers -------- 426

25. The burden of proof is on the plaintiff to prove negligence on the part of the defendant by a preponderance of the evidence. Hoefer v. Marinan ---- 477

26. Negligence must be proved by direct evidence or by facts from which negligence can reasonably be inferred. In the absence of such proof, negligence will not be presumed. Hoefer v. Marinan -------- 477

27. It is not required that one suing the "head of a family" as an individual under the family purpose doctrine for personal injuries received in an auto-

mobile accident must first file his claim in the estate of the member of the family driving the vehicle who was killed in the accident; and neither section 24-517, R. S. Supp., 1974, nor Mueller v. Shacklett, 156 Neb. 881, 58 N. W. 2d 344 (1953), is applicable to that situation. Marcus v. Everett ---------- 518

28. The family purpose doctrine may be applied in an action by an injured third party to impose liability upon a husband who is head of the family for negligence of the wife in driving an automobile titled in both of their names as coowners, which automobile was purchased with funds contributed by both husband and wife, and both of whom have the right to use the automobile. Marcus v. Everett _ 518

29. If the driver of an automobile entering a highway from a private road looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence. Laux v. Robinson ---------- 601

30. One having the right-of-way may not on that account proceed in disregard of the surrounding circumstances and potential dangers. One having a right-of-way is not thereby relieved from the duty of exercising ordinary care to avoid accidents. Laux v. Robinson ---------- 601

31. There is no presumption or inference as to the negligence of a driver of an automobile arising from the mere fact that it collided with another vehicle. Laux v. Robinson ---------- 601

32. Negligence and the duty to use care do not exist in the abstract, but must be measured against a particular set of facts and circumstances. Collins v. Herman Nut & Supply Co. ---------- 665

33. Individuals who come upon premises for the purpose of making a delivery of merchandise or goods or for the purpose of picking up goods from the premises are generally held to be invitees. Collins v. Herman Nut & Supply Co. ---------- 665

34. The duty of a storekeeper to an invitee is to use reasonable care to keep the premises reasonably safe for the use of the invitee, but he is not the insurer against accident. Collins v. Herman Nut & Supply Co. ---------- 665

35. Generally, the liability of an owner or occupant of the premises is predicated on proof of his superior knowledge, actual or constructive, of dangers to which an invitee is subjected and of which the in-

vitee is unaware. Collins v. Herman Nut & Supply Co. ---------- 665
36. A benefit removing an occupant riding in the motor vehicle of another from the provisions of the guest statute must be a tangible and substantial one to the owner and a motivating influence for his furnishing the transportation. Luther v. Pawling ---- 679
37. Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Luther v. Pawling ---------- 679
38. 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 in the determination of gross negligence. Luther v. Pawling ---------- 679
39. Negligence that is purely momentary in nature generally does not constitute gross negligence. Luther v. Pawling ---------- 679
40. Negligence is never presumed. The mere happening of an accident does not create a presumption or authorize an inference of negligence. Luther v. Pawling ---------- 679

New Trial.

1. An assignment in a motion for a new trial that errors of law occurred at the trial does not present the correctness of giving or refusing instructions. Breiner v. Olson ---------- 120
2. In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible, and which the exercise of due diligence could not have discovered and produced at trial. State v. Crawford ---------- 181
3. 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 that court's determination will not be disturbed on appeal. State v. Crawford ---- 181
4. The time requirements of section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days

after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day. State v. Lacy -- 299
State v. Wood ---------- 353
5. A judgment will not be reversed because the trial court failed to set forth findings for the reason for its decision to overrule a motion to transfer the case to juvenile court where the defendant failed to direct the attention of the trial court to the requirement of the statute at any time by motion for new trial or otherwise. State v. Highly ---- 498
6. Under section 25-1143, R. R. S. 1943, an application for a new trial must be made within 10 days after the verdict, report, or decision is rendered, except where unavoidably prevented or where there is newly discovered evidence. Nebraska Children's Home Soc. v. Collins ---------- 531
7. A motion for a new trial which is not filed within the time specified by statute, and not within one of the exceptions, is a nullity and of no force and effect. Nebraska Children's Home Soc. v. Collins - 531
8. In a law action, where no motion for a new trial is filed, this court on appeal will examine the record only for the purpose of determining whether or not the judgment is supported by the pleadings. Nebraska Children's Home Soc. v. Collins -------- 531
9. In order for jury misconduct to be the basis for a new trial, the misconduct must be prejudicial to the defendant. State v. Isley ---------- 539
10. Alleged errors not brought to the attention of the trial judge in any way in a motion for new trial are not entitled to be considered or reviewed by this court. State v. Allen ---------- 560
11. Alleged errors of the trial court in an action at law which are not referred to in a motion for new trial will not be considered on appeal in this court. Torstenson v. Melcher ---------- 764

Notice.

1. The word "immediate" in referring to the notice required in an insurance policy means with reasonable celerity, with reasonable and proper diligence; and what is a reasonable time depends upon all the facts and circumstances of each particular case. Zukaitis v. Aetna Cas. & Sur. Co. ---------- 59
2. Ordinarily, an agent having authority to solicit insurance, receive and forward applications, deliver

policies, and collect premiums is a general agent of the insurance company and notice to him will satisfy a requirement that notice must be sent to the company. Zukaitis v. Aetna Cas. & Sur. Co. -- 59

3. The revocation of an agent's authority does not become effective as between the principal and third persons until they receive notice of the termination. Zukaitis v. Aetna Cas. & Sur. Co. ---------- 59

4. Where property is subject to a mortgage and can be legally sold and conveyed, it is immaterial whether or not a purchaser had notice of plaintiff's interest in the property. Tillotson v. Stephens ---------- 104

5. Section 44-516, R. R. S. 1943, requires registered or certified mail for every cancellation notice regardless of the period the policy has been in force. Saunders v. Mittlieder ---------- 232

6. Under section 42-364, R. S. Supp., 1974, the trial court on its own motion may make subsequent changes or modifications in a decree of dissolution of a marriage in relation to any minor children and their maintenance when required, but only after notice to the parties and an opportunity to be heard. Francis v. Francis ---------- 417

7. An appeal shall be deemed perfected, and the Supreme Court shall have jurisdiction of the cause when notice of appeal shall have been filed, and the docket fee deposited in the office of the clerk of the District Court, and after being so perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional. State v. Allen ---------- 560

8. On appeal from a county or municipal court to the District Court, notice of appeal and bond must be filed within 10 days after the rendition of judgment and this period cannot be prolonged by filing a motion for new trial. Edward Frank Rozman Co. v. Keillor ---------- 587

9. An answer is a pleading, the purpose of which is to notify the court and the plaintiff of the defense relied upon so that the latter may be prepared to meet it. Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co. ---------- 658

10. The notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act is a condition precedent to the institution of suit against a political subdivision and neither that notice re-

quirement nor the limitation of time for suit as set out in section 23-2416, R. R. S. 1943, violate constitutional guaranties of equal protection or uniformity under state or federal Constitutions. Campbell v. City of Lincoln ---------- 703

11. Where one appears and actively participates before a city council hearing where the city council is to vote to acquire land, he cannot afterward complain that he did not receive notice in a legal manner. M.R.D. Corp. v. City of Bellevue ---------- 722
12. Before a cotenant can hold adversely to other cotenants, there must be an ouster of possession of the latter by the former, with notice or knowledge of the acts causing the ouster being brought home to such other cotenants in a plain and unequivocal manner and be shown by acts of such notorious and hostile character as would put a man of ordinary prudence on guard. Acts which are reasonably consistent with the existence of title in other cotenants are insufficient. Bartlett v. Kloepping ---- 755
13. A decree of foreclosure of a tax lien is of no effect as against the persons who were at the time in actual possession of and who were not made parties defendant in the action and had no notice or knowledge thereof. Winkle v. Mitera ---------- 821

Nuisances.

1. Ordinarily a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact. It may become such by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation. Botsch v. Leigh Land Co. ----------54, 509
2. The exercise of due care by the owner of a business in its operation is not a defense to an action to enjoin its operation as a nuisance. Botsch v. Leigh Land Co. ----------54, 509
3. Even in an industrial or rural area one cannot conduct a business enterprise in such manner as to materially prejudice a neighbor. Botsch v. Leigh Land Co. ----------54, 509
4. A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has

been proved that no application of endeavor, science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly. Botsch v. Leigh Land Co. ---------- 54, 509

5. A legitimate business which does not in and of itself constitute a nuisance, when conducted in such a manner as to become a nuisance, is conducted negligently and improperly. Botsch v. Leigh Land Co. ---------- 509

Parent and Child.

1. In this jurisdiction, provisions for support money should be certain and definite, based upon present conditions, and not made to depend upon uncertain and speculative contingencies of hypothetical earnings or income. Breiner v. Breiner ---------- 143
2. A formula providing for calculation of additional support money at the end of every year based on a variable amount of bonus is disapproved by this court. Breiner v. Breiner ---------- 143
3. In determining the amount of child support the status, situation, and character of the parties, and all attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be noted. Breiner v. Breiner ---------- 143
4. The judgment of the trial judge is entitled to great weight in determining the best interests of children in custody proceedings. Young v. Young ---- 163
5. Under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other. This applies equally to lawfully adopted children. Young v. Young ---------- 163
6. In a proceeding to terminate parental rights a physician may be required to testify concerning his examination and treatment of the parent of a dependent and neglected child. State v. Lewis ---- 408
7. Under section 42-364, R. S. Supp., 1974, the trial court on its own motion may make subsequent changes or modifications in a decree of dissolution of a marriage in relation to any minor children and their maintenance when required, but only after notice to the parties and an opportunity to be heard. Francis v. Francis ---------- 417
8. In the absence of an abuse of discretion the amount

of an award of child support will not be disturbed on appeal. Sutton v. Sutton ---------- 495
9. The first and primary consideration in any case involving the custody of a child is the best interest of the child. State v. Loomis ---------- 552
10. 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. In determining those circumstances, the financial position of the husband, the earning capacity of each parent, and the estimated costs of support of the children must be taken into account. Lynch v. Lynch ---------- 804
11. The decision of a trial court in awarding child support will not be disturbed on appeal unless it appears that the court abused its discretion. Lynch v. Lynch ---------- 804
12. Over the objection of one of the parties, an application to modify an award of child support cannot be heard in a county other than the county in which the proceeding is pending. Hanson v. Hanson ---- 836

Parties.

1. A court of general jurisdiction may exercise in personam jurisdiction over a nonresident defendant when legislation has been enacted to specifically provide the court with jurisdiction, provided such exercise of jurisdiction does not violate the due process clause of the United States Constitution. Tiedeman v. Tiedeman ---------- 15
2. A civil contempt proceeding has for its purpose the preservation and enforcement of the rights of private parties. Village of Springfield v. Hevelone ------ 37
3. The right of a party to sue as representative of a class may be determined on motion for summary judgment. Blankenship v. Omaha P. P. Dist. ---- 170
4. A party having an interest adverse to the interests of the parties sought to be represented may not sue as representative of a class under the provisions of section 25-319, R. R. S. 1943. Blankenship v. Omaha P. P. Dist. ---------- 170
5. Potentially conflicting interests within the class are incompatible with the maintenance of a true class action. Blankenship v. Omaha P. P. Dist. -------- 170
6. Where, on motion for summary judgment, the record demonstrates the potentiality of conflict, either within the class or between the person who seeks to

represent the class and the class, it is appropriate to dispose of the class aspect of the case upon motion for summary judgment. Blankenship v. Omaha P. P. Dist. ---------- 170

7. It is not required that one suing the "head of a family" as an individual under the family purpose doctrine for personal injuries received in an automobile accident must first file his claim in the estate of the member of the family driving the vehicle who was killed in the accident; and neither section 24-517, R. S. Supp., 1974, nor Mueller v. Shacklett, 156 Neb. 881, 58 N. W. 2d 344 (1953), is applicable to that situation. Marcus v. Everett -- 518

8. The family purpose doctrine may be applied in an action by an injured third party to impose liability upon a husband who is head of the family for negligence of the wife in driving an automobile titled in both of their names as coowners, which automobile was purchased with funds contributed by both husband and wife, and both of whom have the right to use the automobile. Marcus v. Everett -- 518

9. Ordinarily a demand upon the responsible officers of a governmental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity. Sesemann v. Howell ---- 798

10. Taxpayers, whose right to sue to protect the interests of the school district arising out of the failure or refusal of the officers to do so, have no greater right to sue to protect such interests than the designated officials have. Sesemann v. Howell - 798

11. A decree of foreclosure of a tax lien is of no effect as against the persons who were at the time in actual possession of and who were not made parties defendant in the action and had no notice or knowledge thereof. Winkle v. Mitera ---------- 821

Paternity.

In a paternity case where a jury is not requested by the alleged father, the findings of the court have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. Snay v. Snarr ---------- 375

Penalties.

1. The question of whether a stipulated sum is for a

penalty or for liquidated damages is answered by the application of one or more aspects of the following rule: A stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty, and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach *or* is reasonably proportionate to the damages which have actually been caused by the breach. Growney v. C M H Real Estate Co. ---------- 398

2. Ordinarily a sum paid in part performance of a contract, with a provision that it shall be forfeited in the event of a default, if not excessive, and if the actual damages are not calculable in advance, will be regarded as liquidated damages. Growney v. C M H Real Estate Co. ---------- 398

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. Kortus v. Jensen ---------- 261
2. 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. Kortus v. Jensen -- 261
3. Proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing *both* these essential elements rests upon the plaintiff's introduction of expert medical testimony. Kortus v. Jensen ------ 261
4. A specialist from one medical community is competent to testify as an expert witness in a medical

malpractice case as to the standard of care or skill required in another community, if the witness has knowledge of and familiarity with the practice and standard of the locality in question or in similar or like communities. Kortus v. Jensen ---------- 261

5. The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. It is not enough merely to present the testimony of a doctor who would have acted differently, or who is willing to express the opinion that an operation should have been performed differently. Kortus v. Jensen ---------- 261

6. In a proceeding to terminate parental rights a physician may be required to testify concerning his examination and treatment of the parent of a dependent and neglected child. State v. Lewis ---------- 408

7. The Legislature, by enacting section 25-222, R. S. Supp., 1974, did not intend that the various aspects of the whole professional relationship should be separated and a 2-year statute of limitations be applicable to those acts performed directly by the doctor or head of the professional unit, and a 4-year statute of limitations be applicable to acts performed, during the course of the professional relationship, by employees of the professional unit upon specific direction of the professional master. Swassing v. Baum ---------- 651

Pleadings.

