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STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. RALPH R. BREMERS, A MEMBER OF THE NEBRASKA STATE BAR ASSOCIATION, RESPONDENT.

264 N. W. 2d 194

Filed April 5, 1978. No. 40830.

1. **Attorneys at Law: Disciplinary Proceedings: Canons.** An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal.
2. _____: _____: _____. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach upon the courts or the legal profession, constitute grounds for suspension or disbarment.

Original action. Judgment of disbarment.

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

Clayton H. Shrout of Shrout, Christian, Krieger, Mori & Merwald, for respondent.

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

PER CURIAM.

This is a disciplinary proceeding brought against Ralph R. Bremers, a practicing member of the Nebraska State Bar Association. The formal charges alleged that respondent had violated DR 1-102 (A) (1), (4), (5), and (6); DR 6-101 (A) (3); and DR 9-102 (A) and DR 9-102 (B) (1), (2), (3), and (4), of the Code of Professional Responsibility. Respondent was also charged with violating his oath as an attorney at law, and with violation of several statutory provisions dealing with administering trust funds. Following a hearing before the referee, the referee filed his report, including findings of fact and conclusions of law, and recommended disbarment.

The charges against the respondent primarily in-

volve his conduct in connection with the guardianship estate of Amy R. Rich, and subsequently the estate of Amy R. Rich. Other estates are tangentially involved but are not directly and primarily involved here.

On August 6, 1952, Amy R. Rich was declared incompetent by the county court of Douglas County, Nebraska, and her brother, Frank C. Rich, was appointed guardian. Respondent was his attorney. Frank Rich filed annual reports as guardian until his death in 1960. At that time respondent became the successor guardian, as well as the attorney for the guardianship estate. On January 22, 1972, Amy R. Rich died. At that time respondent had not filed any reports with the county court as to his doings as guardian for any year. In response to a court order to show cause dated October 18, 1973, respondent filed a guardianship report on November 16, 1973, which purported to cover his acts and doings from December 2, 1960, to December 1, 1965. The report contained no reference to loans made, but contained one entry showing interest on loans and deposits of $316.19 for the entire reporting period. The report also showed the payment of attorney's fees and guardian's commissions and expenses to respondent in the sum of $1,902.14. No application had been made to the court for an order authorizing investments of any of the guardianship funds in loans, and no application had been made to the court fixing or authorizing the payment of fees or commissions.

On November 27, 1973, respondent filed a report purporting to be of his acts and doings from December 2, 1965, to January 23, 1972. A lump sum item in that report showed interest and dividends on investments of $6,848.53, and one other item showed the payment of guardian's commissions and attorney's fees and expenses of $12,095.50. Loans had been made and fees paid without authorization or court approval. Subsequent corrected and inconsistent

reports were filed, the final one on December 28, 1973.

Meanwhile respondent was appointed as the administrator C. T. A. of the estate of Amy R. Rich on April 25, 1972, and letters of administration were issued to him. On January 2, 1974, the county court entered an order finding respondent unsuitable to discharge his trust as administrator and removing him from that office. The court appointed a successor administrator and ordered respondent to produce all his records on January 10, 1974. No accounting of any kind was filed in the estate prior to respondent's removal as administrator. In response to the court order the respondent filed a report on or about March 1, 1974.

Hearings were held in the county court with respect to the accountings of respondent in both the guardianship and estate proceedings. Essentially, the county court found that the respondent's reports were erroneous, incomplete, unreliable, and misleading; that the respondent had made numerous loans and advances to various relatives and friends of respondent without court authorization or approval, some of which had been repaid and some of which had not. The county court also found that respondent had made excessive and unauthorized payments of attorney's fees to himself without authorization by the court. The county court surcharged respondent the sum of $25,344.67 for assets not properly accounted for in the guardianship proceeding, and the sum of $4,183.91 for assets not accounted for in the probate estate.

The respondent's direct appeal of those judgments was dismissed on motion. Thereafter the successor administrator of the estate of Amy R. Rich obtained court approval and brought action against the respondent and his surety to recover the surcharge of $25,344.67 in the guardianship estate. The respondent filed a motion for jury trial and when that mo-

tion was denied at trial, he refused to adduce evidence. The plaintiff introduced evidence, and the District Court entered judgment affirming the surcharge. This court affirmed the judgment of the District Court, and the judgment against respondent has become final. McGreevy v. Bremers, 199 Neb. 448, 259 N. W. 2d 477.

It is evident that respondent has violated the disciplinary rules of the Code of Professional Responsibility. He has engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation; in conduct prejudicial to the administration of justice; and conduct adversely reflecting on his fitness to practice law. Respondent has failed to assist in maintaining the integrity and competence of the legal profession; neglected legal matters entrusted to him; and failed to keep funds entrusted to him separate and apart from his own. He has failed to properly account for such funds and to promptly pay over and deliver them, and has converted them, at least in part, to his own uses.

An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal. State ex rel. Nebraska State Bar Assn. v. Ledwith, 197 Neb. 572, 250 N. W. 2d 230.

Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach upon the courts or the legal profession, constitute grounds for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Strom, 189 Neb. 146, 201 N. W. 2d 391.

A restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, is not an exoneration of his professional misconduct.

State ex rel. Nebraska State Bar Assn. v. Conover, 166 Neb. 132, 88 N. W. 2d 135.

A duty rests on the courts to maintain the integrity of the legal profession by disbarring or suspending attorneys who indulge in practices constituting a fraud on the courts, or which tend to corrupt and defeat the administration of justice. State ex rel. Nebraska State Bar Assn. v. Jensen, 171 Neb. 1, 105 N. W. 2d 459.

This court has consistently held that failure to account for or conversion by a lawyer of trust funds in his possession requires disbarment. It is therefore adjudged that respondent be disbarred.

JUDGMENT OF DISBARMENT.

BRODKEY, J., not participating.

ELI I. SCHUPACK ET AL., APPELLEES AND CROSS-APPELLANTS, V. MCDONALD'S SYSTEM, INC., AN ILLINOIS CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES, IMPLEADED WITH ROBERT A. EDWARDS, APPELLEE AND CROSS-APPELLEE.

264 N. W. 2d 827

Filed April 5, 1978. No. 41114.

1. **Equity: Appeal and Error.** In an appeal in an equity action, it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. Such independent conclusions of fact must be determined by this court in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence.
2. **Contracts: Assignments.** Subject to certain exceptions in case of contracts involving relations of personal confidence or trust or being for personal services all contracts are assignable.
3. _____: _____. A contract, which shows by its nature or terms that it is personal in character, that is, that reliance for its performance is placed on the integrity, credit, or responsibility of a party, or that confidence or trust is reposed in him personally for its performance, is not assignable, even in the sense of its performance being delegated to another without the consent of the other party to the contract.

4. **Contracts: Assignments: Intent.** Rights arising out of a contract cannot be transferred if they are coupled with liabilities or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.
5. _____: _____: _____. Whether rights and duties under a contract are too personal in character to permit assignment is a question of construction to be resolved from the nature of the contract and the express or presumed intention of the parties.
6. **Contracts: Intent.** Whether a duty is personal such that it cannot be delegated is a question of the intention of the parties to be ascertained from the contract, its nature, and attending circumstances.

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

Kutak Rock Cohen Campbell Garfinkle & Woodward, for appellants.

Abrahams, Kaslow & Cassman, for appellees Schupack et al.

McGrath, North, O'Malley, Kratz, Dwyer, O'Leary & Martin, for appellee Edwards.

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

WHITE, C. J.

This is an action by the plaintiffs against the defendants, McDonald's Corporation and McDonald's System, Inc., its wholly owned subsidiary (hereinafter referred to as McDonald's), for a declaratory judgment to determine the respective rights and obligations of the parties to and under a certain Right of First Refusal (or Right) originally granted by McDonald's to Bernard L. Copeland and now allegedly possessed by the plaintiffs, and for specific performance and injunctive relief requiring McDonald's to accord the plaintiffs the Right of First Refusal to acquire a McDonald's unit in Bellevue, Nebraska, and any additional units which might be in

the future developed by McDonald's in the Omaha, Nebraska, or Council Bluffs, Iowa, area. After commencement of this action McDonald's granted the franchise for the Bellevue unit to Robert A. Edwards who was subsequently joined as a defendant.

The case was tried to the court which, on September 28, 1976, found that: The Right given to Copeland by McDonald's was not a personal contract and was freely transferable or assignable without McDonald's consent; the Right was transferred and conveyed to the plaintiffs in 1964 by Copeland and John Skoog when they sold all their interest in various McDonald's franchises in Omaha and Council Bluffs to the plaintiffs; McDonald's consented (although their consent was not necessary) to this transfer of the Right by their knowledge of the transfer and their conduct subsequent to the transfer; and the area encompassed by the Right includes only that area which is within the corporate limits of the cities of Omaha and Council Bluffs as those boundaries may be fixed from time to time by appropriate ordinance, and specifically that the Right does not encompass Bellevue.

Accordingly, the District Court held that under the Right McDonald's is obligated to accord the Right of First Refusal to the plaintiffs to acquire any additional units which may hereafter be developed in the geographical area within the corporate limits of the cities of Omaha and Council Bluffs as now existing or as may hereafter be extended; and enjoined McDonald's from granting or operating franchises in the Omaha and Council Bluffs area without according the plaintiffs the Right of First Refusal to acquire such units.

McDonald's appeal from that portion of the decree which finds and holds that the Right was not personal to Bernard L. Copeland and was assignable and was assigned and transferred to the plaintiffs and that McDonald's acknowledged and consented to

this transfer. Plaintiffs cross-appeal from that portion of the decree which finds and holds that the Right is limited in scope to the corporate limits of Omaha and Council Bluffs and that it does not encompass Bellevue. For the reasons stated below, we reverse the judgment of the District Court and remand the cause for further proceedings in accordance with this opinion.

This is an equity action. The following rules govern our review of the trial court's action. "In an appeal in an equity action, it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court." Marfisi v. Spagnola, 197 Neb. 211, 248 N. W. 2d 24 (1976). "Such independent conclusions of fact must be determined by this court in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence." Shirk v. Schmunk, 192 Neb. 25, 218 N. W. 2d 433 (1974). See, also, § 25-1925, R. R. S. 1943.

The Right in question was granted to Bernard Copeland by McDonald's in a letter dated July 1, 1959, which reads:

"This letter, Mr. Copeland, will confirm our understanding regarding any additional McDonald's units that may be developed in the Omaha, Nebraska, or Council Bluffs, Iowa area.