1. Jurisdiction of res of an estate of a decedent is obtained by a county court upon the filing of a petition containing sufficient averments to confer such jurisdiction. Fischer v. Lingle ---------- 108

2. A claim for compensation made within 6 months after the occurrence of disability is a condition prerequisite to the bringing of an action for compensation benefits, and is necessary even though notice of the occurrence of the injury is dispensed with by the knowledge of the employer of the fact of injury. Raymond v. Buckridge, Inc. ---------- 212

3. When an employee knows that an injury has occurred and that disability therefrom was due to his employment, the period for making claim and filing action is not extended even though he was ignorant

of the application of the Workmen's Compensation Act to his situation. Raymond v. Buckridge, Inc. - 212

4. Contributory negligence is an affirmative defense and the burden is upon the defendant to establish such defense. Kaspar v. Schack ---------- 215

5. Where the defendant pleads that the plaintiff is guilty of contributory negligence, the defendant has the burden to prove that defense, and this burden does not shift during the trial. Kaspar v. Schack - 215

6. Where a record discloses that an action was not commenced within the time allowed by statute, the petition is subject to demurrer. Although a specific statement in the demurrer that the petition is barred by the statute of limitations would be more appropriate, a general allegation that the petition does not state facts sufficient to constitute a cause of action is adequate to raise the defense of the statute of limitations. George P. Rose Sodding & Grading Co. v. Dennis ---------- 221

7. In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance. § 25-836, R. R. S. 1943. Timmerman v. Hertz ---------- 237

8. Where by statute plaintiff is authorized to plead a general performance of all conditions precedent, defendant must, if he relies on the fact that any of the conditions precedent have not been performed, set out specially the condition and the breach, thus confining the issue to be tried to such particular condition or conditions precedent as he may indicate as unperformed. A mere general denial, therefore, is unsufficient to raise the issue. Timmerman v. Hertz ---------- 237

9. The purpose of section 25-836, R. R. S. 1943, is to simplify pleading, and only by requiring the defendant to set forth the particular condition which is relied on as a defense may the plaintiff be advised of the exact defense he will be required to meet, and the trial court informed as to the exact issue to be determined. Timmerman v. Hertz ---- 237

10. The right to introduce evidence depends upon there being an issue of fact as to which it is relevant. The issues are made by the pleadings; and unless there is an issue of fact before the court, there is

no right to introduce evidence to prove or disprove the fact. Where the answer does not state a defense, the trial court should direct a verdict for the plaintiff. Timmerman v. Hertz ---------- 237

11. The pleading of legal conclusions is insufficient to raise an issue of fact. A proposed amendment to pleadings offered during trial should plead ultimate facts and not legal conclusions. Timmerman v. Hertz 237

12. It is ordinarily incumbent upon one who relies upon a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto. Timmerman v. Hertz 237

13. The principle that on appeal the case will be considered upon the theory upon which the case was tried below, even though not pleaded, has application only where both parties acquiesce in the theory and the case was submitted to the trial court on that basis. Timmerman v. Hertz ---------- 237

14. To maintain an action for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them, or else were made without knowledge as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby. McGinty v. McGinty ---------- 281

15. When the pendency of a prior suit is pleaded in abatement, the case must be the same, or it will not be sustained. There must be the same parties or such as represent the same interest; the same rights must be asserted and the same relief prayed for. This relief must be founded on the same facts, and the essential basis of the relief must be the same in both actions. National Bank of Commerce T. & S. Assn. v. Shull ---------- 590

16. As a general rule, where a judgment in a prior suit would be a bar to a judgment in the second suit brought in the same or another court of concurrent jurisdiction, the plea in abatement should be sustained. National Bank of Commerce T. & S. Assn. v. Shull ---------- 590

17. A plea in abatement is a dilatory and technical plea. It is not, as a rule, favored by the courts. Generally, it will not be sustained unless the party interposing

it can clearly show he is within the reason for its enforcement. National Bank of Commerce T. & S. Assn. v. Shull ---------- 590

18. Loss of past earnings is an item of special damage and must be specifically pleaded and proved. Impairment of earning capacity is an item of general damage and proof may be had under general allegations of injury and damage. Wortman v. Northwestern Bell Tel. Co. ---------- 637

19. It is unnecessary to plead or establish an actual loss of earnings to recover for loss of earning capacity. Wortman v. Northwestern Bell Tel. Co. ---------- 637

20. An answer is a pleading, the purpose of which is to notify the court and the plaintiff of the defense relied upon so that the latter may be prepared to meet it. Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co. ---------- 658

21. The courts may, in the furtherance of justice, either before or after judgment, permit the amendment of a pleading by conforming the pleading to the facts proved. § 25-852, R. R. S. 1943. Rawlings v. Andersen ---------- 686

22. In the absence of a bill of exceptions, prepared and filed in accordance with applicable statutory provisions and rules of practice, review on appeal is limited to whether the pleadings support the judgment entered by the lower court. Phillippe v. Barbera ---------- 727

23. In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is the sufficiency of the pleadings to sustain the judgment of the trial court. Tunks v. O'Brien ---------- 735

Police Officers and Sheriffs.

1. In the case of an intoxicated prisoner the police officer is impelled to use a higher degree of care for his safety and protection than is necessary or expected in the case of one who has control of his physical and mental faculties and able to protect himself. Daniels v. Andersen ---------- 95

2. A defendant charged with assaulting and resisting a law enforcement officer in the performance of his official duties may be found upon proof of either an assault or a resisting where the statute is worded in the disjunctive and in such a case it is not error

for the trial court to instruct the jury as to the elements of the offense in the language of the statute. § 28-729.01, R. S. Supp., 1974. State v. Davis ---------- 361

Political Subdivisions.

1. Under the Political Subdivisions Tort Claims Act, section 23-2406, R. R. S. 1943, the findings of a District Court under the act will not be disturbed on appeal unless they are clearly wrong. Daniels v. Andersen ---------- 95
2. The Nebraska Political Subdivisions Tort Claims Act, in creating a special class of tort-feasors consisting of all political subdivisions as defined, does not violate Article III, section 18, of the Nebraska Constitution. Campbell v. City of Lincoln ---------- 703
3. The classification of persons and corporations as created in the Nebraska Political Subdivisions Tort Claims Act constitutes a reasonable classification for purposes of the act, operates uniformly upon all members of the class, and is not constitutionally defective. Campbell v. City of Lincoln ---------- 703
4. The notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act is a condition precedent to the institution of suit against a political subdivision and neither that notice requirement nor the limitation of time for suit as set out in section 23-2416, R. R. S. 1943, violate constitutional guaranties of equal protection or uniformity under state or federal Constitutions. Campbell v. City of Lincoln 703

Post Conviction.

1. In a post conviction proceeding, the defendant has the burden of establishing a basis for relief. State v. Halsey ---------- 432
2. Generally, a post conviction proceeding cannot be used as a procedure to secure a review for a defendant dissatisfied with his sentence. State v. Niemann ---------- 675

Premises, View of.

In the appeal of an equity case, the appellate court will give consideration to the fact that the trial court inspected the premises. Steffen v. County of Cuming ---------- 442

Presentence Reports.

Section 29-2261, R. S. Supp., 1974, makes the inspection of a presentence report by the defendant's attorney discretionary with the trial court. However, this is a discretion which may be reviewed in this court. State v. Keller ---------- 209

Pretrial.

The rules of this court require that the trial judge must make a record of pretrial procedures formulating issues. Timmerman v. Hertz ---------- 237

Pretrial Conference.

1. A pretrial conference is neither designed nor intended to arbitrarily exclude noncumulative evidence pertinent to the issues simply because it was not mentioned at the pretrial hearing. Mousel v. ten Bensel ---------- 456
2. The District Court has a broad discretion in regard to the amendment of pretrial orders. Mousel v. ten Bensel ---------- 456

Principal and Surety.

Where the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor (a) surrenders or releases the security, or (b) willfully or negligently harms it, or (c) fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action. Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc. ---------- 292

Privileged Communications.

Communications between attorney and client made in the presence of others do not constitute privileged communications within the meaning of former sections 25-1201 and 25-1206, R. R. S. 1943. Dunmire v. Cool ---------- 247

Probable Cause.

1. 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. A brief stop of an 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. Brown ---------- 321
2. When, subsequent to a stop of a camper, by the use of his senses, a trooper became aware of the presence of marijuana, at that time, under our law, he had probable cause to search the camper for marijuana without the necessity of relying on consent. State v. Wood ---------- 353
3. Probable cause justifying an arrest without a warrant exists if the facts and circumstances within the knowledge of the arresting officers, and of which they had reasonably trustworthy information, are sufficient to warrant a prudent man in believing that a felony has been committed and that the person arrested committed it. State v. McDonald --- 625

Probate and Administration.

1. Jurisdiction of res of an estate of a decedent is obtained by a county court upon the filing of a petition containing sufficient averments to confer such jurisdiction. Fischer v. Lingle ---------- 108
2. Upon obtaining jurisdiction of the res of an estate of a decedent, a county court shall thereafter cause, by appropriate orders, the service of notice on persons entitled thereto, and should the service of such notice be defective, the county court retains jurisdiction of the res until such service is perfected, or until such matter is abandoned. Fischer v. Lingle ---------- 108

Probation and Parole.

1. The determination of whether to grant probation to one convicted of a crime is a matter within the sound discretion of the trial court; and the denial of probation will not be disturbed on appeal in the absence of a showing of abuse of judicial discretion. State v. Kolzow ---------- 93
2. Where a probation revocation hearing is a judicial proceeding, a written statement as to the evidence relied on and the reasons for revoking probation is not required. State v. McFarland ---------- 394
3. This court will not overturn an order or sentence of the trial court which denies probation unless there has been an abuse of discretion. State v. Swails -- 406
4. Suspension of sentence and granting of probation

is discretionary with the trial court. State v. Milligan ---------- 493
5. In the absence of an abuse of discretion the trial court's determination will not be disturbed on appeal. State v. Milligan ---------- 493
6. A sentence denying probation and imposing a period of imprisonment within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. State v. Wade ---------- 761

Process.

1. A court of general jurisdiction may exercise in personam jurisdiction over a nonresident defendant when legislation has been enacted to specifically provide the court with jurisdiction, provided such exercise of jurisdiction does not violate the due process clause of the United States Constitution. Tiedeman v. Tiedeman ---------- 15
2. Both Nebraska and Oklahoma have enacted legislation for obtaining personal jurisdiction over nonresidents, and each state has given broad interpretation of such legislation. Both states have expressed a desire to apply minimum contacts in order to protect the interests of the citizens of its states, when invoking personal jurisdiction over a nonresident, provided it does not offend notions of fair play and substantial justice. Tiedeman v. Tiedeman ---------- 15

Property.

1. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Olson v. Olson 8
2. The fixing of alimony or distribution of property rests in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Olson v. Olson ------ 8
3. Where, in an action for dissolution of marriage, the wife is awarded a judgment for alimony the court should, if possible, divide the property in such a manner as to permit the husband the means of paying the judgment awarded the wife. Olson v. Olson ---------- 8

4. The right of direct access to an existing street or highway is a property right of which an abutting owner cannot be deprived without due process of law and compensation for his loss. Morehead v. State ---------- 31
5. There is no right of direct access to a highway constructed upon a new right-of-way where no highway previously existed if the new highway is designated as a controlled access facility from the beginning. Morehead v. State ---------- 31
6. Where it is clear that the testator has not disposed of all his property, the courts cannot add provisions to his will which will prevent a partial intestacy, but the property which is thus omitted must pass as intestate property. Lowry v. Murren - 42
7. The rule in Shelley's case is not applicable where the "remainder" interest is only a life estate. Lowry v. Murren ---------- 42
8. Vested interests are not subject to the rule against perpetuities nor does the rule apply to reversions. Lowry v. Murren ---------- 42
9. The question of alimony and division of property may be considered together; in determining the same, the court shall have regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the abilities of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Grummert v. Grummert ---------- 148
10. Upon dissolving a marriage, the trial court has legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, title to which is held jointly by them, as the equities require. Grummert v. Grummert ---------- 148
11. In an action for dissolution of marriage, the property should be divided, if possible, in such manner as to permit the husband to retain the means for payment of any judgment awarded to the wife. Hanisch v. Hanisch ---------- 204
12. The rules for determining alimony or division of property is an action for dissolution of a marriage provide no mathematical formula by which such

awards can be precisely determined. Hanisch v. Hanisch ---------- 204
13. An alien may hold and convey the title to land acquired by purchase if no proceedings have been brought by the State to declare an escheat. Wilson v. State ---------- 228
14. The owner of property in its natural state has a right of lateral support from adjoining owners, irrespective of any questions of care or negligence. McKamy v. Bonanza Sirloin Pit, Inc. ---------- 325
15. The right of lateral support is mutual and reciprocal between adjoining property owners, nondelegable and constituting a servitude as to each. McKamy v. Bonanza Sirloin Pit, Inc. ---------- 325
16. An owner of property, entitled to lateral support, has a right of action against the servient owner at the time of the removal of such lateral support; he does not have a cause of action against subsequent owners or tenants, except for negligence. McKamy v. Bonanza Sirloin Pit, Inc. ---------- 325
17. The rule in this state is that the fixing of alimony or distribution of property rests in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Essex v. Essex ---------- 385
18. Generally, assets held in trusts, established by third persons, for the benefit of one of the spouses or the children are not marital assets, even though under some circumstances an indigent spouse may reach them to satisfy a support obligation. Essex v. Essex ---------- 385
19. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Campbell v. Kirby ---------- 610
20. Individuals who come upon premises for the purpose of making a delivery of merchandise or goods or for the purpose of picking up goods from the premises are generally held to be invitees. Collins v. Herman Nut & Supply Co. ---------- 665
21. The duty of a storekeeper to an invitee is to use reasonable care to keep the premises reasonably safe for the use of the invitee, but he is not the insurer against accident. Collins v. Herman Nut & Supply Co. ---------- 665
22. Generally, the liability of an owner or occupant of

the premises is predicated on proof of his superior knowledge, actual or constructive, of dangers to which an invitee is subjected and of which the invitee is unaware. Collins v. Herman Nut & Supply Co. ---------- 665

23. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. § 42-365, R. S. Supp., 1974. Browers v. Browers ---------- 743
24. It is the settled law of Nebraska that erosion of a river, which cuts entirely across riparian land and into the land of an adjoining owner, operates to obliterate the title of him whose land was originally riparian, and that he may not reassert his title if the river thereafter reverses its transverse wanderings and new land is formed within what were his original boundaries. Winkle v. Mitera ---------- 821
25. The ownership of an island carries with it the bed of the river to the center or thread of each surrounding channel. Winkle v. Mitera ---------- 821
26. Where title to an island, bounded by the waters of a nonnavigable stream is in one owner, and title to the land on the other shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland. Winkle v. Mitera ---------- 821

Prosecuting Attorneys.