"Providing you or any corporation you are involved with, is not in default on a McDonald's franchise, or a franchise Realty Corporation lease; any locations that we might develop in the Omaha, Nebraska or Council Bluffs, Iowa area will be offered to Bernard L. Copeland first." This letter was signed by Donald R. Conley, then vice president of McDonald's.

The initial question for us to decide is whether the Right was assignable as transferable without the consent of McDonald's. "Subject to certain excep-

tions in case of contracts involving relations of personal confidence or trust or being for personal services all contracts are assignable." 6A C. J. S., Assignments, § 29, p. 626. "A contract, which shows by its nature or terms that it is personal in character, that is, that reliance for its performance is placed on the integrity, credit, or responsibility of a party, or that confidence or trust is reposed in him personally for its performance, is not assignable, even in the sense of its performance being delegated to another without the consent of the other party to the contract, * * *." 6A C. J. S., Assignments, § 33, p. 635.

In Rice v. Gibbs, 40 Neb. 264, 58 N. W. 724 (1894), we stated: " 'Rights arising out of a contract cannot be transferred if they are coupled with liabilities or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' "

Whether the Right granted to Copeland was personal to him, and thus not assignable without the consent of McDonald's, is a question to be resolved by ascertaining the intent of the parties to the transaction. "Whether rights and duties under a contract are too personal a character to permit assignment is a question of construction to be resolved from the nature of the contract and the express or presumed intention of the parties, * * *." 6A C. J. S., Assignments, § 33, p. 636. In Rossetti v. City of New Britain, 163 Conn. 283, 303 A. 2d 714 (1972), it is stated: "Whether a duty is personal such that it cannot be delegated, however, is a question of the intention of the parties to be ascertained from the contract, its nature, and attending circumstances."

McDonald's was founded in 1954 by Mr. Ray A. Kroc. Kroc licensed and later purchased the name McDonald's and all proprietory rights thereto from two brothers named McDonald, who were operating

a hamburger restaurant in San Bernadino, California. In 1955 Kroc embarked on a plan to create a nationwide standardized system of franchised fast-food restaurants. During the period 1955 to 1959, five individuals operated McDonald's. These were Kroc, who was the founder and controlling stockholder, its president and "the head man" and "boss"; June Martino, Kroc's former secretary; Harry Sonneborn; Fred L. Turner; and Donald R. Conley.

At the trial, Kroc testified about the image he sought to create with McDonald's. He stated that he wanted "to take the joint out of hamburgers." He wanted to create "An image people would have confidence in. An image of cleanliness. An image where the parents would be glad to have the children come and/or have them work there."

Kroc testified that careful selection of franchisees was to be the key to success for McDonald's and the establishment of this image. He stated, "The way to get the image across, was that the kind of people we had in there * * *." People were selected, "who had a great deal of pride, and had an aptitude for serving the public, and had dedication." Kroc testified, "we knew that if we had people that were going to grow with us, that we were going to grow together" and, "I wanted him to be fully committed — full time, get in there with both feet and have the pride, and the philosophy that we were trying to be a part of the community. In those days * * * we were catering to the family image. So we wanted to have persons in that category, that would emulate the philosophy of McDonald's and he would be Mr. McDonald to that community."

Fred L. Turner, the current president of McDonald's testified that the process by which franchises were selected evolved gradually, and that the company made some early mistakes. By 1959, the standards for selection were fairly well established.

Turner stated that by 1957 and 1958, it became apparent that McDonald's could only achieve its goal by careful selection of persons who would adhere to the company's high standards. He stated that an individual's managerial skills and abilities were a matter of prime importance in the selection process.

Prospective franchisees would be interviewed during this early period at McDonald's by Kroc, Turner, and/or Conley. At this time approximately $25,000 was needed to acquire a franchise. Turner testified that individuals who had the money were filtered out in the interview process if they were not otherwise qualified.

At first McDonald's would occasionally grant exclusive territories to a franchisee, which would give the franchisee an absolute right to any new stores opened in the territory. This practice, however, proved to be detrimental to McDonald's growth because if the holder of the exclusive territory was satisfied with a certain number of units, McDonald's growth in that area would come to a standstill. A change was made from exclusive territories to a Right of First Refusal. The Right was better suited to McDonald's desire to expand since they could still build a unit and offer it to another party, if the holder of the Right refused the new store.

Kroc testified about the circumstances under which he would grant a Right: "Well, this was predominantly in my hands — solely in my hands. And, if I got that inflection — if I got that funny bone feeling; if I got that feeling of trust and faith and confidence, then I would give it. I would give it — everything in those days, mind you, was an individual thing. I was dealing as an individual with an individual," and, "As I said before, if he — if he gave me the kind of — that kind of reaction, and I felt that kind of confidence in his ability and in his total person in — in enthusiasm and spirit and dedication,

yes, I would, to give him the assurance that we wanted to grow with him if he did his part."

During the period 1955 to 1960, 155 McDonald's units were opened. During this period, 36 Rights, including the one in question, were granted. Thirteen of these Rights were embodied in the franchise agreement, 21 in separate letter form, and 2 in internal memos.

Plaintiffs' main witness, Donald R. Conley, at the time in question the vice president of McDonald's and director of franchising, testified that selling franchises, "was like selling a car." He stated that he routinely promised Rights to prospective franchisees as a part of his sales pitch. He testified that only when a franchisee or his attorney would pressure them, would they put a Right in written form. The applicant's personal qualifications, according to Conley, were unimportant in the granting of these Rights, and that McDonald's real concern was to obtain the applicant's money because they were financially pressed in this period. He testified:

"Q. You weren't interested in his personal ability to be able to operate this restaurant successfully at all; is that right?

"A. I had some interest, but that wasn't the real factor.

"Q. What was the real factor?

"A. The real factor was did he have the money and was he willing to put it on the line at that time."

Kroc testified that in the early days, McDonald's would never allow financial conditions to press it into granting a Right. He stated that the day after the first unit opened in 1955, they began receiving calls and that there were always people waiting for licenses. McDonald's placed into evidence its 1959 federal income tax returns which showed that McDonald's had over $400,000 in cash flow. On rebuttal, plaintiff Eli Schupack, an accountant, con-

tended that the returns evidenced a decrease in working capital for 1959.

Franchise agreements contained a clause which expressly prohibited transfer without the consent of McDonald's. Kroc explained the purpose of this provision: "Well, that was so that we would know who we were dealing with. We didn't want a questionable character who had money to be able to buy that business out. We wanted to know who that person was, and we wanted to go through the same type of thing with the new owner that we had with the old one. We wanted that authority."

Kroc testified that McDonald's never sold territories because this would have allowed a purchaser to sublease or subfranchise, and McDonald's wanted to retain direct control over what was being done.

All the Rights granted by McDonald's between 1955 and 1960 were placed into evidence. None of these Rights contain any express language of nontransferability. The first Right to contain such language is one issued in 1962. Kroc testified that despite this lack of express terms, it was the intention of McDonald's that these Rights could not be transferred without their consent:

"Q. Now, would those same considerations have been your intentions when you gave out the Right of First Refusal; Did you intend that to be something that would be different as to transferability?

"A. Well, that was no different, we were dealing with that individual. That individual that we had given that Right of First Refusal, was the individual that we were still going to deal with when a new store came up and was offered to him."

Conley testified that he knew that if the Right was contained in the franchise agreement it would be transferred with the agreement, and that the purpose of placing the Right in a separate document was to enable McDonald's to withhold consent to a trans-

fer of the Right while agreeing at the same time to a transfer of the franchise.

In the fall of 1958, Bernard L. Copeland approached McDonald's about a franchise in Omaha. McDonald's had not yet entered Omaha and thus Omaha was selected as the area of preference for his franchise.

Copeland initially dealt with Kroc at McDonald's. Kroc testified concerning Copeland: "Well, he was probably one of the — one of the most prestigious men that had come in. And, I felt very complimented to have a man of that quality come in. He was the head of the furniture division of Sears, Roebuck and Company, whom I long had a great admiration for. * * * And, [he] had built up quite an equity in their profit sharing fund, and was a man of stature and substance, and he showed it and portrayed it. He was our kind of guy, you know."

Turner testified that up to this time McDonald's licensees typically were self-employed, small businessmen, and that it was untypical to have an executive from a large prominent corporation. Copeland, at the time, was considered special. Conley admitted that Copeland was wealthy, an experienced businessman, and a "very good prospect" for a license.

Kroc testified that Copeland asked for the exclusive territory of Omaha - Council Bluffs. He told him that they no longer gave out exclusive territories, but that they would grant him a Right which was "exactly the same thing as long as he was going to open new stores." Kroc stated that he made the decision and arranged that Copeland would have a Right. On November 10, 1958, Copeland and McDonald's entered into a preliminary franchise, and preliminary agreement, which required McDonald's to use its best efforts to procure an acceptable site in Omaha and to grant him a lease and franchise for that site.

While waiting for an Omaha site to be obtained, Copeland met John A. Skoog, who also had applied for a franchise, but had not yet been granted one. The two men decided to go into partnership and operate the Omaha-Council Bluffs units jointly, and agreed to form the Copeland Corporation, owned on a 50-50 basis. On June 18, 1959, McDonald's granted a franchise and sublease to the Copeland Corporation for a site located at 8022 West Dodge Road in Omaha, Nebraska. This franchise granted no Right of First Refusal.

The Right was discussed between Conley and Copeland during the negotiations which culminated in the granting of the franchise to the Copeland Corporation. Both Copeland and his attorney, Sherman Carmell, requested to have the Right put into writing. On June 25, 1959, a week after the franchise was granted, Copeland wrote Conley stating that attempts were being made to restrict the Right which had been granted to him by Kroc to the effect that McDonald's units in the Omaha area would be offered to someone else if McDonald's did not feel that his operations were satisfactory. Copeland felt this was contrary to his understanding with Kroc and wanted this cleared up. That letter, in part, stated:

"1. You left the implication with me the other day that the 'right of first refusal' agreement covering the twin-city Omaha-Council Bluffs area would contain subjective qualifications. * * *

"2. Any such qualifications proposed are simply 'ex post facto' of the agreement which I had with Ray Kroc. At the time he and I came to an agreement on this entire move of mine he assured me that at the time the franchise agreement was signed on the first unit, I would secure *coincidentally with this a 'right of first refusal' on additional units.* He will verify that there were no *qualifying* stipulations made. * * *

"3. * * * Certainly if McDonald's feels that poor

management becomes evident at any point they could withhold franchising additional units to the Copeland Corporation until the situation is cured. * * * It would, however, be counter to my original understanding if additional units were offered *to any other party* resulting from the feeling on the part of McDonald's that the first unit was not receiving optimum management.