1. A prosecutor in his argument is entitled to refer to previous convictions of felony only for the purpose of arguing the defendant's credibility. He is not entitled to use the conviction for the purpose of inferring the probability of the defendant's guilt of the crime charged. State v. Boss ---------- 467
2. Ordinarily a party who does not object to an argument of the prosecutor which is alleged to constitute misconduct will be held to have waived his right to complain. State v. Boss ---------- 467

Proximate Cause.

1. In an action based on negligence, the plaintiff, in order to recover, must establish not only the negligence of defendant but also that such negligence was the proximate cause of the occurrence and the resulting damages. Pendleton Woolen Mills v. Vending Associates, Inc. ---------- 46
2. Proximate cause is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. Pendleton Woolen Mills v. Vending Associates, Inc. ---- 46
3. Negligence is not the cause in fact of an occurrence unless it is a "substantial factor" in causing the occurrence or "but for" the negligence, the occurrence would not have happened. Pendleton Woolen Mills v. Vending Associates, Inc. ---------- 46
4. Proximate cause, as used in the law of negligence is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. Daniels v. Andersen ---- 95
5. If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence. Daniels v. Andersen ---------- 95
6. An accident insurance policy, providing for the payment of stipulated sums for accidental injury or death of the insured, where such injury or death is from violent and accidental means alone, resulting directly, independently, and exclusively of all other causes and also providing that there shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect, or bodily infirmity is a contributing cause of death or injury, means that recovery may be had when the accident is the active, efficient, and precipitating cause which sets in motion the agencies which resulted in the injury or death without the intervention of any other independent force, even though existing infirmities of the insured may be necessary conditions to the result. Brown v. Inter-Ocean Ins. Co. ---------- 189

Public Officers and Employees.

Late filing of the transcript in District Court may, under certain circumstances, be excused if caused by the fault or negligence of county court officials or employees. Caha v. Nelson ---------- 333

Public Purpose.

1. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. Chase v. County of Douglas ------ 838
2. The general encouragement of growth and industry through such devices as publicity and advertising are public purposes. Appropriations for such public purposes may be expended through private concerns. The appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means. Chase v. County of Douglas 838

Purchaser.

1. A bona fide mortgagee is entitled to the same protection as a bona fide purchaser or grantee. Tillotson v. Stephens ---------- 104
2. It is ordinarily held that a subsequent purchaser or mortgagee of the land without notice is not bound by an agreement between the annexer and the landowner that the property retain its status as personalty. Tillotson v. Stephens ---------- 104
3. Where property is subject to a mortgage and can be legally sold and conveyed, it is immaterial whether or not a purchaser had notice of plaintiff's interest in the property. Tillotson v. Stephens --- 104

Quieting Title.

An agreement creating a lien upon real estate must meet the requirements of section 76-211, R. R. S. 1943, to be valid against subsequent purchasers. Marechale v. Burr ---------- 306

Records.

1. Where a dismissal by the plaintiff is intended as a retraxit or abandonment of his cause, the facts supporting that conclusion must be affirmatively and clearly shown by the record. Miller v. Harris ---- 75

2. The inclusion of evidence in a bill of exceptions is the only vehicle for bringing evidence before this court on appeal. Evidence not included in the bill of exceptions may not be considered. Elm Creek State Bank v. Johnson ---------- 131
3. Where, on motion for summary judgment, the record demonstrates the potentiality of conflict, either within the class or between the person who seeks to represent the class and the class, it is appropriate to dispose of the class aspect of the case upon motion for summary judgment. Blankenship v. Omaha P. P. Dist. ---------- 170
4. The rules of this court require that the trial judge must make a record of pretrial procedures formulating issues. Timmerman v. Hertz ---------- 237
5. Before this court can consider evidence bearing upon an issue of fact, the evidence must have been offered in the trial court and embodied in a bill of exceptions. Timmerman v. Hertz ---------- 237
6. Sections 30-1601, 30-1602, 30-1604, 30-1605, and 30-1606, R. R. S. 1943, and 30-1603, R. S. Supp., 1974, concerning appeals in probate matters, require that a transcript of the probate proceedings be filed in the District Court within 40 days from the date of the order which appellant challenges. Caha v. Nelson ---------- 333
7. Section 30-1605, R. R. S. 1943, requires the county judge to transmit a certified transcript to the District Court within 10 days of the perfection of appeal, if the transcript fees have been paid. Caha v. Nelson ---------- 333
8. Prepayment of transcript fees may be waived by the county judge. Caha v. Nelson ---------- 333
9. Late filing of the transcript in District Court may, under certain circumstances, be excused if caused by the fault or negligence of county court officials or employees. Caha v. Nelson ---------- 333
10. A proffer of payment to a county court employee at time of ordering a transcript for appeal does not constitute a legal tender, since no payment was then due nor would the cost of said transcript be then ascertainable. Caha v. Nelson ---------- 333
11. Where conviction of a previous felony is an essential element of the crime charged, proof of such prior conviction is properly made by offering in evidence authenticated copies of the complaint or information, and the judgment rendered on the verdict or

the plea of guilty, evidence that the judgment has become final, and that the defendant is the same person presently before the court. State v. Lee -- 348

12. Where a probation revocation hearing is a judicial proceeding, a written statement as to the evidence relied on and the reasons for revoking probation is not required. State v. McFarland ---------- 394

13. A judgment will not be reversed because the trial court failed to set forth findings for the reason for its decision to overrule a motion to transfer the case to juvenile court where no record of the hearing upon the motion in the trial court is filed in this court. State v. Highly ---------- 498

14. A judgment will not be reversed because the trial court failed to set forth findings for the reason for its decision to overrule a motion to transfer the case to juvenile court where the defendant failed to direct the attention of the trial court to the requirement of the statute at any time by motion for new trial or otherwise. State v. Highly ---------- 498

15. Section 25-12,109, R. S. Supp., 1974, provided: A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission. Bobbie Brooks, Inc. v. Hyatt 596

16. The purpose of section 25-12,109, R. S. Supp., 1974, was to permit admission of systematically entered records without the necessity of identifying, locating, and producing as witnesses the individuals who made entries in the records in the regular course of the business. Bobbie Brooks, Inc. v. Hyatt ---------- 596

17. The Uniform Business Records As Evidence Act was intended to bring the realities of business and professional practice into the courtroom and the act should not be interpreted narrowly to destroy its obvious usefulness. Bobbie Brooks, Inc. v. Hyatt -- 596

18. In the absence of a bill of exceptions, prepared and filed in accordance with applicable statutory provisions and rules of practice, review on appeal is limited to whether the pleadings support the judgment entered by the lower court. Phillippe v. Barbera ---------- 727

19. When a case is tried in the District Court upon the record from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the Revised Rules of the Supreme Court, 1974, before it can be considered on appeal to this court. Tunks v. O'Brien ---------- 735

20. In the absence of a proper bill of exceptions, any assignment of error that requires an examination of evidence cannot prevail on appeal. In such a case, the only question presented to this court is the sufficiency of the pleadings to sustain the judgment of the trial court. Tunks v. O'Brien ---------- 735

21. Statements constituting alleged misconduct of counsel in argument to the jury must be taken by the court reporter at the trial, together with the objection made thereto and the court's ruling thereon. State v. Sanders ---------- 789

22. Section 24-541, R. S. Supp., 1974, providing for review "de novo on the record" intends that the District Court exercise independent judgment, which must be based on the issues, pleadings, and evidence presented in the lower court unless additional evidence is adduced pursuant to that statute. Von Seggern v. Kassmeier Implement ---------- 791

Records and Recording Laws.

1. Section 9-401, U. C. C., requires that in regard to goods which are to become fixtures to perfect a security interest, it must be filed in the office where a real estate mortgage would be filed or recorded. Tillotson v. Stephens ---------- 104

2. Section 9-401, U. C. C., renders an improper filing ineffective as against any party not having notice of the financing statement. Tillotson v. Stephens-- 104

3. Section 9-313, U. C. C., provides that a security interest on goods which become fixtures does not take priority over a subsequent purchaser for value of an interest in the real estate if the subsequent purchase is made without knowledge of the security interest and before it is perfected. Tillotson v. Stephens ---------- 104

Reformation of Instruments.

1. A court of equity will reform the description contained in a deed of conveyance where it is established by clear and convincing evidence that the instru-

ment fails to express the real intention of the parties. Booth v. Wilkinson ---------- 730
2. Where there is no mistake as to the identity of the land intended to be conveyed, but there is a mistake in the description of it, equity may reform the instrument to conform to the true intention of the parties. Booth v. Wilkinson ---------- 730
3. To justify reformation the mistake must be proven by clear and convincing evidence, but a mere denial by one party that a mistake has been made, or the fact that testimony is conflicting, will not preclude reformation. Booth v. Wilkinson ---------- 730

Res Judicata.

Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown, but when alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony. § 42-365, R. S. Supp., 1974. Haug v. Haug ---------- 377

Rescission.

To maintain an action for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them, or else were made without knowledge as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby. McGinty v. McGinty ---------- 281

Rules of Supreme Court.

1. The rules of this court require that the trial judge must make a record of pretrial procedures formulating issues. Timmerman v. Hertz ---------- 237
2. When a case is tried in the District Court upon the record from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the Revised Rules of the Supreme Court, 1974, before it can be considered on appeal to this court. Tunks v. O'Brien ---------- 735

Sales.

1. Under the Uniform Commercial Code, any affirma-

tion of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

2. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U.C.C., an implied warranty that the goods shall be fit for such purpose. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

3. If instructions given in connection with the sale of the product were part of the basis of the bargain, and were inaccurate, and were relied on by the purchaser to his detriment, the breach of warranty may be based upon the inaccurate instructions. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

4. Where the seller of goods has breached a warranty with respect thereto the purchaser may recover consequential damages proximately resulting from the seller's breach. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

5. Where the seller of goods has breached a warranty with respect thereto the purchaser has the burden of proving both the cause of the loss and the extent thereof. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

Schools and School Districts.

1. Ordinarily a demand upon the responsible officers of a governmental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity. Sesemann v. Howell - 798

2. Tax money received by one school district from personal property taxed in that district but which should have, under the pertinent statutes, been taxed in another district cannot be recovered by the district within which the property should have been taxed where no levy was made on the property for its uses and purposes, where both districts involved obtained the amount of money for which the budget

called, and where neither district obtained any money intended for the other. Sesemann v. Howell ---- 798
3. Taxpayers, whose right to sue to protect the interests of the school district arising out of the failure or refusal of the officers to do so, have no greater right to sue to protect such interests than the designated officials have. Sesemann v. Howell 798
4. The provisions of section 77-1216, R. R. S. 1943, if timely pursued, afford an administrative remedy to a school district where it claims that personal property which it was entitled to tax has been erroneously assessed in the wrong district. Sesemann v. Howell ---------- 798

Searches and Seizures.
1. The foundation for the admission of a tape recording taken from the possession of defendant is sufficient if the evidence shows the circumstances of the seizure and that the exhibit is in the same condition as at the time of seizure. State v. Hoffman ---------- 200
2. A consent to search may be valid even though the subject of the search is unaware that he has a right to refuse consent. State v. Wood ---------- 353
3. Where probable cause exists for the arrest of an accused in his motor vehicle upon a public highway and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a short time later at a different location while the vehicle is still in police custody is not unreasonable even though made without a warrant. State v. Wood 353
4. When, subsequent to a stop of a camper, by the use of his senses, a trooper became aware of the presence of marijuana, at that time, under our law, he had probable cause to search the camper for marijuana without the necessity of relying on consent. State v. Wood ---------- 353
5. A thief has no legitimate interest in a stolen car and does not have standing to challenge a search of the automobile. State v. McFarland ---------- 394
6. A consent, freely and intelligently given, validates a search even if the suspect was not under arrest or if the officer did not have a search warrant. State v. Rathburn ---------- 485
7. The voluntariness of a consent to search is a question of fact to be determined by the totality of the circumstances. State v. Rathburn ---------- 485
8. The State has the burden of proving that consent

to search was freely and voluntarily given. State v. Rathburn ---------- 485
9. An officer's statement that he will obtain a search warrant is not per se coercive and will not alone vitiate the voluntariness of a consent. State v. Rathburn ---------- 485
10. The exclusionary rule does not apply to evidence seized in a search made by Mexican authorities in Mexico at the request of a police officer of this state. State v. Barajas ---------- 502
11. In order for a defendant to invoke the exclusionary rule as to evidence seized in the search of a premises, the evidence must indicate that the defendant has such interest in the premises as give rise to a reasonable expectation on his part that some right of his in the privacy of these premises will be respected. State v. Barajas ---------- 502
12. Miranda rules are not applicable to a consent search. State v. Clouse ---------- 671

Security Agreements.