"4. I strongly believe that McDonald's must *now* have the same kind of faith in *my* ability to insure good, aggressive management in the Copeland Corporation, as *I* have faith in McDonald's in making such a major decision. I would like to point out that I had direct responsibility for a 200 million dollar segment of Sears' business annually over a period of years and performed to their complete satisfaction. *It certainly stands to reason that the four McDonald's units which I am ultimately planning will be given good management.* In fact, this was my purpose in bringing Mr. John Skoog into the picture as he has a very successful background in business and restaurant management." (Emphasis supplied.) Skoog testified that he participated in the writing of this letter and that it had nothing to do with the question of whether the [separately created] Right was transferable or not.

A copy of Copeland's letter was forwarded to Kroc by Conley with a memo from Conley attached which read: "In keeping with our verbal discussion - let's make it a 1st refusal right to Bernard L. Copeland. This right *will not pass* to an heir, purchaser, etc. Don 6/30." (Emphasis supplied.)

This memo was initialed "OK" by Kroc. On the *following day,* July 1, 1959, the letter containing the Right, quoted earlier, was sent to Copeland addressed to him at his Park Ridge, Illinois, address.

As a result, Conley testified that he suggested to Kroc that the Right be made personal to Copeland

instead of having subjective qualifications on it, and wrote the June 30th memo to Kroc to that effect.

Skoog, now a disinterested witness, testified as to the formation of and the personal nature of Copeland's Right of First Refusal. He explained the relationship between the Right and his business association with Copeland. Skoog stated that he had also talked to Kroc when he applied for a franchise, *but that unlike Copeland,* he had *not* been promised a Right. At the time they met, Copeland told him that he had been orally promised a Right to Omaha and Council Bluffs.

Skoog testified that the Right always stood in Copeland's name during the existence of their partnership, and that it was his understanding that the Right was a promise from Kroc to Copeland. Prior to the Right being made written, he and Copeland had discussions about whether or not it should be placed in their joint names. Skoog stated that he would have liked to have had it given to them jointly, but that Copeland had the agreement with Kroc. He testified that they decided to leave the Right in Copeland's name because when they had these discussions the negotiations for the West Dodge Road site were taking place and they felt that if they were to ask McDonald's for a change, McDonald's might want something in return or might say "No."

Skoog explained that it was his understanding he had no ownership interests in the Right and it always stood in Copeland's name as something he held individually and personally, and that the Right was something separate and apart from the franchise agreements, which is undisputed. Skoog testified, "I believe that Copeland had the Right of First Refusal, and it was a personal thing."

Skoog stated that he only shared in the benefits of the Right through his partnership with Copeland. Copeland told him, " 'John, you and I are partners' and he said, 'When we get another location, which *I*

have a Right of First Refusal on, we will be partners.' " (Emphasis supplied.) Skoog explained that in substance each new restaurant was offered to Copeland and, if accepted by him, a franchise was issued to a corporation owned jointly by the two. It is undisputed that the Right was never transferred to any of the corporations formed by Copeland and Skoog but remained in Copeland's name all through these transactions.

Summarizing, the evidence is overwhelming and almost undisputed to establish the following factual conclusions:

(1) That it was the basic and undeviating policy of McDonald's to retain the rigid and absolute control over *who* received new franchises in the rapidly expanding demand for new franchises.

(2) That the Right of First Refusal was intended to be personal in nature and was separately a grant independent of the terms of the franchise contract itself.

(3) That the grant depended upon the personal confidence and trust that McDonald's placed in the grantee, and that to permit assignability or transfer by the grantee without the permission of McDonald's, would serve to destroy the basic policy of control of the quality and confidence in performance in the event any new franchises were to be granted in the locality.

(4) That by its terms, the letter granting the Right granted it only to Bernard L. Copeland, even though it expressly recognized and extended Copeland's Right to corporate involvement in his operation and management of the franchise.

(5) That the written authority of Kroc to Conley only extended to a nontransferable Right.

(6) That the intent and the purpose of the letter granting the Right to Copeland was to look to the personal performance of Mr. Copeland.

We now discuss the credibility of Conley's testi-

mony. Conley was the chief and crucial witness for the plaintiffs. First, and, most important, we note the trial judge did not adopt or rely upon the contradictory testimony of Conley in finding that the Right was not personal in nature. An examination of his decree reveals this clearly. As we interpret the decree, particularly paragraph 7, the court's theory was based upon the actions and conduct of McDonald's subsequent to the issuance of the franchise to Copeland and the grant of the Right of First Refusal.

It appears that the witness Conley was more than just a partial witness on the part of the plaintiffs. It appears that Conley was discharged in 1964, the same year the transaction of plaintiffs with Copeland took place. Conley's bias against McDonald's was admitted by him. Conley is the president of McDonald's Operators Association (MOA), an association of dissident McDonald's franchisees. The plaintiffs are members of this association. In its newsletters, MOA has advised McDonald's franchisees that they exist under "the constant threat of harassment, intimidation, encroachment, non-renewal and even termination"; that "McDonald's executives, the trustworthy ones [are] no longer with the company"; and that McDonald's "plays favorites" in determining who was entitled to a new restaurant. In an open letter to *all* franchisees, Conley has advised them that McDonald's treats its franchisees as "enemies, simpletons, black hats, or dissidents." Conley by his own admission, forced on cross-examination, testified that what he told prospects about the importance of their personal skills in acquiring a Right of First Refusal, was, in fact, false. There are many illustrations in the record to this effect, only one example, in the interest of brevity, will be given here:

"Q. At the time you told a prospective franchisee, who was going into a new area, that he would have the Right of First Refusal on additional stores, was

his particular past experience or abilities of any great importance?

"A. I tried to make him believe that; but, it was not so. * * *

"Q. Did you try to make him believe then that his skills and abilities were important to the obtaining of this Right of First Refusal and license?

"A. In most cases, yes.

"Q. Was it the truth?

"A. No."

Again, Conley testified that in the conversation with Copeland he tried to make Copeland believe that his personal performance and business experience were factors that were important as criteria for granting a Right of First Refusal. However, on direct examination Conley claimed that, in spite of what he had told Copeland, the Right of First Refusal was not granted out of consideration for Copeland's management abilities and qualifications, but that the reason for granting the Right was simply to obtain Copeland's money. He stated that Copeland's business ability, experience, and background were not of particular interest to him although, as set out above, he tried to make Copeland believe he was being considered because of these qualities.

The critical part of Conley's testimony, admitted without objection as to competency, is that, as a result of an uncorroborated conversation occurring between sometime on June 30, 1959, and on July 1, 1959, when he forwarded the Right of First Refusal to Copeland, he issued the Right without including any language that would restrict its transferability. He testified that at the time he drafted the Right, there was no intention on his part that it be personal to Copeland. Beyond Conley's admission that he would say one thing and mean another and make fraudulent representations to prospective franchisees, his testimony is confusingly contradictory. On cross-examination, Conley admitted that the in-

tent and purpose of the Right was to look to the personal performance of Copeland. Summarizing his cross-examination, Conley could not explain why, after negotiating and insisting upon the transferable Right, as Conley claims, that Copeland, an experienced businessman who was represented by counsel, would accept a Right (exhibit 5) that was totally devoid of language of transferability. Nor could Conley explain why McDonald's would issue Copeland a freely transferable Right which entitled the holder to the first offer of a new franchise, when at the same time McDonald's would not grant Copeland a franchise that was freely transferable. His exact testimony is very significant:

"Q. Why, then, would McDonald's issue a Right of First Refusal which would be freely transferable, when at the same time they wouldn't give a franchise that would not be freely transferable?

"A. I am trying to go back to our — I can't give you an answer, counselor.

"Q. It's not consistent, is it?

"A. Everything we did was catch as catch can at that time."

On cross-examination, Conley explained the alleged overnight switch in McDonald's position as to the personal nature of the Right, by claiming that it was possible the company was not in financial trouble on June 30, 1959, when he wrote the memo to Kroc stating the Right would not be transferable and then one day later on July 1, 1959, when he issued the Right, contends the company was in such a financial bind that it had to accede to Copeland's demand for a transferable Right.

Irrespective of the conclusion that the written language of the letter granting the Right needs no interpretation and that under the law it was not transferable or assignable because of its personal nature, we rely on the testimony of the other witnesses as to the 1959 transaction and reject, on the grounds of

credibility, the uncorroborated testimony of the reasons for a switch in his drawing of the letter between the time of the memorandum that he executed to Kroc on June 30, 1959, and the forwarding of the written Right on July 1, 1959.

We hold that the Right of First Refusal granted to Copeland by McDonald's was personal to Copeland, and could not be transferred or assigned without the consent of McDonald's. We also find that the Right was not shared, transferred, or assigned by Copeland to Skoog, but that at all times during their business association the Right remained with Copeland, and that Skoog merely shared in the benefits, the operation of franchises, and of the Right.

The next question for us to determine is whether Copeland's Right was transferred and assigned to the plaintiffs, and whether McDonald's has ever consented to a transfer or assignment of Copeland's Right to the plaintiffs.

From 1959 until 1964, Copeland and Skoog acquired a total of six units, one in Council Bluffs and five in Omaha. Each franchise was placed in a separate corporation owned by them in equal shares. In 1964, Copeland and Skoog decided to sell their franchises and requested the plaintiffs, who at the time were accountants in Chicago and handled the accounting work of numerous McDonald's franchises including theirs, to act as their agents and represent them in seeking a purchaser.

After about 6 months, plaintiffs assembled a small investment group of Chicago investors, with themselves included for a small percentage of the investment who were willing to pay the price asked for by Copeland and Skoog. It was plaintiffs' intent to form an investment group which would purchase the franchises and operate them as absentee owners. McDonald's refused to consent to a sale by Copeland and Skoog to this group because McDonald's did not want their franchises operated by absentee owners.

About this time the plaintiffs then became interested in acquiring a majority interest in a purchase of the franchises.

Julian Wineberg testified that on September 14, 1964, he met with Harry Sonneborn. McDonald's had rejected the initial investor group and there was an impasse in Copeland and Skoog's attempt to sell the franchises. He wanted to resolve this. At this meeting Wineberg testified that he disclosed the existence of the Right to Sonneborn, who admitted that it did exist, and explained to Sonneborn what an excellent opportunity the Omaha area was, a growing market with only six units. He stated that he tried to convince Sonneborn that he and Schupack were the ones who should be able to acquire these franchises, and he asked Sonneborn what was required of them to get the franchises.

Wineberg testified that a few days after this meeting, they received a call from Turner and Richard Boyland, who suggested to the plaintiffs that the transfer would be acceptable if they would own at least 51 percent of the stock and if one of them would leave the accounting practice, move to Omaha, and be an active operator. After discussions between themselves, the plaintiffs agreed to accept this proposal.

Wineberg testified that he and Schupack had a meeting with Turner in October of 1964. Wineberg stated that they mentioned to Turner that the Right of First Refusal would give them an opportunity to expand in the market and invited Turner to join them as an employee or as an investor. *Turner turned them down.* Wineberg testified that he and Schupack were aware they needed McDonald's consent to acquire the Right. Wineberg testified:

"Q. All right. You were aware of the fact that you needed McDonald's consent before you could acquire any of the interest in the corporations held by

Copeland and Skoog or any of Copeland's *personal* interests, were you not?

"A. Yes, we were knowledgeable that we needed McDonald's consent." (Emphasis supplied.)

Turner testified that the Right never came up at this meeting. He stated that he emphasized, "The opportunities to improve the existing operations and that there was a lot more volume in those stores," and that any discussion of the growth potential of the Omaha area was in terms of the volume of the existing stores. He admitted, however, that there probably was discussion by the plaintiffs about their ability to obtain additional stores.

Following the discussions with Sonneborn, Turner, and Boyland, the plaintiffs agreed to purchase Copeland and Skoog's interests in the Omaha-Council Bluffs franchises, for a net purchase price of $473,500, subject to McDonald's consent. Schupack testified that Copeland had discussed the Right during negotiations and that he had stated: "That he was selling all of his interests, the stock in the corporation, his Right of First Refusal and everything else that he had involved in the Omaha-Council Bluffs area." Skoog also testified that the Right was discussed during negotiations with the plaintiffs, and that the sellers did not intend to retain any interest in the Right after the sale. They did not know if it was transferable, but if it was, they intended to transfer it. They intended to sell, "the right, title, and interest in anything we had in the Omaha-Council Bluffs area - in anything we had in McDonald's," according to Skoog. Skoog stated that their attorney advised them not to allocate any part of the purchase price to the Right because in the event the Right was not transferable they would have to refund part of the purchase price to the buyers. Schupack testified that the price asked by Copeland and Skoog for the existing stores was in excess of their actual value and that the expan-

sion rights in the market area represented the premium.

On November 19, 1964, the plaintiffs sent McDonald's a letter advising them of their intention individually, as agents, and/or as agents of corporations to be formed: "to purchase all of the issued and outstanding stock in all corporations now operating McDonald's franchises and/or sub-leases at locations above described, together with all right, title and interest of any and all individuals now operating said franchises and/or sub-leases on locations above described."

Turner testified that he was very upset and concerned with plaintiff's attempt to purchase the franchises and that he stopped consideration by McDonald's of their original offer to purchase the franchises. He did not think that the plaintiffs would make good operators and he thought that they "were going to pull a fast one on the company and set up an absentee investor deal and we would have some operation problems in Omaha." Axelrad, McDonald's general counsel, then put some pressure on Turner advising him he should make certain that McDonald's did not unreasonably withhold its consent to a transfer of the franchises. Axelrad testified that he recognized a franchisee has a right to sell his franchise and that McDonald's could not withhold its consent without reason. Out of subsequent discussions, the proposal that plaintiffs own 51 percent of the stock in the franchises, and that one of them move to Omaha to actively operate the units, emerged.

Despite the plaintiffs' acceptance of these terms, Turner remained very negative to the idea of the sale of the franchises to the plaintiffs. On advice from Axelrad that consent could no longer reasonably be withheld, Turner reluctantly agreed to a consent to the transfer of the six franchises under these conditions. Turner then turned the matter

over to Axelrad to draft the necessary written consent. Turner told Axelrad to be very careful and dot the "i's" and cross the "t's".

Axelrad testified that during his routine examination of the files he became aware of the existence of the Right. He stated that *prior to drafting the consent* he had a vast amount of conversation with Schupack over his eligibility to acquire the stores, and that the Right was discussed. *Axelrad testified he advised Schupack that the Right was considered a personal Right and would expire at the time of the transfer, that it would have to be reissued in the plaintiffs' names, that the matter of his eligibility to acquire the stores was very touch and go, that Turner had only reluctantly agreed to consent to this sale, and that to press for the Right might tilt the entire transaction backwards.* Axelrad testified this was *not* a major issue and *Schupack conceded that to let it go was the most practical route since he was most anxious to acquire the stores.* He stated that Schupack's primary concern was just getting the franchises and that he did not make an issue over the Right. In response, Schupack only testified that he *did not recall* having any conversations with Axelrad in 1964.

On November 19, 1964, McDonald's issued its consent to the transfer. The consent, in part, read: "* * * we have examined a purported Purchase and Sale Agreement under which you propose to sell all of your right, title, and interest individually, and as stockholders * * * in the following named corporations: * * *.

"The undersigned, as an inducement and reliance of the aforesaid representation and compliance with the terms and conditions of the aforesaid Purchase and Sale Agreement, does hereby consent to the transfer of all stock in the aforesaid corporations by you to said Eli L. Schupack and Julian J. Wineberg,

individually, as agents, and/or as agents for corporations to be formed."

On November 24, 1964, plaintiffs and the sellers executed a purchase and sale agreement. Following the purchase the plaintiffs established corporations to take over each of the sellers' corporations. The total purchase price was allocated to the assets shown on the corporate books. The Right was not set up as an asset on the books of any of those corporations, and no part of the purchase price was allocated to it. There was testimony that in 1964 it was McDonald's policy to reissue a Right of First Refusal in the name of the transferee if such transfer was consented to by McDonald's. Copeland's Right was never reissued in the names of Schupack and/or Wineberg.

After their purchase of the franchises in 1964, the plaintiffs were desirous of more units. In August 1970, Edward H. Schmitt, McDonald's regional manager for the area at that time, met with Schupack to discuss the licensing of a new store on South 40th Street in Omaha. Schmitt testified that there was no mention of the Right during his discussions with Schupack. Schmitt made a verbal commitment to license this unit to Schupack. Schmitt testified that the South 40th Street unit was offered to Schupack, not because of any claim by the plaintiffs that they had a Right, but because Schupack was an existing franchisee in the area who was operating in a successful manner and had met McDonald's formal standards for expansion, in accordance with general company policy. Schupack testified that the Right was mentioned in discussions he had in Chicago with Bernard Hall, Schmitt's successor, prior to the franchise on the South 40th Street site being granted.

As part of the routine licensing procedure, Schmitt made a written request to McDonald's licensing department for a territorial clearance. In accordance with general procedure, upon receipt of such a re-

quest, the department searches the franchise files to determine whether there is any Right or exclusive territory outstanding on the site of the proposed unit. If there is a Right, it will be evidenced in the files and noted on the response to the clearance request. The review made pursuant to Schmitt's request disclosed there were no outstanding Rights in Omaha on the South 40th Street location at the time. In 1963, a clearance request for the unit at 42nd and E Streets in Omaha disclosed that this site was subject to a First Refusal Right in Bernard L. Copeland.

On September 15, 1971, McDonald's offered, in writing, the South 40th Street location to Schupack. On September 24, 1971, Schupack made a written acceptance of the offer of this unit. The franchise on this unit was granted on October 6, 1971.

On September 24, 1971, Schupack wrote Turner a letter complaining about the terms under which he had to accept the South 40th Street unit. He wrote: "Your company presumably has a right to offer franchises under any terms to new franchisees; however, in this instance, I strongly feel that your company is denying certain rights purchased by me and others in 1964 dating back to 1959. Certainly the first right of refusal becomes meaningless under your current terms."

Turner testified that he skimmed over this letter and turned it over to J. Kenneth Props who pointed out to him that the letter made a claim to the Right of First Refusal which should be answered. On November 23, 1971, Turner responded to Schupack: "There is one inference in your letter that I would like to correct, and that refers to 'first right of refusal'. *There is no such right* at the present time in Omaha, since it was granted to *Bernard Copeland individually* and was not passed on when he sold the units." (Emphasis supplied.)

In 1974, McDonald's developed a unit in Fremont, Nebraska, which was offered to someone other than

the plaintiffs. On March 28, 1974, Schupack wrote Pat Flynn, McDonald's district manager, contending that Fremont was in the Omaha-Council Bluffs area and that not offering it to him was a "violation of the agreements between your companies and mine." In his letter, Schupack cited the July 1, 1959, letter from Conley to Copeland. On April 12, 1974, Flynn wrote back advising that: "There is no existing right of first refusal for the Omaha, Nebraska and Council Bluffs, Iowa area."

In 1975, McDonald's developed a unit in Bellevue, Nebraska. This unit was originally offered to the plaintiffs, but with conditions relating to contributions to a national advertising fund which Schupack found unacceptable. Subsequent to the plaintiffs' refusal of the unit, McDonald's offered it to the defendant Edwards who accepted it. This litigation followed.

We hold that McDonald's did not consent to a transfer of the Right of First Refusal from Copeland to the plaintiffs, but that they only consented to a sale of the stock in the then existing franchises. We also find McDonald's has consistently maintained the position that the Right of First Refusal was personal only to Copeland and did not pass to the plaintiffs, and has acted in accordance with that position, and has not at any time subsequent to the 1964 purchase of the Omaha-Council Bluffs franchises by the plaintiffs, recognized the existence of the Right of First Refusal in the plaintiffs.

Accordingly, plaintiffs possess no Right of First Refusal to additional McDonald's franchises in the Omaha-Council Bluffs area. Holding as we do, it becomes unnecessary for us to discuss the plaintiffs' cross-appeal relating to the scope of the Right.

The judgment of the District Court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

WHITE, C. THOMAS, J., dissenting.

The majority omits in its discussion of de novo review a significant part of that standard. When credible evidence on material questions of fact is in conflict, we will consider that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. See Shirk v. Schmunk, 192 Neb. 25, 218 N. W. 2d 433.