1. Section 9-402, U.C.C., provides that a security agreement will suffice as a financing statement if it meets the requirements for a financing statement. It is evident that one instrument may qualify for both purposes and it follows that a financing statement may also constitute a security agreement if it qualifies as such. Crete State Bank v. Lauhoff Grain Co. ---------- 605
2. To constitute a security agreement there must be a written instrument, signed by the debtor, evidencing that such an agreement existed. Crete State Bank v. Lauhoff Grain Co. ---------- 605

Security Interest.

1. Section 9-401, U. C. C., requires that in regard to goods which are to become fixtures to perfect a security interest, it must be filed in the office where a real estate mortgage would be filed or recorded. Tillotson v. Stephens ---------- 104
2. Section 9-401, U. C. C., renders an improper filing ineffective as against any party not having notice of the financing statement. Tillotson v. Shephens -- 104
3. Section 9-313, U. C. C., provides that a security interest on goods which become fixtures does not take priority over a subsequent purchaser for value of an interest in the real estate if the subsequent

purchase is made without knowledge of the security interest and before it is perfected. Tillotson v. Stephens ---------- 104
4. Where property is subject to a mortgage and can be legally sold and conveyed, it is immaterial whether or not a purchaser had notice of plaintiff's interest in the property. Tillotson v. Stephens ---------- 104

Sentences.
1. Work release is a privilege that may be granted by the sentencing court. It is not a right which must be granted to all prisoners. State v. Temple - 91
2. The sentencing court has a broad discretion in ruling on petitions for work release. State v. Temple ---------- 91
3. A denial of the privilege of work release should not be subject to review except where there has been a clear abuse of discretion. State v. Temple - 91
4. Where the punishment of an offense is left to the discretion of a court to be exercised within certain statutorily prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Kolzow ---------- 93
5. Unless an abuse of discretion appears, a sentence within the statutory limits will not be disturbed on appeal. State v. Painter ---------- 183
6. A sentence imposed within the statutory limits will not be disturbed by this court on appeal, in the absence of an abuse of discretion. State v. Keller - 209
7. Section 29-2261, R. S. Supp., 1974, makes the inspection of a presentence report by the defendant's attorney discretionary with the trial court. However, this is a discretion which may be reviewed in this court. State v. Keller ---------- 209
8. A more severe punishment cannot be exacted in order to punish a convicted person for exercising his right to trial. However, sentence concessions are proper when a defendant pleads guilty to an offense. State v. Lacy ---------- 299
9. If a sentence is invalid or erroneous and beyond the power of the trial court to pronounce, it is of no effect and the court may then impose a lawful sentence. State v. Blankenship ---------- 329
10. The rule that the penalty of a sentence cannot be increased after the sentence is being served is applicable only when the sentence is legal and valid

and within the minimum and maximum statutory sanctions. State v. Blankenship ---------- 329
11. A sentence within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Blankenship ---------- 329
12. A sentence imposed within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. State v. Allen ---------- 560
State v. McMullen ---------- 796
13. A sentence denying probation and imposing a period of imprisonment within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. State v. Wade ---------- 761
14. State v. Randolph (1971), 186 Neb. 297, 183 N. W. 2d 225, does not apply where the new statute does not merely amend the former statute by lessening the punishment, but repeals the old statute and defines new categories of crime. It also does not apply where the new statute taken as a whole may be said to evidence a legislative intent that the penalty provision thereof not apply retroactively. State v. Crisp ---------- 833

Specific Performance.

1. Equity will grant specific performance of a parol agreement to leave property to another under an oral contract, if it is proved by evidence convincing and satisfactory, and if it has been wholly performed by one party and its nonperformance would be a fraud on him. Dunmire v. Cool ---------- 247
2. Each action for specific performance or suit to impress a trust on certain property is to be determined from the facts, circumstances, and conditions, presented by the evidence. Dunmire v. Cool -------- 247

Standing.

1. This court will not declare a statute or ordinance unconstitutional at the suit of one who is not injuriously affected thereby. Bali Hai', Inc. v. Nebraska Liquor Control Commission ---------- 1
2. The right of a party to sue as representative of a class may be determined on motion for summary judgment. Blankenship v. Omaha P. P. Dist. ------ 170
3. A party having an interest adverse to the interests of the parties sought to be represented may not sue as representative of a class under the provisions

of section 25-319, R. R. S. 1943. Blankenship v. Omaha P. P. Dist. ---------- 170
4. Potentially conflicting interests within the class are incompatible with the maintenance of a true class action. Blankenship v. Omaha P. P. Dist. ---------- 170
5. Where, on motion for summary judgment, the record demonstrates the potentiality of conflict, either within the class or between the person who seeks to represent the class and the class, it is appropriate to dispose of the class aspect of the case upon motion for summary judgment. Blankenship v. Omaha P. P. Dist. ---------- 170
6. One who claims under an oral contract a portion of decedent's estate for services rendered has no standing to contest decedent's will in county court, and his remedy is restricted to the District Court for equitable relief. Dunmire v. Cool ---------- 247
7. A thief has no legitimate interest in a stolen car and does not have standing to challenge a search of the automobile. State v. McFarland ---------- 394
8. In order for a defendant to invoke the exclusionary rule as to evidence seized in the search of a premises, the evidence must indicate that the defendant has such interest in the premises as give rise to a reasonable expectation on his part that some right of his in the privacy of these premises will be respected. State v. Barajas ---------- 502

Statutes.

1. Section 76-408, R. R. S. 1943, applies to sections 76-401 and 76-402, R. R. S. 1943. Wilson v. State - 228
2. A treaty is the supreme law of the land and is controlling over statutory provisions which conflict with it. Wilson v. State ---------- 228
3. In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance. § 25-836, R. R. S. 1943. Timmerman v. Hertz ---------- 237
4. The purpose of section 25-836, R. R. S. 1943, is to simplify pleading, and only by requiring the defendant to set forth the particular condition which is relied on as a defense may the plaintiff be advised of the exact defense he will be required to

meet, and the trial court informed as to the exact issue to be determined. Timmerman v. Hertz ---- 237
5. All acts of the Legislature are presumed to be constitutional. American Fed. of S., C. & M. Emp. v. Department of Public Institutions ---------- 253
6. In construing an act of the Legislature, all reasonable doubts must be resolved in favor of its constitutionality. American Fed. of S., C. & M. Emp. v. Department of Public Institutions ---------- 253
7. The extent to which the Legislature may exercise the police power, an attribute of state sovereignty, is primarily a matter of legislative judgment, but the purpose of the regulatory matter must be legitimate and the means employed to effect it must be reasonable. Bridgeford v. U-Haul Co. ---------- 308
8. If, in this court's opinion, a reasonable basis exists for legislative enactments, this court will not ordinarily substitute its judgment for that of the Legislature. Bridgeford v. U-Haul Co. ---------- 308
9. A classification created by legislation need not be all-inclusive so long as the class subject to the law is differentiated from other classes upon some rational basis. Bridgeford v. U-Haul Co. ---------- 308
10. A statute is not vague unless men of normal intelligence would necessarily have to guess at its meaning or would usually differ as to its application. Bridgeford v. U-Haul Co. ---------- 308
11. The cash bond required by section 30-1603, R. S. Supp., 1974, is not available for payment of the county judge's transcript fees. Caha v. Nelson --- 333
12. Where it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld. State v. Padley ---------- 358
13. The Legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend. State v. Padley -- 358
14. Section 39-662, R. S. Supp., 1974, is not unconstitutional. State v. Padley---------- 358
15. It is the duty of the court, so far as practicable, to give effect to the language of a statute and to

reconcile the different provisions of it, so they are consistent, harmonious, and sensible. State v. Black 366
16. When the literal enforcement of a statute would result in absurdity, the courts will assume that such consequences were not intended. State v. Black 366
17. The constitutionality of a legislative act must be raised at the trial or it will be considered to be waived. State v. Lewis 408
18. This court will not, unless justice requires it, reverse a decision of the trial court refusing to apply legislative changes in rules of evidence, which changes were not law at the time of trial only because the effective date of the legislative act had not been reached. Rawlings v. Andersen 686
19. It is the province of the Legislature to make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relationship to the legitimate objectives and purposes of the legislation. Campbell v. City of Lincoln 703
20. Where legislation creates a right of action, the Legislature has absolute power to determine the conditions under which the action must be brought. Campbell v. City of Lincoln 703
21. Public agencies, generally speaking, afford a proper subject for legislative classification. Campbell v. City of Lincoln 703
22. Legislative intent is the cardinal rule in the construction of statutes. Brown v. Sullivan 729
23. A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. Brown v. Sullivan 729
24. State v. Randolph (1971), 186 Neb. 297, 183 N. W. 2d 225, does not apply where the new statute does not merely amend the former statute by lessening the punishment, but repeals the old statute and defines new categories of crime. It also does not apply where the new statute taken as a whole may be said to evidence a legislative intent that the penalty provision thereof not apply retroactively. State v. Crisp 833
25. The fact that a part of a law is invalid does not always require that the entire law be treated as

void. If the part that is bad is independent of and separable from the balance of the law, or if the invalid part was not an inducement to the passage of the act, or if the remainder of the act is not so connected with the invalid portion that it cannot be upheld without doing violence to the legislative intent as a whole or result in putting into effect a law which the Legislature would not have passed had its attention been called to the invalid parts, the portion of the act that is valid may be sustained and given effect. Chase v. County of Douglas ----- 838

Stop and Check.

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. A brief stop of an 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. Brown -------- 321

Strict Liability.

1. Vicarious liability is generally recognized as a form of strict liability. Bridgeford v. U-Haul Co. ------ 308
2. The legislative imposition of strict liability does not per se constitute a deprivation of due process under the federal and state Constitutions. Bridgeford v. U-Haul Co. ---------- 308
3. Section 39-6,193, R. R. S. 1943, imposing vicarious liability on owners-lessors of trucks for the damages caused by lessees and operators of the leased trucks is not a violation of either state or federal due process or equal protection of the law. Bridgeford v. U-Haul Co. ---------- 308

Subrogation.

1. A guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control, and in the absence of assent, waiver, or estoppel, he is generally released by an act of the creditor which deprives him of such right. Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc. ---------- 292
2. Where the creditor has security from the principal and knows of the surety's obligation, the surety's

obligation is reduced pro tanto if the creditor (a) surrenders or releases the security, or (b) willfully or negligently harms it, or (c) fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action. Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc. ---------- 292

Summary Judgments.

1. The right of a party to sue as representative of a class may be determined on motion for summary judgment. Blankenship v. Omaha P. P. Dist. ---- 170
2. The statutes of this state authorize a partial summary judgment. Whether a partial summary judgment is a final and appealable order depends upon its effect. Blankenship v. Omaha P. P. Dist. ----- 170
3. Where, on motion for summary judgment, the record demonstrates the potentiality of conflict, either within the class or between the person who seeks to represent the class and the class, it is appropriate to dispose of the class aspect of the case upon motion for summary judgment. Blankenship v. Omaha P. P. Dist. ---------- 170
4. The burden is upon the party moving for a summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. Upon a motion for summary judgment, the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. In considering a motion for summary judgment, the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom. Pfeifer v. Pfeifer ---------- 369
5. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Properly used it can accomplish that purpose. It can, however, have the opposite effect. In tort cases of the kind where reasonable minds may differ as to whether an inference of negligence is to be drawn from the given set of facts, it can have no application. Pfeifer v. Pfeifer ---------- 369
6. Motion for summary judgment may be granted where there is no genuine issue as to any material

fact and the moving party is entitled to judgment as a matter of law. Johnson v. Evers ---------- 426

Taxation.

1. Tax money received by one school district from personal property taxed in that district but which should have, under the pertinent statutes, been taxed in another district cannot be recovered by the district within which the property should have been taxed where no levy was made on the property for its uses and purposes, where both districts involved obtained the amount of money for which the budget called, and where neither district obtained any money intended for the other. Sesemann v. Howell ---- 798
2. The provisions of section 77-1216, R. R. S. 1943, if timely pursued, afford an administrative remedy to a school district where it claims that personal property which it was entitled to tax has been erroneously assessed in the wrong district. Sesemann v. Howell ---------- 798
3. A decree of foreclosure of a tax lien is of no effect as against the persons who were at the time in actual possession of and who were not made parties defendant in the action and had no notice or knowledge thereof. Winkle v. Mitera ---------- 821
4. It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts. However, to justify a court in declaring a tax invalid because it is not for a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind. Chase v. County of Douglas ---------- 838
5. The general encouragement of growth and industry through such devices as publicity and advertising are public purposes. Appropriations for such public purposes may be expended through private concerns. The appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means. Chase v. County of Douglas ---------- 838

Tenancy in Common.