The majority concludes that it is better able to determine on a reading of the record, than was the trial judge who saw, heard, and observed the witnesses, who was truthful and who was not. I confess that the record does not speak as plainly to me as it does to the majority. I would have placed great reliance on the findings of the trial judge.

CATHER & SONS CONSTRUCTION, INC., APPELLANT, V. CITY OF LINCOLN, NEBRASKA, APPELLEE, THE GOODYEAR TIRE & RUBBER COMPANY, INTERVENER-APPELLEE.

264 N. W. 2d 413

Filed April 5, 1978. No. 41263.

1. **Municipal Corporations: Streets and Alleys.** The exercise of a city council's discretionary power to vacate streets and alleys is not ordinarily subject to judicial review unless there has been an abuse of discretion, fraud, a glaring informality or illegality in proceedings, or an absence of jurisdiction.
2. **Municipal Corporations: Streets and Alleys: Damages.** A property owner whose property does not abut upon a portion of a street which a municipality proposes to vacate or obstruct has no right of action to restrain the vacation or prevent the obstruction unless the access to his property is interfered with and he suffers a special or peculiar damage differing in kind from that of the general public.
3. **Municipal Corporations: Ordinances: Injunction.** To overturn a city ordinance on the ground that it invades a private right, the evidence of such fact must be clear and satisfactory. A party seeking an injunction must establish by competent evidence every fact necessary to entitle him to relief, and injunction will not lie unless the right is clear, the damage irreparable, and the remedy at law is inadequate to prevent failure of justice.

4. **Municipal Corporations: Property.** In the absence of illegality, fraud, or a clear abuse of discretion on the part of municipal officers in the exercise of their discretionary power to dispose of municipal property, the sale of such property will not be restrained in equity.
5. _____: _____. To warrant this court in interfering with a sale of municipal property by municipal officers acting within the scope of their statutory authority, the evidence should be such as to show with reasonable certainty that their action could not be construed as having been taken with a view of the general public welfare.
6. **Municipal Corporations: Gifts: Property.** A municipality may not make a gift of its property to private persons for purposes other than corporate ones, and may not sell its property for wholly inadequate consideration such that a gift is in fact being made.

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

Edward F. Carter, Jr., of Barney & Carter, for appellant.

Charles D. Humble and William D. Austin, for appellee.

J. Taylor Greer of Woods, Aitken, Smith, Greer, Overcash & Spangler, for intervener-appellee.

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

BRODKEY, J.

This action involves a dispute arising out of the vacation of portions of streets and an alley by the City of Lincoln, defendant and appellee herein, and the sale of the vacated property by the City to The Goodyear Tire & Rubber Company ("Goodyear"), intervenor and appellee herein. The plaintiff and appellant, Cather & Sons Construction, Inc. ("Cather"), objected to the vacation and sale at a public hearing before the city council of Lincoln. Over Cather's objections, the council, by unanimous vote, passed ordinances authorizing the vacation and sale of the property. Cather then filed a petition on appeal in the District Court for Lancaster County pursuant to sections 15-1201 to 15-1205, R. R. S. 1943.

In its petition on appeal in the District Court, Cather set forth three separate causes of action. In the first cause of action Cather alleged that the vacation of the streets was not in the public interest and therefore invalid because it blocked traffic flow, diverted commercial and industrial traffic onto streets in residential areas, and deprived Cather means of ingress to and egress from its property. In the second cause of action Cather alleged that the consideration paid by Goodyear to the City of Lincoln, for the vacated property, was inadequate and less than its true market value. In the third cause of action Cather alleged that the vacation and sale denied it reasonably convenient ingress to and egress from its property, that Cather had not consented to the vacation, and that the City had not condemned Cather's rights with respect to reasonable ingress and egress, as required by section 15-702.03, R. R. S. 1943. Cather alleged its property abutted the vacated land. It prayed that the District Court find the ordinances authorizing the vacation and sale null and void, and enjoin the implementation of those ordinances. In the alternative, Cather prayed that the court appoint appraisers in condemnation to determine the value of the right of access taken from it by the City as a result of the vacation, and to award damages therefor. Goodyear was permitted to intervene in the action, and both it and the City of Lincoln denied the material allegations of Cather's petition on file.

After presentation of evidence by the parties and an inspection of the land involved in the vacation and sale, the trial court concluded that Cather's claims were not meritorious for several reasons: First, because the court found that Cather did not have standing to maintain its first and third causes of action for the reason it was not an owner of property abutting the vacated land; second, the court found that Cather had not suffered damage different

in kind from that suffered by the general public as a result of the vacation, and that Cather still has reasonable access to the street system and reasonable ingress to and egress from its property; and, third, the trial court concluded that the evidence was not sufficient to sustain a finding that the purchase price paid by Goodyear to the City for the vacated land was the product of fraud, illegality, or a clear abuse of discretion on the part of the city council. Finally, the court concluded that Cather's third cause of action was not properly raised in the proceeding because it interjected a new matter into the appeal that was not raised before the city council at the time the ordinances were discussed and passed. Cather's petition on appeal was dismissed by the District Court.

Cather has now appealed to this court, contending that the findings of the trial court were erroneous, and that the trial court erred in failing to grant the relief prayed for in Cather's petition on appeal. We affirm the dismissal of Cather's petition on appeal.

The facts relevant to this appeal are as follows. Goodyear owns land on the west side of North 56th Street between Ballard and Morrill Avenues in Lincoln, Nebraska. In February 1974, Goodyear and other adjacent property owners petitioned the city council of Lincoln to vacate North 56th Street between those avenues, a small portion of the avenues immediately to the east of North 56th Street, and a portion of an alley. Goodyear desired to purchase the property, if vacated, for the purpose of building a new warehouse which could be served by existing railroad facilities. Various city departments made reports and recommendations concerning the proposed vacation and sale. The Lincoln Lancaster Planning Commission and the Director of the Department of Public Works recommended approval of the vacation, subject to conditions concerning the relocation of utilities and the construction of cul-de-

sacs or other acceptable vehicle "turnarounds" at what would become the stub ends of Ballard and Morrill Avenues, and North 56th Street. Ordinances authorizing the vacation and sale were presented to the city council, which, after a public hearing, unanimously voted to pass the ordinances. The purchase price of the vacated land was $9,434.80. One week after the ordinances were passed, Cather offered to purchase the vacated property for the sum of $30,000, which offer was refused by the council. The City conveyed the vacated land to Goodyear, which has constructed a building thereon.

Cather's objections to the vacation, as set forth both at the public hearing held before the city council and in the District Court, were that it denied reasonable access to Cather's property, that it forced industrial traffic onto streets in residential neighborhoods, and that it denied Cather the most convenient route to its property. A description of Cather's property is required to clarify these claims.

Cather owns a triangular shaped plot of land, the south edge of which borders on Ballard Avenue. The land comes to a point approximately 50 feet east of the northeast corner of the intersection of North 56th Street and Ballard Avenue. There is a driveway, hereinafter referred to as the "southwest driveway," which provides access to Cather's property from Ballard Avenue at this point. This is one of several driveways on the Cather property, which has been used for the operation of an asphalt batch plant. Large transport trucks which deliver liquid asphalt to a storage tank on the Cather property have used the southwest driveway as a means of ingress. Before the vacation, the trucks would usually proceed north on North 56th Street, turn right on to Ballard Avenue, and enter the Cather property at the southwest driveway. This means of ingress was particularly useful to Cather due to the location of the storage tank, as the trucks could enter the

Cather property via the southwest driveway, be in proper position for unloading, and then leave the property via an exit on the opposite end of the property without turning around and without engaging in any difficult maneuvers.

It is undisputed that Cather's property does not "front," nor is it adjacent to, the vacated portions of Ballard Avenue and North 56th Street. Only 50 feet of Ballard Avenue to the east of North 56th Street was vacated, precisely to the point where the south edge of the Cather property begins to border on Ballard Avenue. The southwest corner of the Cather property does touch, at a single point, the northeast corner of the vacated portion of Ballard Avenue. The vacation did not, therefore, block any driveway providing access to the Cather property. The result of the vacation was that Cather's southwest driveway is now at the west end of Ballard Avenue, what has become a "dead end," whereas previously vehicles could approach the southwest driveway from either direction.

There was a dispute in the evidence regarding the effect of the vacation on Cather's use of its southwest driveway. Although no portion of Ballard Avenue in front of that driveway was vacated, the owners of Cather testified that the large asphalt transport trucks, now forced to approach the driveway from the east on Ballard Avenue, could not make the turn off Ballard Avenue due to inadequate turning space. They stated that after the vacation Cather was forced to have the trucks back onto its property from its northeast driveway. It was undisputed that no vehicles other than the large asphalt trucks had difficulty in using the southwest driveway after the vacation. During the construction season, approximately two such trucks delivered liquid asphalt to Cather each week.

Goodyear and the City adduced evidence that the large asphalt trucks could still use the southwest

driveway after the vacation. At the public hearing, Goodyear committed itself to providing a turning area for the large trucks to enable them to utilize the southwest driveway as a means of ingress to the Cather property. Goodyear offered Cather a written license which would have permitted Cather to use a suitable portion of the vacated land as a turning area, but Cather refused to accept the license. Although Goodyear stood ready to do whatever was necessary to enable Cather to utilize the southwest driveway as a means of ingress for the asphalt trucks, Cather made no serious or extended attempts to do so. The evidence indicates that the asphalt trucks could enter the southwest driveway with no difficulty if a portion of the vacated land was used, and that they could possibly enter directly off Ballard Avenue without using any portion of the vacated land if Cather gave up one or more of its parking spaces located immediately to the east of the southwest driveway.

No extensive evidence was presented regarding the effect of the vacation with respect to diversion of industrial traffic onto streets in residential areas. The city traffic engineer stated that there were both benefits and detriments caused by the vacation with respect to traffic flow, and that residential areas were affected regardless of whether North 56th Street remained open or was vacated. Although the owners of Cather correctly stated that industrial traffic could no longer approach the Cather property via North 56th Street, they did not present evidence that feasible, alternative routes were unavailable. The city traffic engineer stated that there were three alternative routes for traffic to reach the Cather property after the vacation. Insofar as residential areas are concerned, no residents, who might have been affected by any diversion of industrial traffic, testified at trial, nor did they appear at the public hearing on the ordinances.