1. When there is common ownership of two contiguous tracts of land, subsequently conveyed to different grantees, one of the grantees cannot, for the purpose of establishing title by adverse possession

against the other grantee, tack his possession to that of the common grantor. Bartlett v. Kloepping 755
2. Generally, possession of real estate by one cotenant is possession of all and such possession is presumed friendly as to all cotenants. Bartlett v. Kloepping 755
3. Before a cotenant can hold adversely to other cotenants, there must be an ouster of possession of the latter by the former, with notice or knowledge of the acts causing the ouster being brought home to such other cotenants in a plain and unequivocal manner and be shown by acts of such notorious and hostile character as would put a man of ordinary prudence on guard. Acts which are reasonably consistent with the existence of title in other cotenants are insufficient. Bartlett v. Kloepping ---------- 755

Tender.

1. Mere conclusionary allegations of "tender" stated in an affidavit do not suffice to establish the fact of "tender." Caha v. Nelson---------- 333
2. A proffer of payment to a county court employee at time of ordering a transcript for appeal does not constitute a legal tender, since no payment was then due nor would the cost of said transcript be then ascertainable. Caha v. Nelson ---------- 333

Time.

1. A motion for a mistrial because of the erroneous admission of evidence must be timely made. Breiner v. Olson ---------- 120
2. Evidence is admissible to show conduct by the defendant both before and after the date charged in the complaint in support of an allegation that defendant engaged in gambling for a livelihood. State v. Hoffman ---------- 200
3. A claim for compensation made within 6 months after the occurrence of disability is a condition prerequisite to the bringing of an action for compensation benefits, and is necessary even though notice of the occurrence of the injury is dispensed with by the knowledge of the employer of the fact of injury. Raymond v. Buckridge, Inc. ---------- 212
4. When an employee knows that an injury has occurred and that disability therefrom was due to his employment, the period for making claim and filing action is not extended even though he was ignorant of the application of the Workmen's Com-

pensation Act to his situation. Raymond v. Buckridge, Inc. ---------- 212
5. An action is deemed commenced within the meaning of Chapter 25, R. R. S. 1943, on the date of the summons which is properly served on the defendant. George P. Rose Sodding & Grading Co. v. Dennis -- 221
6. The fact that funds are not available to pay a claim does not toll the statute of limitations. The statute commences to run upon a contract with a governmental subdivision, which raises its money by tax levy and assessment, at the same time as upon other contracts when the right to payment accrues and not when funds become available to pay the debt. George P. Rose Sodding & Grading Co. v. Dennis ---------- 221
7. Fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity or things to be done or performed in the future. McGinty v. McGinty ---------- 281
8. The time requirements of section 29-2103, R. R. S. 1943, are mandatory. A motion for a new trial under that section must be filed within 10 days after the verdict is rendered, not within 10 days from the date of sentencing, unless the verdict and sentencing occur on the same day. State v. Lacy ---------- 299
State v. Wood ---------- 353
9. An owner of property, entitled to lateral support, has a right of action against the servient owner at the time of the removal of such lateral support; he does not have a cause of action against subsequent owners or tenants, except for negligence. McKamy v. Bonanza Sirloin Pit, Inc. ---------- 325
10. If a sentence is invalid or erroneous and beyond the power of the trial court to pronounce, it is of no effect and the court may then impose a lawful sentence. State v. Blankenship ---------- 329
11. The rule that the penalty of a sentence cannot be increased after the sentence is being served is applicable only when the sentence is legal and valid and within the minimum and maximum statutory sanctions. State v. Blankenship ---------- 329
12. Sections 30-1601, 30-1602, 30-1604, 30-1605, and 30-1606, R. R. S. 1943, and 30-1603, R. S. Supp., 1974, concerning appeals in probate matters, require that a transcript of the probate proceedings be filed in the District Court within 40 days from the date of

the order which appellant challenges. Caha v. Nelson ---------- 333
13. Section 30-1605, R. R. S. 1943, requires the county judge to transmit a certified transcript to the District Court within 10 days of the perfection of appeal, if the transcript fees have been paid. Caha v. Nelson ---------- 333
14. Late filing of the transcript in District Court may, under certain circumstances, be excused if caused by the fault or negligence of county court officials or employees. Caha v. Nelson ---------- 333
15. A proffer of payment to a county court employee at time of ordering a transcript for appeal does not constitute a legal tender, since no payment was then due nor would the cost of said transcript be then ascertainable. Caha v. Nelson ---------- 333
16. The general rule is that in a prosecution for a crime, where there is other evidence of the guilt of the accused and the crime is of such a nature that the acquisition of money may be regarded as a natural or ordinary result of its perpetration, evidence is admissible of the sudden acquisition of money by the defendant, or the marked improvement in his financial condition at or subsequent to the time the offense was committed, even though the source of the money is not definitely traced or identified by the prosecution. However, under some circumstances testimony as to possession of such money may be admissible without the foundation of showing the accused's previous financial condition. State v. Banks ---------- 340
17. When, subsequent to a stop of a camper, by the use of his senses, a trooper became aware of the presence of marijuana, at that time, under our law, he had probable cause to search the camper for marijuana without the necessity of relying on consent. State v. Wood ---------- 353
18. In a modification proceeding in a workmen's compensation case, the whole question of the employee's physical condition can again be inquired into as of that time. Camp v. Blount Bros. Corp. ---------- 459
19. Under section 25-1143, R. R. S. 1943, an application for a new trial must be made within 10 days after the verdict, report, or decision is rendered, except where unavoidably prevented or where there is newly discovered evidence. Nebraska Children's Home Soc. v. Collins ---------- 531

20. A motion for a new trial which is not filed within the time specified by statute, and not within one of the exceptions, is a nullity and of no force and effect. Nebraska Children's Home Soc. v. Collins -- 531
21. On appeal from a county or municipal court to the District Court, notice of appeal and bond must be filed within 10 days after the rendition of judgment and this period cannot be prolonged by filing a motion for new trial. Edward Frank Rozman Co. v. Keillor ---------- 587
22. Equitable conduct requires that a person should make timely assertion of his rights against another known to be acting in ignorance of his claim. Campbell v. Kirby ---------- 610
23. Although ordinarily one has an undoubted right to bring an action within the statutory period, courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute when not to do so would work injustice in the particular case. Campbell v. Kirby ---------- 610
24. This court will not, unless justice requires it, reverse a decision of the trial court refusing to apply legislative changes in rules of evidence, which changes were not law at the time of trial only because the effective date of the legislative act had not been reached. Rawlings v. Andersen -------- 686
25. The courts may, in the furtherance of justice, either before or after judgment, permit the amendment of a pleading by conforming the pleading to the facts proved. § 25-852, R. R. S. 1943. Rawlings v. Andersen ---------- 686
26. An unqualified allowance of alimony in gross made before July 6, 1972, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is not subject to modification. Kasper v. Kasper ---------- 754
27. The general rule in this state is that in order to claim title by adverse possession one must have been in open, notorious, exclusive, and adverse possession of the property for a period of 10 years. Winkle v. Mitera ---------- 821

Torts.

1. In an action based on negligence, the plaintiff, in order to recover, must establish not only the negligence of defendant but also that such negligence

was the proximate cause of the occurrence and the resulting damages. Pendleton Woolen Mills v. Vending Associates, Inc. ---------- 46

2. Proximate cause is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. Pendleton Woolen Mills v. Vending Associates, Inc. ------ 46

3. Negligence is not the cause in fact of an occurrence unless it is a "substantial factor" in causing the occurrence or "but for" the negligence, the occurrence would not have happened. Pendleton Woolen Mills v. Vending Associates, Inc. ---------- 46

4. Under the Political Subdivisions Tort Claims Act, section 23-2406, R. R. S. 1943, the findings of a District Court under the act will not be disturbed on appeal unless they are clearly wrong. Daniels v. Andersen ---------- 95

5. An essential element in any negligence action is a duty recognized by law which the defendant owes to the plaintiff. Daniels v. Andersen ---------- 95

6. It is a basic principle of law that a jailer has a duty to exercise that degree of care necessary to provide reasonably adequate protection for his prisoners. Daniels v. Andersen ---------- 95

7. 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. Kortus v. Jensen ---------- 261

8. 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. Kortus v. Jensen ---------- 261

9. Proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently de-

parted from that standard in his treatment of the plaintiff. The burden of establishing *both* these essential elements rests upon the plaintiff's introduction of expert medical testimony. Kortus v. Jensen 261

10. A specialist from one medical community is competent to testify as an expert witness in a medical malpractice case as to the standard of care or skill required in another community, if the witness has knowledge of and familiarity with the practice and standard of the locality in question or in similar or like communities. Kortus v. Jensen ---------- 261

11. The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. It is not enough merely to present the testimony of a doctor who would have acted differently, or who is willing to express the opinion that an operation should have been performed differently. Kortus v. Jensen ---------- 261

12. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Properly used it can accomplish that purpose. It can, however, have the opposite effect. In tort cases of the kind where reasonable minds may differ as to whether an inference of negligence is to be drawn from the given set of facts, it can have no application. Pfeifer v. Pfeifer ---------- 369

13. The Nebraska Political Subdivisions Tort Claims Act, in creating a special class of tort-feasors consisting of all political subdivisions as defined, does not violate Article III, section 18, of the Nebraska Constitution. Campbell v. City of Lincoln ---------- 703

14. The classificiation of persons and corporations as created in the Nebraska Political Subdivisions Tort Claims Act constitutes a reasonable classification for purposes of the act, operates uniformly upon all members of the class, and is not constitutionally defective. Campbell v. City of Lincoln ---------- 703

15. The notice of claim requirements of the Nebraska Political Subdivisions Tort Claims Act is a condition precedent to the institution of suit against a political subdivision and neither that notice requirement nor the limitation of time for suit as

set out in section 23-2416, R. R. S. 1943, violate constitutional guaranties of equal protection or uniformity under state or federal Constitutions. Campbell v. City of Lincoln ---------- 703

Trade Secrets and Unfair Competition.

1. One who uses another's trade secret without a privilege to do so is liable to the other if his use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565
2. Some factors to be considered in determining whether given information is one's trade secret are: (1) The extent to which the information is known outside his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565
3. Whether the information of a trade secret disclosed was intended to be appropriable by the disclosee will depend upon the relationship of the parties and the circumstances under which the disclosure was made. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565

Treaties.

A treaty is the supreme law of the land and is controlling over statutory provisions which conflict with it. Wilson v. State ---------- 228

Trial.

1. While an action for dissolution of marriage is heard de novo in this court, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Olson v. Olson ---------- 8
2. In reviewing the correctness of a trial court's action in directing a verdict, the party against whom the motion was directed is entitled to have the evidence, and every reasonable inference that can

be drawn therefrom, construed in the light most favorable to him. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

3. Where the seller of goods has breached a warranty with respect thereto the purchaser has the burden of proving both the cause of the loss and the extent thereof. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

4. Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact to estimate with a reasonable degree of certainty and exactness the actual damages. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

5. It is the duty of the District Court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture. Shotkoski v. Standard Chemical Manuf. Co. - 22

6. If the effect of the taking is to increase the value of the remainder, or some of it, or not diminish the value at all, the condemner is entitled to introduce valuation testimony from which these inferences may be drawn. Morehead v. State ---------- 31

7. The trial court has a wide discretion in determining whether evidence of a particular sale may be admitted. Morehead v. State ---------- 31

8. Speculation and conjecture are not sufficient to establish causation. Plaintiff's evidence must be sufficient to make the theory of causation reasonable and not merely possible. Pendleton Woolen Mills v. Vending Associates, Inc. ---------- 46

9. In all appeals from the District Court to the Supreme Court in suits in equity, wherein review of some or all of the findings of fact of the District Court is asked by the appellant, it shall be the duty of the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and, upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the District Court or the fact that there may be some evidence in support thereof. Haller v. Chiles, Heider & Co., Inc. ---------- 65

10. A final submission of an action, within the purview of section 25-601, R. R. S. 1943, contemplates its submission upon both law and fact. Miller v. Harris 75
11. A plaintiff cannot dismiss his action without prejudice after there has been a final submission of it either to the court or jury. Miller v. Harris ----- 75
12. When a case has been submitted upon a motion for directed verdict, plaintiff's absolute right to dismiss without prejudice is lost. Miller v. Harris -- 75
13. When a motion for directed verdict has been overruled, there is no longer a final submission to the court where issues remain to be determined by the jury and have not been submitted to it. Miller v. Harris ---------- 75
14. Where a dismissal by the plaintiff is intended as a retraxit or abandonment of his cause, the facts supporting that conclusion must be affirmatively and clearly shown by the record. Miller v. Harris - 75
15. In an election contest, the burden of proving facts which may make the vote illegal is upon the party so contending; and when such vote has been counted, such party also has the burden of proving how it was cast. Dugan v. Vlach ---------- 81
16. In jury cases, the jurors are the judges of the credibility of the witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment. State v. French -------- 88
17. In determining the sufficiency of evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Daniels v. Andersen ---------- 95
18. In determining whether a party is entitled to a directed verdict the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. Treffer v. Seevers ---------- 114
19. Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof

when one is compared with the other, the issues must be submitted to the jury. Treffer v. Seevers .. 114
20. A party on appeal may not properly assign the admission of evidence as error where no objection was made thereto in the trial. Breiner v. Olson 120
21. Error cannot be predicated on the admission of testimony when testimony of the same nature was previously admitted without objection. Breiner v. Olson 120
22. A motion for a mistrial because of the erroneous admission of evidence must be timely made. Breiner v. Olson 120
23. The correctness of a ruling of the District Court in giving or refusing instructions cannot be considered by the Supreme Court unless such ruling is first challenged in the District Court by a motion for new trial. Breiner v. Olson 120
24. In a case where it becomes necessary to give further instructions to a jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel. Breiner v. Olson 120
25. It is error to give an instruction to a jury after it has retired to deliberate out of the presence of the parties and their counsel, but if it clearly appears that prejudice did not and could not flow therefrom, this is error without prejudice and not ground for reversal. Breiner v. Olson 120
26. In a jury-waived action, the judgment of the District Court on the facts has the same force as a jury verdict and will not be set aside if there is sufficient competent evidence to support it. Elm Creek State Bank v. Johnson 131
27. While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Grummert v. Grummert 148
28. The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that his disability was caused by an accident arising out of and in the course of his employment. Eliker v. D. H. Merritt & Sons 154
29. The word accident as used in the Workmen's Com-

pensation 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. Eliker v. D. H. Merritt & Sons ---------- 154