Cather did not attempt to prove the amount of damages it allegedly sustained as a result of the vacation. Witnesses testifying on behalf of Cather stated only that it had been damaged, as a result of delays caused in its operation, due to the loss of North 56th Street as an approach route for the asphalt transport trucks. There was no evidence that Cather lost business as a result of the vacation, or that their shipping costs for asphalt increased. Since the vacation, Cather has moved its batch plant to a different location, allegedly because of difficulties caused by the vacation.

In support of its claim that the purchase price paid by Goodyear for the vacated land was inadequate, Cather presented the testimony of a real estate appraiser. He testified that the land was worth 50 cents per square foot, or $23,577, and that the paving on the vacated land was worth approximately $16,000. Therefore he valued the land at approximately $39,000. The property manager of Lincoln, a licensed appraiser, assessed the vacated land as being worth 60 cents per square foot, or approximately $29,000. In determining the sale price, however, he deducted 40 cents per square foot to compensate for the cost of removing the paving, and relocation of water and sewer lines. By this method of calculation, he reached the sale price of $9,434.80. Goodyear, in fact, expended more than $30,000 in relocating and replacing water and sewer lines. Although Cather offered to purchase the vacated land for $30,000 after the ordinances were passed, the record does not reflect that the Cather offer included a promise with respect to the relocation or replacement of existing utilities, or that the Cather purchase would bring to the local economy the benefit of any industrial expansion similar to that offered by Goodyear.

We first note that Cather filed its petition on appeal in the District Court pursuant to section 15-1201,

R. R. S. 1943, which provides for an appeal to the District Court from a final administrative or judicial order or decision of the city council of a city of the primary class. Obviously, therefore, this action was not a direct action by Cather to restrain the vacation or to recover damages, as has been true in prior Nebraska cases involving the vacation of city streets. See, Rossitto v. City of Omaha, 199 Neb. 260, 258 N. W. 2d 126 (1977); Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622 (1953), rehearing denied, 157 Neb. 768, 61 N. W. 2d 556 (1953); Kraft & Sons, Inc. v. City of Lincoln, 182 Neb. 187, 153 N. W. 2d 725 (1967). Cather appealed to the District Court from the enactment of the ordinances, and not from any order or decision of the city council concerning Cather's alleged right to compensation. There is nothing in the record to indicate that Cather raised its alleged right to compensation before the council, or that the council made any decision in regard to that issue. In choosing to proceed pursuant to section 15-1201, R. R. S. 1943, Cather has precluded itself from raising in the District Court an issue not the subject of an order or decision of the city council. Therefore, we limit our review in this case to the issue of whether the ordinances in question are valid, and whether Cather is entitled to injunctive relief.

Section 15-701, R. R. S. 1943, provides that a city council of a city of the primary class shall have power by ordinance to vacate any street or alley, and that in the event title to the vacated property is retained by the city, "such property may be sold, conveyed, exchanged or leased upon such terms and conditions as shall be deemed in the best interests of the city, as authorized in its home rule charter." Article VIII, section 1, of the charter of the City of Lincoln contains provisions to the same effect as those in section 15-701, R. R. S. 1943. The City of Lincoln also has the general power to sell, convey, exchange, or lease real property owned by it, in such

manner and upon such terms and conditions as shall be deemed in the best interest of the city, provided that no real property having a market value in excess of $5,000 shall be sold, conveyed, or exchanged unless authorized by ordinance of the city council. See, § 15-201, R. R. S. 1943; Art. II, § 1 (5), charter of the City of Lincoln.

It is apparent that under these statutory and charter provisions, the city council has the discretionary power to vacate streets and alleys. The exercise of this discretionary power "is not ordinarily subject to judicial review, unless there has been abuse of discretion, fraud, or glaring informality or illegality in proceedings, or absence of jurisdiction." Hanson v. City of Omaha, *supra*. See, also, 11 McQuillin, Municipal Corporations, § 30.187, p. 116 (3d Ed., 1977). In the present case, there was no evidence of fraud, informality or illegality in proceedings, or absence of jurisdiction. Therefore, the issue subject to judicial review is whether the city council so abused its discretion that the vacation ordinance can be held to be unreasonable and arbitrary. Insofar as the vacation ordinance is concerned, Cather's evidence regarding abuse of discretion was essentially that the vacation deprived Cather of its right to reasonable access to the street system. To overturn a city ordinance on the ground that it invades a private right, the evidence of such facts must be clear and satisfactory. A party seeking an injunction must establish by competent evidence every fact necessary to entitle him to relief, and 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. Hanson v. City of Omaha, *supra*.

The parties are in dispute as to whether Cather is a party entitled to maintain an action to enjoin the vacation. The general rule is that: "A property owner whose property does not abut upon a portion of a street which it is proposed to vacate or which is

obstructed has no right of action to restrain the vacation or prevent the obstruction unless the access to his property is interfered with and he suffers a special or peculiar damage differing in kind from that of the general public." Hanson v. City of Omaha, *supra*. See, also, Feldman v. City of Omaha, 184 Neb. 226, 166 N. W. 2d 421 (1969); 11 McQuillin, Municipal Corporations, § 30.192, p. 124 (3d Ed., 1977). The rule is similar with respect to a property owner's right to compensation. See Rossitto v. City of Omaha, *supra*. Goodyear and the City contend that Cather is not an abutting property owner because its property does not "front" the vacated portion of Ballard Avenue, and that the evidence does not support the view that Cather suffered special damage differing in kind from that of the general public. Cather contends that touching the vacated land, even at a single point, constitutes abutting, and that it in any event did suffer special damage as a result of the vacation.

Although the question of what constitutes abutting property with respect to the vacation of streets is interesting, we need not reach that issue in this case. Even assuming, without deciding, that Cather is either an abutting property owner or has suffered special damage different in kind from that of the general public, it is clear that Cather has not shown by clear and satisfactory evidence that it is entitled to injunctive relief. The question of whether Cather has suffered special damage is concededly a close one, but Cather's evidence was not such that it can be said that its right was clear, its damage irreparable, and particularly that the remedy at law is inadequate to prevent a failure of justice. See, Hanson v. City of Omaha, *supra*; 11 McQuillin, Municipal Corporations, § 30.200, p. 142 (3d Ed., 1977). Counsel for Cather appeared to concede this point at oral argument in this case, as he stated that as a practical matter, since Goodyear has already

constructed its building and has invested large sums of money in connection therewith, Cather did not expect this court to hold the vacation ordinance void, set aside the conveyance to Goodyear, and order the City to reopen the streets. He was primarily concerned with obtaining compensation for damages allegedly sustained.

The second issue in this case is whether the sale ordinance should be declared void because the consideration paid by Goodyear to the City for the vacated land was inadequate. As indicated above, section 15-701, R. R. S. 1943, provides that the city council may sell vacated property "* * * upon such terms and conditions as shall be deemed in the best interest of the city * * *." In the absence of illegality, fraud, or clear abuse of discretion on the part of municipal officers in the exercise of their discretionary power to dispose of municipal property, the sale of such property will not be restrained in equity. 18 McQuillin, Municipal Corporations, § 52.38, p. 75 (3d Ed., 1977); Kalmbach v. City of Mobridge, 81 S. D. 158, 132 N. W. 2d 293 (1964); Newell v. City of Kenosha, 7 Wis. 2d 516, 96 N. W. 2d 845 (1959); 64 C. J. S., Municipal Corporations, § 2152, p. 978. To warrant this court in interfering with a sale of municipal property by municipal officers acting within the scope of their statutory authority, the evidence should be such as to show with reasonable certainty that their action could not be construed as having been taken with a view of the general public welfare. Karlin v. Franciscan Sisterhood of Nebraska, 109 Neb. 711, 192 N. W. 122 (1923). A municipality may not, of course, make a gift of its property to private persons for purposes other than corporate ones, and may not sell its property for wholly inadequate consideration so that a gift is in fact being made. See, 10 McQuillin, Municipal Corporations, § 28.43, pp. 136, 137 (3d Ed., 1966); Gritton v. City of Des Moines,

247 Iowa 326, 73 N. W. 2d 813 (1955); Herman v. City of Lake Mills, 275 Wis. 537, 82 N. W. 2d 167 (1957).

In this case it cannot be said that there was any evidence of fraud or illegality on the part of the city council in selling the land to Goodyear for $9,434.80, and, therefore, the only issue is whether the city council abused its discretion in selling the land for that price.

Cather argues that the consideration was shown to be inadequate for two reasons. First, its expert witness testified that the land was worth approximately $39,000 ($23,000 for the land itself and $16,000 for the paving thereon). Secondly, Cather offered to purchase the land for $30,000, although it did not make this offer until the ordinance authorizing the sale to Goodyear had already been passed.

The issue is not merely whether the consideration accepted by the City was less than it might have procured, but whether the consideration was so inadequate that the sale constituted an abuse of discretion on the part of the city council because it was not in the public interest. The fair market value of the land is not to be judged simply on the estimated value of the land per square foot, but also on other considerations, such as the irregular shape of the land, the purposes for which the land could be used, and the costs inherent in making the land suitable for use by the buyer. It is undisputed that before the vacated land in this case could be put to uses other than a street, removal and relocation of utilities had to take place. As a condition of the sale, Goodyear was required to, and did, not only remove and relocate utilities at the cost of more than $30,000, but also improve them. It was appropriate for the City to consider the cost of removing and relocating utilities in determining the value of the land, and the final sale price was reached by taking such considerations into account.

Although Cather offered to purchase the land for

$30,000 after the ordinance had been passed, there is no evidence that the offer included a promise to relocate or replace utilities. In making the sale, and in considering the public welfare, the city council could properly consider what the buyer would do with the land, whether benefits to the City such as improved utilities would accrue, and whether the local economy would be enhanced. It is also possible that the public welfare would be promoted by placing a vacated street in private control, thereby relieving the municipality from the expense of maintenance and from liability for defects. See 11 McQuillin, Municipal Corporations, § 30.186 a, p. 110 (3d Ed., 1977). Also, the sale to a private party would increase the amount of taxable property in the city.

Although experts could undoubtedly argue whether the City could have obtained a higher price from Goodyear or from another buyer who would fulfill various conditions and meet various requirements favorable to the City, the record in this case does not indicate that the sale price to Goodyear was so inadequate that the sale constituted an abuse of discretion. Therefore Cather's contentions on this issue are without merit.