30. The statutes of this state authorize a partial summary judgment. Whether a partial summary judgment is a final and appealable order depends upon its effect. Blankenship v. Omaha P. P. Dist. ------ 170

31. While it is advisable to do so, the trial court is not required to specifically inquire of the defendant as to the factual basis for a plea of guilty. Inquiry of the county attorney or examination of the presentence report, if before the court, are alternative methods. State v. Painter ---------- 183

32. Evidence that at some previous time a house cat bit its owner, without any evidence as to the circumstances present when the biting occurred, is not sufficient to sustain a finding that the cat was a vicious or dangerous animal or that the owner had notice of its vicious or dangerous nature. Lee v. Weaver ---------- 194

33. In the absence of a showing of prejudice, a method of drawing and empaneling a jury substantially complying with the statute will be upheld. State v. Hoffman ---------- 200

34. Evidence showing a course of conduct, scheme, design, or intent relevant to an element of the offense charged is admissible, even though it also tends to show the commission of other criminal offenses. State v. Hoffman ---------- 200

35. Evidence is admissible to show conduct by the defendant both before and after the date charged in the complaint in support of an allegation that defendant engaged in gambling for a livelihood. State v. Hoffman ---------- 200

36. The foundation for the admission of a tape recording taken from the possession of defendant is sufficient if the evidence shows the circumstances of

the seizure and that the exhibit is in the same condition as at the time of seizure. State v. Hoffman - 200
37. Contributory negligence is an affirmative defense and the burden is upon the defendant to establish such defense. Kaspar v. Schack ---------- 215
38. Where the defendant pleads that the plaintiff is guilty of contributory negligence, the defendant has the burden to prove that defense, and this burden does not shift during the trial. Kaspar v. Schack - 215
39. Generally, it is error to give the jury instructions which contain inconsistent and conflicting paragraphs relating to the burden of proof. Kaspar v. Schack ---------- 215
40. The giving of an instruction which places the burden of proof to establish some of the facts put in issue by the pleadings on the wrong party is reversible error. Kaspar v. Schack ---------- 215
41. Where, in order to fairly and intelligibly present all the issues in a case to the jury by the instructions, it becomes necessary to repeat a proposition, its repetition, in proper connection with other facts or principles involved, is not erroneous. Kaspar v. Schack ---------- 215
42. In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance. § 25-836, R. R. S. 1943. Timmerman v. Hertz ---------- 237
43. The right to introduce evidence depends upon there being an issue of fact as to which it is relevant. The issues are made by the pleadings; and unless there is an issue of fact before the court, there is no right to introduce evidence to prove or disprove the fact. Where the answer does not state a defense, the trial court should direct a verdict for the plaintiff. Timmerman v. Hertz ---------- 237
44. Before this court can consider evidence bearing upon an issue of fact, the evidence must have been offered in the trial court and embodied in a bill of exceptions. Timmerman v. Hertz ---------- 237
45. The principle that on appeal the case will be considered upon the theory upon which the case was tried below, even though not pleaded, has application only where both parties acquiesce in the theory and the case was submitted to the trial court on

that basis. Timmerman v. Hertz ---------- 237
46. Equity will grant specific performance of a parol agreement to leave property to another under an oral contract, if it is proved by evidence convincing and satisfactory, and if it has been wholly performed by one party and its nonperformance would be a fraud on him. Dunmire v. Cool ---------- 247
47. Each action for specific performance or suit to impress a trust on certain property is to be determined from the facts, circumstances, and conditions presented by the evidence. Dunmire v. Cool ------ 247
48. 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. Kortus v. Jensen ---------- 261
49. Proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing *both* these essential elements rests upon the plaintiff's introduction of expert medical testimony. Kortus v. Jensen --- 261
50. A specialist from one medical community is competent to testify as an expert witness in a medical malpractice case as to the standard of care or skill required in another community, if the witness has knowledge of and familiarity with the practice and standard of the locality in question or in similar or like communities. Kortus v. Jensen ------- 261
51. The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. It is not enough merely to present the testimony of a doctor who would have acted differently, or who is willing to express the opinion that an operation should have been performed differently. Kortus v. Jensen ---------- 261

52. A prior written statement of a witness, not a party, contrary to a statement made before an administrative tribunal, may be admitted by the tribunal for impeachment purposes, although not substantive evidence of the fact declared in the written statement. Tri-City Beer Co. v. Nebraska Liquor Control Commission ---------- 278

53. To maintain an action for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them, or else were made without knowledge as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby. McGinty v. McGinty ---------- 281

54. Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence. McGinty v. McGinty ---------- 281

55. In an action for the recovery of amounts due upon a severable contract, judgment may be rendered for the items established by the evidence, but not for any claim not proved as alleged. Breiner v. Olson - 290

56. The judgment of the trial court in an action at law in which a jury has been waived has the effect of the verdict of a jury and will not be set aside unless clearly wrong. Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc. ---------- 292

57. A motion for a directed verdict admits, for the purpose of the ruling thereon, the truth of all relevant evidence together with all inferences which might reasonably be drawn from it in favor of the adverse party. McKamy v. Bonanza Sirloin Pit, Inc. ----- 325

58. When reasonable minds might draw different conclusions either as to the weight of evidence or the credibility of witnesses, a motion for a directed verdict should be overruled. McKamy v. Bonanza Sirloin Pit, Inc. ---------- 325

59. Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it. State v. Banks ---------- 340

60. Even though an identification procedure may have been suggestive, the in-court identification may be allowed to go to the jury if under the totality of the circumstances it is determined to be reliable

because it has an origin independent of the taint. State v. Banks ---------- 340

61. If identification procedures are such as to violate due process, the denial of a proper and timely motion to suppress and the admission of the in-court identification constitutes reversible error unless this court can say beyond a reasonable doubt that the error was harmless. State v. Banks ---------- 340

62. Bolstering of an eyewitness identification of an accused by reference to a pretrial identification of the accused is prohibited only where the pretrial identification procedures violate due process standards. State v. Banks ---------- 340

63. The general rule is that in a prosecution for a crime, where there is other evidence of the guilt of the accused and the crime is of such a nature that the acquisition of money may be regarded as a natural or ordinary result of its perpetration, evidence is admissible of the sudden acquisition of money by the defendant, or the marked improvement in his financial condition at or subsequent to the time the offense was committed, even though the source of the money is not definitely traced or identified by the prosecution. However, under some circumstances testimony as to possession of such money may be admissible without the foundation of showing the accused's previous financial condition. State v. Banks ---------- 340

64. Evidence of possession of a revolver or gun of prohibited description, which is in apparently good condition and has the characteristics and appearance commonly understood to be those of the firearm it purports to be, is prima facie evidence sufficient to go to the jury in a prosecution under section 28-1011.15, R. S. Supp., 1974. State v. Lee ---------- 348

65. A trial court may, in a proper case, order a continuance on its own motion. State v. Lee ---------- 348

66. 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. State v. Lee ---------- 348

67. Where conviction of a previous felony is an essential element of the crime charged, proof of such prior conviction is properly made by offering in evidence authenticated copies of the complaint or information, and the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that the defendant is

the same person presently before the court. State v. Lee ---------- 348

68. A defendant charged with assaulting and resisting a law enforcement officer in the performance of his official duties may be found guilty upon proof of either an assault or a resisting where the statute is worded in the disjunctive and in such a case it is not error for the trial court to instruct the jury as to the elements of the offense in the language of the statute. § 28-729.01, R. S. Supp., 1974. State v. Davis ---------- 361

69. In a law action tried to the court without a jury, it is not within the province of this court to weigh or resolve conflicts in the evidence. The credibility of the witnesses and the weight to be given to their testimony are for the trier of fact. Snay v. Snarr 375

70. In a paternity case where a jury is not requested by the alleged father, the findings of the court have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. Snay v. Snarr ---------- 375

71. Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. Olds v. Jamison ---------- 388

72. Conflicting evidence relating to ambiguity and contradictory provisions in a written contract is for the finder of fact. Olds v. Jamison ---------- 388

73. The fact that one of the parties to a contract denies that a mistake was made does not prevent a finding of mutual mistake nor prevent reformation. Olds v. Jamison ---------- 388

74. Where a written contract is the basis of an action and neither party asks for a reformation thereof, it is the duty of the court to ascertain its meaning and enforce it accordingly. Olds v. Jamison ------ 388

75. Issues of fact in will contest cases are determined in this court by the sufficiency of the evidence under the law to sustain the verdict of the jury or the findings of the District Court and, where the evidence in a case tried to the jury is conflicting, issues of fact are questions for its determination. Minor v. Bickford ---------- 402

76. In a proceeding to terminate parental rights a physician may be required to testify concerning his examination and treatment of the parent of a dependent and neglected child. State v. Lewis ------ 408

77. Alleged errors in instructions given by the trial court will not be considered on appeal when they were not raised in the motion for new trial. Omaha Home for Boys v. Stitt Constr. Co., Inc. ---------- 422
78. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Omaha Home for Boys v. Stitt Constr. Co., Inc. ---------- 422
79. In an action against an employer for personal injuries inflicted by an employee upon a third person by the negligent use of an automobile owned and operated by the employee, the burden is on the plaintiff to prove that the employee was acting within the scope of his employment at the time of the injury. Johnson v. Evers ---------- 426
80. In a post conviction proceeding, the defendant has the burden of establishing a basis for relief. State v. Halsey ---------- 432
81. In a prosecution brought under section 28-4,125(3), R. S. Supp., 1974, for possession of amphetamine, it is not necessary that the State prove that the defendant possessed a *quantity* of amphetamine having a potential for abuse associated with a stimulant effect on the central nervous system. State v. Jennings ---------- 434
82. A party seeking injunction must establish by competent evidence every controverted fact necessary to entitle him to relief, and an injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. Steffen v. County of Cuming --- 442
83. A pretrial conference is neither designed nor intended to arbitrarily exclude noncumulative evidence pertinent to the issues simply because it was not mentioned at the pretrial hearing. Mousel v. ten Bensel ---------- 456
84. The District Court has a broad discretion in regard to the amendment of pretrial orders. Mousel v. ten Bensel ---------- 456
85. When the State calls a witness to challenge defendant's claim of truth and veracity, a line of inquiry directed toward the defendant's previous character is firmly forbidden the State on direct examination. State v. Boss ---------- 467
86. When a defendant testifies on his own behalf, the prosecuting attorney may question him as to his previous convictions for felony and the number there-

of, but no details as to the nature of the charges or other details may be elicited or received. State v. Boss ---------- 467

87. A defendant is entitled to offer evidence of his reputation for truth and veracity. The prosecution is entitled to dispute that evidence only by evidence of bad reputation for truth and veracity. State v. Boss ---------- 467

88. A prosecutor in his argument is entitled to refer to previous convictions of felony only for the purpose of arguing the defendant's credibility. He is not entitled to use the conviction for the purpose of inferring the probability of the defendant's guilt of the crime charged. State v. Boss ---------- 467

89. Ordinarily a party who does not object to an argument of the prosecutor which is alleged to constitute misconduct will be held to have waived his right to complain. State v. Boss ---------- 467

90. Error may not be predicated on the refusal to give an instruction which either erroneously or only partially covers the applicable law. State v. Boss - 467

91. Jurors are judges of the credibility of witnesses and of the weight to be given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their duty to determine the truth. State v. Boss ---------- 467

92. Resolutions of conflicts in evidence and credibility of witnesses are not for the reviewing court, but for the jury. State v. Boss ---------- 467

93. The burden of proof is on the plaintiff to prove negligence on the part of the defendant by a preponderance of the evidence. Hoefer v. Marinan -- 477

94. Negligence must be proved by direct evidence or by facts from which negligence can reasonably be inferred. In the absence of such proof, negligence will not be presumed. Hoefer v. Marinan ------- 477

95. A motion for a 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. Hoefer v. Marinan ---------- 477

96. 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 to submit it to a jury for determination. Hoefer v. Marinan ---------- 477

97. The voluntariness of a consent to search is a question of fact to be determined by the totality of the circumstances. State v. Rathburn ---------- 485

98. The State has the burden of proving that a consent to search was freely and voluntarily given. State v. Rathburn ---------- 485

99. An officer's statement that he will obtain a search warrant is not per se coercive and will not alone vitiate the voluntariness of a consent. State v. Rathburn ---------- 485

100. The admission of irrelevant evidence will be considered "harmless error," not requiring reversal of a judgment, unless it affects the "substantial rights of the adverse party," when considered in connection with other evidence properly adduced. § 29-2308, R. R. S. 1943. State v. Rathburn ---------- 485

101. In order for a defendant to invoke the exclusionary rule as to evidence seized in the search of a premises, the evidence must indicate that the defendant has such interest in the premises as give rise to a reasonable expectation on his part that some right of his in the privacy of these premises will be respected. State v. Barajas ---------- 502

102. To be admissible, a confession must be free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. Barajas ---------- 502

103. It is not required that one suing the "head of a family" as an individual under the family purpose doctrine for personal injuries received in an automobile accident must first file his claim in the estate of the member of the family driving the vehicle who was killed in the accident; and neither section 24-517, R. S. Supp., 1974, nor Mueller v. Shacklett, 156 Neb. 881, 58 N. W. 2d 344 (1953), is applicable to that situation. Marcus v. Everett - 518

104. The family purpose doctrine may be applied in an action by an injured third party to impose liability upon a husband who is head of the family for negligence of the wife in driving an automobile

titled in both of their names as coowners, which automobile was purchased with funds contributed by both husband and wife, and both of whom have the right to use the automobile. Marcus v. Everett 518

105. Proof of contradictory statements of a witness is received not as evidence of the facts declared, but for the purpose only of aiding the jury in estimating the credibility of the witness. State v. Isley ----- 539

106. A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to matters relative to the issues. Such declarations are not substantive evidence of the fact declared. State v. Isley -------- 539

107. The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated in the impeaching testimony. State v. Isley ---------- 539

108. In a criminal case, the trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion. State v. Isley -- 539

109. In an information containing three counts, a verdict of guilty on two of the counts and an acquittal on the other is not inconsistent, although the evidence would have justified the conviction on all the counts. State v. Steinmark ---------- 545

110. The polygraph, commonly known as a lie detector, used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory. State v. Steinmark ---------- 545

111. It is the general rule that in a homicide or assault case a defendant may show the dangerous and turbulent character of the victim, but may do so only after laying a foundation by evidence tending to show self-defense. State v. Escamilla ---------- 558

112. An illegally obtained confession may be used to impeach a defendant's testimony and if he elects not to testify he has not been deprived of his constitutional right to testify. State v. Escamilla --- 558

113. In the absence of a request for a hearing to determine voluntariness of a confession, a defendant cannot complain of the failure to hold a Jackson v. Denno-type hearing. State v. Escamilla -------- 558

114. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565
115. In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565
116. It shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it. § 25-1127, R. R. S. 1943. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565
117. Where no section 25-1127, R. R. S. 1943, request has been made, the correct rule is: If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565
118. A general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565
119. The rules stated in the three immediately preceding syllabi are not made inapplicable merely because in addition to the general finding the trial court also mentioned certain matters specifically. Henkle & Joyce Hardware Co. v. Maco, Inc. ---------- 565
120. In the absence of a showing of good cause the trial court may refuse to compel the production of documents for inspection by the adverse party. Hadenfeldt v. State Farm Mut. Auto. Ins. Co. ---------- 578
121. To sustain a conviction under section 28-4,125 (1) (a), R. S. Supp., 1974, it is not necessary for the State to show actual physical transfer of a controlled substance from the defendant. State v. Guyott ---------- 593
122. Section 25-12,109, R. S. Supp., 1974, provided: A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity

and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission. Bobbie Brooks, Inc. v. Hyatt _ 596

123. The purpose of section 25-12,109, R. S. Supp., 1974, was to permit admission of systematically entered records without the necessity of identifying, locating, and producing as witnesses the individuals who made entries in the records in the regular course of the business. Bobbie Brooks, Inc. v. Hyatt ____ 596

124. The Uniform Business Records As Evidence Act was intended to bring the realities of business and professional practice into the courtroom and the act should not be interpreted narrowly to destroy its obvious usefulness. Bobbie Brooks, Inc. v. Hyatt _ 596

125. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and supported by the evidence. Laux v. Robinson _____ 601

126. A motion for directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Laux v. Robinson _____ 601

127. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. McDonald _____ 625

128. The determination of whether a statement was voluntarily made necessarily turns on the consideration of the totality of the circumstances in any particular case. State v. McDonald _____ 625

129. The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. State v. McDonald 625

130. Loss of past earnings is an item of special damage and must be specifically pleaded and proved. Impairment of earning capacity is an item of general damage and proof may be had under general allega-

tions of injury and damage. Wortman v. Northwestern Bell Tel. Co. ---------- 637
131. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. Wortman v. Northwestern Bell Tel. Co. 637
132. The questioning of a witness in a condemnation proceeding concerning the possibility of locating a transmission line at an alternative site is not proper, but does not necessarily constitute prejudicial error, particularly where objections to questions are immediately sustained before the witness answers. Ward v. Nebraska Electric G. & T. Coop., Inc. ---- 641
133. The validity of an objection to the taking of notes by jurors depends on the subsequent use of those notes resulting in prejudice to the objector. Ward v. Nebraska Electric G. & T. Coop., Inc. ---------- 641
134. 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. Ward v. Nebraska Electric G. & T. Coop., Inc. ---------- 641
135. The scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion. State v. Clouse ---------- 671
136. Where an action at law is tried to the court without a jury, the findings of the court have the same effect as a jury verdict, and will not be disturbed on appeal unless clearly wrong. L. Robert Kimball Consulting Engineers, Inc. v. Ryan ---------- 677
137. Negligence is never presumed. The mere happening of an accident does not create a presumption or authorize an inference of negligence. Luther v. Pawling ---------- 679
138. A party may not complain that correct instructions are not sufficiently specific when no request is made for more specific instructions. Rawlings v. Andersen ---------- 686
139. This court will not, unless justice requires it, reverse a decision of the trial court refusing to apply legislative changes in rules of evidence, which changes were not law at the time of trial only because the

effective date of the legislative act had not been reached. Rawlings v. Andersen ---------- 686
140. In an action where permanent, personal injury is claimed, the defendant may show as affecting damages that the plaintiff was a person of intemperate habits. Rawlings v. Andersen ---------- 686
141. A witness may testify as to the posted speed limit at a particular location if appropriate foundation is laid. Rawlings v. Andersen ---------- 686
142. Under the provisions of section 27-612, R. S. Supp., 1975, a precondition to the production of and use by an adverse party of a witness' prior written statement is that the statement has been used by the witness to refresh his recollection. Rawlings v. Andersen ---------- 686
143. The courts may, in the furtherance of justice, either before or after judgment, permit the amendment of a pleading by conforming the pleading to the facts proved. § 25-852, R. R. S. 1943. Rawlings v. Andersen ---------- 686
144. Photographs, accurately depicting the matters shown therein, are not admissible in evidence unless the matters shown are relevant to the issues in the case. Glass v. Harper ---------- 722
145. The overruling of an objection to a question upon cross-examination is not prejudicial when the answer elicited is a repetition of prior testimony by the same witness. Glass v. Harper ---------- 722
146. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong. Glass v. Harper ---- 724
147. In the absence of a bill of exceptions, prepared and filed in accordance with applicable statutory provisions and rules of practice, review on appeal is limited to whether the pleadings support the judgment entered by the lower court. Phillippe v. Barbera ---------- 727
148. On appeal to the District Court in civil matters, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county court. Phillippe v. Barbera_ 727
149. To justify reformation the mistake must be proven by clear and convincing evidence, but a mere denial by one party that a mistake has been made, or the fact that testimony is conflicting, will not preclude reformation. Booth v. Wilkinson---------- 730

150. When a case is tried in the District Court upon the record from a lower tribunal, that record must be certified as the bill of exceptions in accordance with the Revised Rules of the Supreme Court, 1974, before it can be considered on appeal to this court. Tunks v. O'Brien ---------- 735

151. The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there has been a change in relationship and he has become, for the time being, the employee of another person. In such case, whether the right of control, or want of it, existed, is ordinarily a question of fact for the jury; but where the pertinent facts pertaining to the contract and relationship of the persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court. Schwartz v. Riekes & Sons -------- 737

152. Alleged errors of the trial court in an action at law which are not referred to in a motion for new trial will not be considered on appeal in this court. Torstenson v. Melcher ---------- 764

153. A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must be, proved by a number of indefinite acts, conditions, and circumstances, which vary according to the purpose to be accomplished. If it be proved that defendants, by their acts, pursued the same object, although by different means, one performing one part and another another part, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object. Piccolo-Lynam Drug Co. v. Omaha Nat. Bank------ 772

154. The value of an opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true. Magdaleno v. Nebraska Panhandle Community Action Agency ---- 783

155. Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence. Magdaleno v. Nebraska Panhandle Community Action Agency ---------- 783

156. Statements constituting alleged misconduct of counsel in argument to the jury must be taken by the court reporter at the trial, together with the objection made thereto and the court's ruling thereon. State v. Sanders ---------- 789

157. Section 24-541, R. S. Supp., 1974, providing for review "de novo on the record" intends that the District Court exercise independent judgment, which must be based on the issues, pleadings, and evidence presented in the lower court unless additional evidence is adduced pursuant to that statute. Von Seggern v. Kassmeier Implement ---------- 791

158. In reviewing orders affecting procedural matters this court will presume in the absence of evidence to the contrary that the District Court has not abused its discretion, and the burden of showing an abuse of discretion is upon the party adversely affected by the District Court's order. Von Seggern v. Kassmeier Implement ---------- 791

159. The findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury and will not be disturbed on appeal unless clearly wrong. Zweygardt v. Farmers Mut. Ins. Co. ---------- 811

160. In equity cases where the trial court has made personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Winkle v. Mitera 821

161. A presumption is not evidence but it may take the place of evidence unless and until evidence appears to overcome or rebut it, and when evidence sufficient in quality appears to rebut it, the presumption disappears and thereafter the party having the burden of proof on the issue must, in civil actions, sustain his position by a preponderance of the evidence. First Nat. Bank in Kearney v. Bunn 829

Trusts.

1. Although the term has been broadly defined as a trust which is raised or created by the act or construction of law, in its more restricted sense and contradistinguished from constructive trusts a re-

sulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance. Campbell v. Kirby ---------- 610

2. Resulting trusts are also called "presumptive" trusts, and are frequently defined in terms of or in connection with the character of the tranasaction out of which they most frequently arise, namely, where one person pays the consideration for a purchase and the title is taken in the name of another. Campbell v. Kirby ---------- 610

3. If the trustee of a resulting trust in breach of trust transfers trust property to a bona fide purchaser, the transferee takes the property free of the resulting trust; but if the transferee is not a bona fide purchaser, he does not hold it free of the resulting trust. Campbell v. Kirby ---------- 610

4. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Campbell v. Kirby ---------- 610

5. In order to establish a trust by parol evidence, the proof must be clear, unequivocal, and convincing. Campbell v. Kirby ---------- 610

Undue Influence.

Implicit in the concept of the term undue influence, as that term is used in the law, is the premise that the influence which overcomes the will of the testator must be undue influence exercised upon the testator by someone else so that the testamentary disposition is not really the testator's own. Minor v. Bickford ---------- 402

Verdicts.

1. In reviewing the correctness of a trial court's action in directing a verdict, the party against whom the motion was directed is entitled to have the evidence, and every reasonable inference that can be drawn therefrom, construed in the light most favorable to him. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

2. A verdict may be set aside as excessive on appeal when, and not unless, it is so clearly exorbitant as

to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record. Daniels v. Andersen ---------- 95

3. In determining whether a party is entitled to a directed verdict the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. Treffer v. Seevers ---------- 114

4. Verdicts of juries in actions for interference with the marriage relationship should be set aside as excessive only where it clearly appears that the award was the result of passion and prejudice. Breiner v. Olson ---------- 120

5. 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. Kortus v. Jensen 261

6. 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. Lacy ---- 299
State v. Isley ---------- 539

7. A motion for a directed verdict admits, for the purpose of the ruling thereon, the truth of all relevant evidence together with all inferences which might reasonably be drawn from it in favor of the adverse party. McKamy v. Bonanza Sirloin Pit, Inc. ---------- 325

8. When reasonable minds might draw different conclusions either as to the weight of evidence or the credibility of witnesses, a motion for a directed verdict should be overruled. McKamy v. Bonanza Sirloin Pit, Inc. ---------- 325

9. In an information containing three counts, a verdict of guilty on two of the counts and an acquittal on the other is not inconsistent, although the evidence would have justified the conviction on all the counts. State v. Steinmark ---------- 545

10. A motion for directed verdict must be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to

have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Laux v. Robinson ---------- 601

11. A verdict may be set aside as excessive only where it is so clearly exorbitant as to indicate that it was a result of passion, prejudice, or mistake or that it is clear that the jury disregarded the evidence or controlling rules of law. Ward v. Nebraska Electric G. & T. Coop., Inc. ---------- 641

12. The verdict of a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Torstenson v. Melcher ---------- 764
Piccolo-Lynam Drug Co. v. Omaha Nat. Bank ----- 772

Waiver.

1. Where the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor (a) surrenders or releases the security, or (b) willfully or negligently harms it, or (c) fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action. Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc. ---------- 292

2. The constitutionality of a legislative act must be raised at the trial or it will be considered to be waived. State v. Lewis ---------- 408

3. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. Omaha Home for Boys v. Stitt Constr. Co., Inc. ---------- 422

4. Ordinarily a party who does not object to an argument of the prosecutor which is alleged to constitute misconduct will be held to have waived his right to complain. State v. Boss ---------- 467

5. If an insurance company has knowledge through its agent, when a contract of insurance is effected, that the premises are vacant or unoccupied, the issuance of the policy waives any provision as to vacancy or unoccupancy, at least so far as the existing vacancy is concerned. Zweygardt v. Farmers Mut. Ins. Co. 811

Warranty.

1. Under the Uniform Commercial Code, any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part

of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

2. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under section 2-316, U.C.C., an implied warranty that the goods shall be fit for such purpose. Shotkoski v. Standard Chemical Manuf. Co.---------- 22

3. If instructions given in connection with the sale of the product were part of the basis of the bargain, and were inaccurate, and were relied on by the purchaser to his detriment, the breach of warranty may be based upon the inaccurate instructions. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

4. Where the seller of goods has breached a warranty with respect thereto the purchaser may recover consequential damages proximately resulting from the seller's breach. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

5. Where the seller of goods has breached a warranty with respect thereto the purchaser has the burden of proving both the cause of the loss and the extent thereof. Shotkoski v. Standard Chemical Manuf. Co. ---------- 22

Waters.