As noted at the outset of our discussion, we do not reach the issue of whether Cather is entitled to compensation due to the vacation because Cather has appealed only from the enactment of the ordinances, and not from any order or decision of the city council concerning its alleged right to compensation. Cather's claim for compensation was based on section 15-702.03, R. R. S. 1943, which provides: "The right of reasonably convenient egress to and ingress from (sic) lands or lots, abutting on an existing highway, street, or road, may not be denied except with the consent of the owners of such lands or lots, or with the condemnation of such right of access to and from such abutting lands or lots." If, as alleged by Cather in this case, a city of the primary class fails

to condemn a property owner's right of reasonably convenient ingress to and egress from lands or lots under section 15-702.03, R. R. S. 1943, the property owner's remedy would be to bring either an inverse condemnation action pursuant to section 76-705, R. R. S. 1943, or an action in tort. See, City of Omaha v. Matthews, 197 Neb. 323, 248 N. W. 2d 761 (1977); Rossitto v. City of Omaha, *supra*; Hanson v. City of Omaha, *supra*.

We hold only that the city council did not exceed its authority or abuse its discretion in passing the ordinances, and that Cather is not entitled to injunctive relief. All other issues were not properly before the District Court, and are not disposed of in this proceeding.

AFFIRMED.

BOSLAUGH, J., concurring.

While I concur in the result which the court reached in this case, there is a procedural question that I believe requires mention. It was not raised by the parties and is not discussed in the opinion of the court.

The appellant in this case attempted to appeal to the District Court from the adoption by the City of the ordinances vacating the streets and authorizing a sale of the land. The petition on appeal recited that the appeal was taken pursuant to the provisions of sections 15-1201 to 15-1205, R. R. S. 1943. Properly construed that statute permits an appeal from any final administrative or judicial order of the city council only when the council was acting in a quasi-judicial capacity. There can be no direct judicial appeal from an exercise of legislative power. Williams v. County of Buffalo, 181 Neb. 233, 147 N. W. 2d 776.

It is generally held that the power to vacate streets is legislative in nature and may be delegated to municipal corporations by the state. The exercise of such power in a particular case is a legisla-

tive question not ordinarily subject to review. See 11 McQuillin, Municipal Corporations (3d Ed., 1977), § 30.185, pp. 97, 98.

An ordinance vacating a street is, of course, subject to collateral attack, and that is what the present action amounted to. The parties subjected themselves to the jurisdiction of the court and are bound by its judgment.

CLINTON, J., joins in this concurrence.

STATE OF NEBRASKA EX REL. RONALD D. KAIPUS ET AL., APPELLANTS, V. BOARD OF TRUSTEES OF SANITARY AND IMPROVEMENT DISTRICT NO. 113 OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

264 N. W. 2d 422

Filed April 5, 1978. No. 41297.

1. **Judgments: Motions, Rules, and Orders.** No judgment is rendered until the pronouncement thereof is entered on the trial docket.
2. **New Trial: Judgments: Time.** A motion for new trial filed prior to the rendition of a judgment is premature and constitutes a nullity.

Appeal from the District Court for Douglas County: JOHN E. MURPHY and JAMES A. BUCKLEY, Judges. Appeal dismissed.

Victor L. Lich, Jr., of Lich, Herold & Mackiewicz, for appellants.

August Ross of Ross & Mason, for appellee.

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

WHITE, C. J.

This action originated with a petition for mandamus brought by the relators to compel respondent to repair and maintain a drainageway lying behind relators' residence. The action was tried to the Dis-

trict Court which, in a decree dated December 19, 1973, found generally for the relators and required respondent to submit plans and specifications to the court for repair of the drainageway and restoration of relators' property. On October 14, 1974, a judgment in the sum of $13,500 was entered, by amended decree, in favor of relators pursuant to a stipulation of the parties.

On May 9, 1975, relators filed a motion for an order requiring respondent to pay the $13,500 judgment. On June 19, 1975, respondent filed a motion for an order vacating the judgment for $13,500. Hearings were held on these two motions on September 19, 1975, and July 7, 1976. At the conclusion of the hearing on July 7th, the District Court announced its findings and decision in favor of the respondent on both motions. The relators' judgment was to be reduced to $3,500. Counsel was directed to prepare and submit an appropriate order.

On July 16, 1976, the relators filed a motion for a new trial. On July 19, 1976, an order in the form of a second amended decree was presented to and signed by the District Court. On September 28, 1976, a hearing was held on relators' motion for a new trial. On December 14, 1976, the District Court found that relators' motion for a new trial was filed prematurely, before rendition of judgment; that it was of no force and effect; and ordered that it be stricken. On December 21, 1976, relators filed a second motion for a new trial which was overruled on February 1, 1977. Notice of appeal was filed on February 8, 1977. We conclude that we lack jurisdiction to entertain this appeal.

The situation at bar is governed by our recent pronouncement in Spanheimer Roofing & Supply Co. v. Thompson, 198 Neb. 710, 255 N. W. 2d 265 (1977). In that case, the District Court, after trial, announced its findings and decision in a letter dated June 23, 1976, to all counsel. Counsel for the prevailing party

was directed to submit an appropriate decree. On June 30, 1976, the defendant filed a motion for a new trial. On July 2, 1976, the District Court signed the decree and noted entry of the decree on the trial docket. On August 6, 1976, defendant's motion for a new trial was quashed and defendant gave notice of appeal the same day. We held that we lacked jurisdiction to hear defendant's appeal because no effective motion for a new trial had been filed, defendant's June 30th motion being premature and that no notice of appeal had been filed within 1 month of the date of rendition of judgment.

The District Court's journal entry on the docket of Wednesday, July 7, 1976, does not purport to be a decree or judgment in the case. It is captioned "ORDER." Its full context is as follows:

"At request of defendant, court reopens hearing.

"Defendant presents evidence.

"Court announces general findings.

"Order to be submitted."

This "ORDER" on the trial docket cannot be said to constitute the *rendition of a judgment* under our statutory scheme. § 25-1301, R. R. S. 1943; Valentine Production Credit Assn. v. Spencer Foods, Inc., 196 Neb. 119, 241 N. W. 2d 541 (1976); Fritch v. Fritch, 191 Neb. 29, 213 N. W. 2d 445 (1973). Relators' July 16, 1976, motion for a new trial was filed prematurely and was thus a nullity. Spanheimer Roofing & Supply Co. v. Thompson, *supra*. No effective motion for a new trial was filed within 10 days of the rendition of judgment, July 19, 1976. § 25-1143, R. R. S. 1943. No notice of appeal was filed within 1 month of that date. § 25-1912, R. R. S. 1943. Even if relators' first motion for a new trial were arguably effective, it was ordered stricken on December 14, 1977. No notice of appeal was filed within 1 month of that date.

Relators did file a second motion for a new trial on December 21, 1977, alleging as error the striking of

their first motion for a new trial. Relators' second motion for a new trial is of no avail. The time for appeal cannot be extended by a party with the successive filing of motions for new trial.

The appeal is dismissed for want of jurisdiction.

APPEAL DISMISSED.

BOSLAUGH and MCCOWN, JJ., dissenting.

We dissent for the reasons stated in our dissenting opinions in Spanheimer Roofing & Supply Co. v. Thompson, 198 Neb. 710, 255 N. W. 2d 265.

HERMAN G. BLOME, APPELLANT, V. JESS V. HOTTELL ET AL., APPELLEES.

264 N. W. 2d 424

Filed April 5, 1978. No. 41394.

1. **Contracts: Evidence.** When a writing shows upon inspection a complete legal obligation without uncertainty or ambiguity as to object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein.
2. **Summary Judgments.** The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined.
3. _____. In considering a motion for summary judgment, the court should take that view of the evidence 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 from the evidence.

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

Wright & Simmons, for appellant.

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellees.

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

SPENCER, J.

This is an action on a note, given for the purchase of cattle. Both parties moved for summary judgment. The court sustained plaintiff's motion and entered judgment in his favor for the balance due on the note, less $5,200 for cattle which did not meet the terms of the agreement between the parties. Plaintiff appeals from the allowance of the $5,200 credit to the defendants. We reverse and remand.

The note recites that it was given for the purchase of 74 head of cattle at $400 apiece. The bill of sale executed contemporaneously with the note contains the following clause: "All of said cows are believed by Seller to be pregnant. In the event, however, that any of said cows are not pregnant, or have lost their calf before January 24, 1974, then Buyers shall be given credit on the $29,600.00 herein, at the rate of $400.00 per head for those cow (s) which are not pregnant or have lost a calf before January 24, 1974."

There is a dispute between the parties as to the meaning of this clause. It is to be noted that it does not provide that the nonpregnant cow would need to be returned for credit nor does it make provision for payment to the defendants for feeding the nonpregnant cow if returned. The attorney who drew the agreement testified that the cows were old and the intent of the parties was that each of them was to be pregnant. No instructions were given to him other than the information which appears in the bill of sale.

Plaintiff claims the cattle were represented to be from 2 to 8 years old. The evidence would indicate that they were much older, as much as 13 to 15 years of age. On the record, the trial court was correct in construing the agreement to allow defendants a credit of $400 for every nonpregnant cow.

When a writing shows upon inspection a complete legal obligation without uncertainty or ambiguity as to object and extent of the engagement, it is conclu-

sively presumed that the whole agreement of the parties was included therein. Master Laboratories, Inc. v. Chesnut, 157 Neb. 317, 59 N. W. 2d 571 (1953).

There is, however, a factual dispute as to the number of nonpregnant cows. The testimony of the Hottells, which is supported by the weight of the evidence in the record, is that 13 of the cows did not have calves. The trial judge so found in his ruling on the motion for summary judgment.

In a deposition taken July 23, 1975, Blome testified that Jess V. Hottell sorted off 74 cows out of a herd of 100; that there were 8 or 10 close springers; 22 cows with calves; and 44 of the cows were either to have calves later or had lost their calves. In a subsequent deposition taken the 12th of November 1976, Blome testified that Jess Hottell took 60 cows that had little calves with them and then he picked out the other 14 cows that were pregnant right close up to calving. This testimony cannot be reconciled with his previous testimony.

On the record the trial judge found that 13 of the cows did not calve. If we were trying the fact question, we also would so find. While the question may be arguable, the record does indicate a dispute of fact. A summary judgment is not proper except where there is no genuine issue as to any material fact and where under the facts the movant is entitled to judgment as a matter of law. Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508 (1976).

The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion, the court should take that view of the evidence 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 from the evidence. Farmland Service Coop, Inc. v. Klein, 196 Neb. 538, 244 N. W. 2d 86 (1976).