1. It is the settled law of Nebraska that erosion of a river, which cuts entirely across riparian land and into the land of an adjoining owner, operates to obliterate the title of him whose land was originally riparian, and that he may not reassert his title if the river thereafter reverses its transverse wanderings and new land is formed within what were his original boundaries. Winkle v. Mitera ---------- 821

2. The ownership of an island carries with it the bed of the river to the center or thread of each surrounding channel. Winkle v. Mitera ---------- 821

3. Where title to an island, bounded by the waters of a nonnavigable stream is in one owner, and title to the land on the other shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland. Winkle v. Mitera 821

Weapons.

Evidence of possession of a revolver or gun of prohibited description, which is in apparently good condition and has the characteristics and appearance commonly understood to be those of the firearm it purports to be, is prima facie evidence sufficient to go to the jury in a prosecution under section 28-1011.15, R. S. Supp., 1974. State v. Lee ---------- 348

Wills.

1. Where the language of a will is clear and unambiguous there is no room for construction. Lowry v. Murren ---------- 42
2. Where it is clear that the testator has not disposed of all his property, the courts cannot add provisions to his will which will prevent a partial intestacy, but the property which is thus omitted must pass as intestate property. Lowry v. Murren ---------- 42
3. The rule in Shelley's case is not applicable where the "remainder" interest is only a life estate. Lowry v. Murren ---------- 42
4. Vested interests are not subject to the rule against perpetuities nor does the rule apply to reversions. Lowry v. Murren ---------- 42
5. One who claims under an oral contract a portion of decedent's estate for services rendered has no standing to contest decedent's will in county court, and his remedy is restricted to the District Court for equitable relief. Dunmire v. Cool---------- 247
6. Implicit in the concept of the term undue influence, as that term is used in the law, is the premise that the influence which overcomes the will of the testator must be undue influence exercised upon the testator by someone else so that the testamentary disposition is not really the testator's own. Minor v. Bickford ---------- 402
7. Issues of fact in will contest cases are determined in this court by the sufficiency of the evidence under the law to sustain the verdict of the jury or the findings of the District Court and, where the evidence in a case tried to the jury is conflicting, issues of fact are questions for its determination. Minor v. Bickford ---------- 402

Witnesses.

1. In jury cases, the jurors are the judges of the credibility of the witnesses and of the weight to be

given their testimony and, within their province, they have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgment. State v. French ------ 88

2. The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. It is not enough merely to present the testimony of a doctor who would have acted differently, or who is willing to express the opinion that an operation should have been performed differently. Kortus v. Jensen ---------- 261

3. A prior written statement of a witness, not a party, contrary to a statement made before an administrative tribunal, may be admitted by the tribunal for impeachment purposes, although not substantive evidence of the fact declared in the written statement. Tri-City Beer Co. v. Nebraska Liquor Control Commission ---------- 278

4. In determining the sufficiency of evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Lacy ---------- 299

5. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausability of explanations, or weigh the evidence. State v. Brown ---------- 321

6. In a proceeding to terminate parental rights a physician may be required to testify concerning his examination and treatment of the parent of a dependent and neglected child. State v. Lewis ------ 408

7. Expert evidence is not ordinarily required to lay a foundation for the introduction of an aerial photograph. It is sufficient that some witness familiar with the subject matter can testify that it is an accurate and true representation of the scene depicted. Mousel v. ten Bensel ---------- 456

8. When the State calls a witness to challenge defendant's claim of truth and veracity, a line of inquiry directed toward the defendant's previous character

is firmly forbidden the State on direct examination. State v. Boss ---------- 467

9. When a defendant testifies on his own behalf, the prosecuting attorney may question him as to his previous convictions for felony and the number thereof, but no details as to the nature of the charges or other details may be elicited or received. State v. Boss ---------- 467

10. Proof of contradictory statements of a witness is received not as evidence of the facts declared, but for the purpose only of aiding the jury in estimating the credibility of the witness. State v. Isley ------ 539

11. A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to matters relative to the issues. Such declarations are not substantive evidence of the fact declared. State v. Isley ---------- 539

12. The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated in the impeaching testimony. State v. Isley ---------- 539

13. The polygraph, commonly known as a lie detector, used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory. State v. Steinmark ---------- 545

14. The scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion. State v. Clouse ---------- 671

15. A witness may testify as to the posted speed limit at a particular location if appropriate foundation is laid. Rawlings v. Andersen ---------- 686

16. The overruling of an objection to a question upon cross-examination is not prejudicial when the answer elicited is a repetition of prior testimony by the same witness. Glass v. Harper ---------- 724

17. Actions in equity on appeal to this court are subject to the rule that when credible evidence on material questions of fact is in irreconcilable 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. Booth v. Wilkinson ---------- 730

18. The value of an opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true. Magdaleno v. Nebraska Panhandle Community Action Agency ---- 783
19. Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence. Magdaleno v. Nebraska Panhandle Community Action Agency ---------- 783

Words and Phrases.

1. General benefits are those which arise from the fulfillment of the public object which justified the taking. Special benefits are those which arise from the particular relation of the land in question to the public improvement. Morehead v. State ------ 31
2. Proximate cause is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. Pendleton Woolen Mills v. Vending Associates, Inc. ---- 46
3. Negligence is not the cause in fact of an occurrence unless it is a "substantial factor" in causing the occurrence or "but for" the negligence, the occurrence would not have happened. Pendleton Woolen Mills v. Vending Associates, Inc. ---------- 46
4. The word "immediate" in referring to the notice required in an insurance policy means with reasonable celerity, with reasonable and proper diligence; and what is a reasonable time depends upon all the facts and circumstances of each particular case. Zukaitis v. Aetna Cas. & Sur. Co. ---------- 59
5. Proximate cause, as used in the law of negligence is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. Daniels v. Andersen --- 95
6. Section 9-313, U. C. C., provides that anyone, other than the mortgage holder, purchasing at a foreclosure sale is a subsequent purchaser. Tillotson v. Stephens ---------- 104
7. The word accident as used in the Workmen's Compensation 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. Eliker v. D. H. Merritt & Sons ---------- 154

8. 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. Eliker v. D. H. Merritt & Sons ---------- 154

9. The words "arising out of" refer 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. Eliker v. D. H. Merritt & Sons ---------- 154

10. Vicarious liability is generally recognized as a form of strict liability. Bridgeford v. U-Haul Co. ------ 308

11. In section 28-4,117, R. S. Supp., 1974, Schedule II(c), listing as a controlled substance: "Any material, compound, mixture, or preparation which contains any quantity of the following substances *having a potential for abuse associated with a stimulant effect on the central nervous systems*: (1) Amphetamine, its salts, optical isomers, and salts of its optical isomers" the italicized words modify the word "substances," not "quantity." State v. Jennings 434

12. The word "abuse" insofar as it includes verbal abuse in section 28-729, R. S. Supp., 1974, is construed to include only those which have been described as "fighting" words, i.e., those which by their very utterance tend to inflict injury or tend to incite an immediate breach of the peace. As so construed the statute violates neither the First Amendment to the Constitution of the United States, nor Article I, section 5, of the Constitution of Nebraska. State v. Boss ---------- 467

13. Whether any particular use of abusive language constitutes "fighting words" depends not only upon

the words, but also upon the circumstances in which they are used. State v. Boss ---------- 467
14. The word "resist" as used in section 28-729, R. S. Supp., 1974, is not so vague as to make the statute unconstitutional. State v. Boss ---------- 467
15. An order affecting a substantial right made in a special proceeding is a final order which may be appealed to this court. State v. Loomis ---------- 552
16. Section 28-4,115 (13), R. S. Supp., 1974, provides that deliver or delivery shall mean the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. State v. Guyott -- 593
17. Although the term has been broadly defined as a trust which is raised or created by the act or construction of law, in its more restricted sense and contradistinguished from constructive trusts a resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance. Campbell v. Kirby ---------- 610
18. Resulting trusts are also called "presumptive" trusts, and are frequently defined in terms of or in connection with the character of the transaction out of which they most frequently arise, namely, where one person pays the consideration for a purchase and the title is taken in the name of another. Campbell v. Kirby ---------- 610
19. A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. Swassing v. Baum ---------- 651
20. In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself. Swassing v. Baum ---------- 651
21. Gross negligence within the meaning of the motor vehicle guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief

that there was an indifference to the safety of others. Luther v. Pawling ---------- 679
22. The term "street" as used in section 19-709, R. R. S. 1943, is a generic term and includes the portion of the street for vehicular traffic, the parkway, and the sidewalk. M.R.D. Corp. v. City of Bellevue -- 722

Work Release.

1. Work release is a privilege that may be granted by the sentencing court. It is not a right which must be granted to all prisoners. State v. Temple ----- 91
2. The sentencing court has a broad discretion in ruling on petitions for work release. State v. Temple ---- 91
3. A denial of the privilege of work release should not be subject to review except where there has been a clear abuse of discretion. State v. Temple ------ 91

Workmen's Compensation.

1. The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that his disability was caused by an accident arising out of and in the course of his employment. Eliker v. D. H. Merritt & Sons - 154
2. The word accident as used in the Workmen's Compensation 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. Eliker v. D. H. Merritt & Sons ---------- 154
3. The "by accident" requirement of the Workmen's Compensation Act is now satisfied, either if the cause was of an accidental character, or if the effect was unexpected or unforeseen, and happened suddenly and violently. The problem in cases such as this is now causation, and whether an accidental injury arose out of and in the course of the employment. Eliker v. D. H. Merritt & Sons -------- 154
4. 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. Eliker v. D. H. Merritt & Sons ---------- 154

5. The words "arising out of" refer 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. Eliker v. D. H. Merritt & Sons ---------- 154

6. A claim for compensation made within 6 months after the occurrence of disability is a condition prerequisite to the bringing of an action for compensation benefits, and is necessary even though notice of the occurrence of the injury is dispensed with by the knowledge of the employer of the fact of injury. Raymond v. Buckridge, Inc. ---------- 212

7. When an employee knows that an injury has occurred and that disability therefrom was due to his employment, the period for making claim and filing action is not extended even though he was ignorant of the application of the Workmen's Compensation Act to his situation. Raymond v. Buckridge, Inc. 212

8. The Supreme Court, on an appeal from the District Court in a workmen's compensation case, may set aside the judgment of the District Court only upon the grounds provided by statute which include "(3) the findings of fact are not supported by the evidence as disclosed by the record." Cain v. La Grange Steel Erectors, Inc. ---------- 272

9. When the record in a workmen's compensation case reflects nothing more than a resolution of conflicting medical testimony, this court will not substitute its judgment of facts for the judgment of the Workmen's Compensation Court. Cain v. La Grange Steel Erectors, Inc. ---------- 272

10. Where pain is sufficiently severe to prevent a normal function of a body member, a partial loss of use of that member results within the purview of section 48-121(3), R. R. S. 1943. Cain v. La Grange Steel Erectors, Inc. ---------- 272

11. Section 48-118, R. R. S. 1943, provides in part: "If the employee or his personal representative or the employer or his compensation insurer join in the prosecuting of such claim and are represented by counsel, the reasonable expenses and the attorney's

fees shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought." Schulz v. General Wholesale Coop. Co., Inc. ---------- 410

12. That portion of section 48-118, R. R. S. 1943, involved here, ordinarily does not apply to require a division of attorneys' fees where the subrogation interest of the employer or its insurance carrier is fully and adequately represented by its own counsel and where the services of the employee's attorney were not relied upon to effect the subrogation recovery. Schulz v. General Wholesale Coop. Co., Inc. ---------- 410

13. Under the Workmen's Compensation Act an award which is payable periodically for 6 months or more is subject to modification on the ground of increase of incapacity due solely to the injury. § 48-141, R. R. S. 1943. Camp v. Blount Bros. Corp. ---------- 459

14. In a modification proceeding in a workmen's compensation case, the whole question of the employee's physical condition can again be inquired into as of that time. Camp v. Blount Bros. Corp. ---------- 459

15. If an employee receives an injury which of itself would cause only partial disability, but which combined with a previous disability other than one caused by disease does in fact cause permanent total disability, the employer shall be liable only for the partial disability which would have resulted from the second injury in the absence of any preexisting disability, and the employee shall be compensated for the additional disability out of the Second Injury Fund. § 48-128, R. R. S. 1943 (Reissue 1968). Camp v. Blount Bros. Corp. ---------- 459

16. Total disability, as used in section 48-128, R. R. S. 1943 (Reissue 1968), means total disability in fact. A workman who is unable to perform or to obtain any substantial amount of labor, either in his particular line of work or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of section 48-128. Camp v. Blount Bros. Corp. ---------- 459

17. An employee who has permanent total disability as a result of a combination of injuries sustained in separate accidents is entitled to compensation out of the Second Injury Fund even though the injuries

sustained in the separate accidents were schedule injuries which would otherwise be compensated under subdivision (3) of section 48-121, R. R. S. 1943. Camp v. Blount Bros. Corp. ---------- 459

18. In making an award for rehabilitation services it is proper for the Workmen's Compensation Court to prescribe the procedure for the employee to follow if he wants to obtain rehabilitation services. Camp v. Blount Bros. Corp. ---------- 459

19. On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence. Scott v. Young Men's Christian Assn. -- 746

20. Upon appellate review of a workmen's compensation case in the Supreme Court, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Magdaleno v. Nebraska Panhandle Community Action Agency ---------- 783

21. In a workmen's compensation proceeding a District Court finding against a party will only be set aside if the evidence compels a finding for that party. Magdaleno v. Nebraska Panhandle Community Action Agency ---------- 783

Zoning.

Notwithstanding section 24-517 (5), R. S. Supp., 1974, the District Court retains jurisdiction in injunction actions brought to enforce zoning ordinances. Village of Springfield v. Hevelone ---------- 37