Here, resolution of the question as to whether there is a genuine issue of material fact depends upon the credibility of witnesses. When the testimony of the parties is in conflict and credibility is a factor, summary judgment is not proper.

The issue to be determined is the number of nonpregnant cows for which credit should be given. We vacate the summary judgment and remand the cause for a trial on the merits, with each party to pay his own costs in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I respectfully dissent because I believe the opinion of the court does not fairly and accurately state the record in this case. There is no evidence which contradicts the deposition testimony of the defendant on the issue of the number of cows not pregnant, or which had lost their calves before January 24, 1974. The opinion accurately reflects the first sworn testimony of Blome given on July 23, 1975, and that does not in any way contradict the testimony of Hottell, but in fact supports it by the statement that some of the cows "had lost their calves." This was the day the cows were selected. There is no foundation for any testimony by Blome that would give any basis for his testimony as to what happened later.

The testimony of Blome in the deposition of November 12, 1976, is not correctly reflected in the opinion. There is not a word in the deposition about "14 cows that were pregnant right close up to calving." The full testimony on the point is: "the next day when we went down and sorted up the cows and he took 74 cows. He picked out 60 cows that had calves on them and then he picked out the rest of the cows that were right close up to pregnant and I told him — he cut the rest of them off and I said, 'It don't make no difference how many you cut off, those dry cows will bring as much as the others.' " This testimony contains no statement that the cows were

pregnant and close to calving. What the phrase "close up to pregnant" means is anybody's guess.

In Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643, we said that testimony (in that case an affidavit) "opposing the rendition of a summary judgment to be effective must be made on personal knowledge, must set forth such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein." The testimony of Blome in the deposition of November 12, 1976, does not meet that standard. It is surely vague and imprecise and its meaning unintelligible. The record, as we have already noted, further shows that there is no foundation for testimony by Blome as to what may have been the facts with reference to calving after the cows were delivered.

It is fairly apparent that both parties testified fully. A trial on the merits is useless. The result is going to be the same in any event.

DONALD SEMPEK ET AL., APPELLEES, V. BERNARD J. MINARIK ET AL., APPELLANTS.

264 N. W. 2d 426

Filed April 5, 1978. No. 41415.

1. **Landlord and Tenant: Property: Notice.** A tenancy from year-to-year can only be terminated by agreement of the parties, express or implied, or by notice given, 6 calendar months ending with the period of the year at which the tenancy commenced.
2. **Landlord and Tenant: Lessor and Lessee: Property.** In the absence of an express covenant inconsistent therewith, the ordinary lease of realty raises an implied covenant that the lessee shall have the quiet and peaceable possession and enjoyment of the leased premises, so far as regards the lessor, or anyone lawfully claiming through or under him, or anyone asserting a title to the leased premises superior and paramount to that of the lessor. In the absence of a provision to the contrary, such covenant is implied in every lease, and leases by parol are included within the scope of this rule.

3. **Landlord and Tenant: Lessor and Lessee: Damages.** The measure of damages for the wrongful eviction of a tenant by his landlord is ordinarily the rental value of the property for the unexpired term, less the amount of rent reserved by the lease. In a proper case special damages in addition may be awarded, where such damages are certain and the natural result of the wrong complained of.

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

Michael J. Dugan and Martin W. Penkwitz of Costello & Dugan, for appellants.

John J. Higgins of Eisenstatt, Higgins, Kinnamon, Okun & Stern, for appellees.

Heard before WHITE, C. J., BOSLAUGH, and WHITE, JJ., and WARREN and KORTUM, District Judges.

WARREN, District Judge.

Donald Sempek and John R. Walsh, plaintiffs and appellees herein, brought this action in the municipal court for the City of Omaha to recover damages suffered due to a breach of their implied covenant of quiet enjoyment, claiming they were wrongfully evicted from an 100-acre tract on the Platte River near Valley, Nebraska, owned by the defendants, Bernard J. Minarik and Helen Minarik, after they had made cabin improvements under oral tenancies from year-to-year. After trial, municipal judge William F. Ryan found for the defendants and dismissed plaintiffs' petition. On appeal to the District Court and a trial de novo on the record, the District Court found generally for plaintiffs and entered a single judgment for plaintiffs in the total sum of $4,999. Defendants Minarik appeal from an order overruling their motion for new trial.

On March 22, 1968, plaintiff John R. Walsh orally agreed with the defendant Dr. Bernard J. Minarik (hereinafter called Minarik) to lease a portion of the Minarik river tract for a cabin site and family recreational use on a year-to-year basis for $200 a year

rent. Walsh put up a cabin in May of 1968. In 1970, one John Lesak made a similar oral lease with Minarik. Plaintiff Donald Sempek, by agreement with Minarik, assumed the tenant's obligations of the Lesak lease in 1971, and in that year he erected a modern, two-bedroom cabin at a cost of $4,000. Annual rentals were paid by each plaintiff to Minarik until the 1973-74 lease year.

In October 1972, defendant Minarik announced to plaintiffs and others at a picnic on the premises that he was contemplating sale of the property, but assured the tenants they would be protected so far as their cabins and leases were concerned, and they would either be given compensation or time to remove their improvements.

A tenancy from year-to-year " 'can only be terminated by agreement of the parties, express or implied, or by notice given, six calendar months ending with the period of the year at which the tenancy commenced.' " Barnes v. Davitt, 160 Neb. 595, 71 N. W. 2d 107 (1955).

The year-to-year tenancy of Walsh would have expired March 22, 1973, if he had received notice of termination 6 months before; similarly, the Sempek tenancy could have been terminated May 29, 1973, by 6 months previous notice. Defendants admit that no such notice of termination was given to either Walsh or Sempek prior to the 1973 renewal dates. The oral leases therefore were in effect for the respective years ending March 22, 1974 (Walsh) and May 29, 1974 (Sempek).

In the spring of 1973, both Walsh and Sempek, having heard a sale was in the offing, inquired of Minarik and were told in vague terms that he was selling to some unnamed party, but that "they got it all screwed up, and I'm not going to go through with it if they don't get it straightened out." Minarik again assured plaintiffs that they would be kept informed and that all tenants would be protected.

In May 1973, both Walsh and Sempek were physically prevented from entering the property by persons claiming to represent the new owners, the Flinn people, who changed the lock on the gate padlock and told plaintiffs they could not go onto the premises to use their cabins or to remove any personal property. On at least one occasion, an armed guard was stationed at the entry gate to prevent entrance. On further inquiry by Walsh, after being barred from entry, Minarik told Walsh "Well, they say they bought the cabins, and I say they didn't." Then Minarik's attorney referred Walsh to the attorney for the Flinns, who contended that Flinns bought the cabins.

On May 31, 1973, there were recorded two deeds to the subject property from Dr. B. J. Minarik and Helen Minarik to Truman Clare, trustee; the first being a warranty deed which had been executed on December 29, 1972; and the second, a quitclaim deed to the same property executed May 29, 1973.

Upon inquiry through their attorneys, plaintiffs then learned that defendants had on October 5, 1972, accepted a written offer to purchase the 100 acres made by Mathew L. Flinn, c/o Truman Clare, for $100,000, with final settlement scheduled for November 2, 1972. The contract, which was not recorded, provided for conveyance free and clear of all liens and encumbrances, "except rights to lessees of cabin leases, a list of which is attached hereto; said lessees are on an oral year-to-year tenancy, the area of which tenancies is attached in the attached list." The attachment listed among others: John Walsh, expiration date March 22, 1973; Sempek, expiration date May 29, 1973; and the footnote was: "* Indicates nice cabin."

Walsh and Sempek testified that neither paid the $200 rental in 1973 because of confusion at that time as to whether a sale was pending or who the new owner was if a sale had been made. Walsh testified

that his leasehold interest had a reasonable annual value of $1,000 to $1,500 a year; and Sempek valued his lease at $2,000 per year. Sempek testified his cabin had a fair market value of $5,000 to $6,000 at the time of trial.

Defendants offered no testimony, but defendants' attorney, when called by plaintiffs, testified that he had on October 9, 1972, and again in April 1973, prepared written notices to each plaintiff to vacate the premises as of the 1974 renewal dates, but that he sent the notices to Dr. Minarik with instructions to sign and serve them. The notices to vacate were signed by "Bernard J. Minarik, Owner," but were never served.

The theory of defendants' assignment of error, although somewhat difficult to discern, seems to be that even if defendants did breach the implied covenant of quiet enjoyment, their actions did not proximately cause any damage to the plaintiffs because they had already deeded the land to the purchaser Truman Clare, trustee, on December 29, 1972, and so Minariks were not the owners-landlords in May 1973, when plaintiffs were evicted by the new owners. In effect, Minariks say: "We didn't do it; they did; you should sue them." Defendants offered in evidence a petition by Sempek and Walsh, plaintiffs, v. Truman Clare, trustee, defendant, which had been filed in the District Court for Douglas County, Nebraska, on the same date as this action was commenced. The District Court action was admittedly still pending at the time of the trial of the instant case, and prayed for damages arising out of the same incident.

We note that the Minariks first contracted to sell the premises subject to the Walsh and Sempek oral year-to-year leases expiring "March 22, 1973," and "May 29, 1973," and then in December of 1972 by warranty deed conveyed the premises to Truman Clare, trustee, "free of encumbrances except ease-

ments and restrictions of record." It clearly appears that defendants thereby represented to the new owners they could rightfully bar Walsh and Sempek from the premises after May 29, 1973.

"In the absence of an express covenant inconsistent therewith, the ordinary lease of realty raises an implied covenant that the lessee shall have the quiet and peaceable possession and enjoyment of the leased premises, so far as regards the lessor, or anyone lawfully claiming through or under him, or anyone asserting a title to the leased premises superior and paramount to that of the lessor." Annotation, 41 A. L. R. 2d 1414, at p. 1420.

"* * * the rule ordinarily is announced that, in the absence of a provision to the contrary, such covenant is implied in every lease, and leases by parol are included within the scope of this rule." 51C C. J. S., Landlord & Tenant, § 323 (1), p. 831.

"The execution of a lease of real estate ordinarily raises an implied covenant that the lessee shall have the quiet and peaceable possession and enjoyment of the leased premises as against anyone asserting a title paramount to the lessor unless there is some express covenant of a more limited character inconsistent with such a covenant." Grand Island Hotel Corp. v. Second Island Development Co., 191 Neb. 98, 214 N. W. 2d 253 (1974).

"The fact that the lessor has sold the premises subject to the lease does not relieve him from liability for damages for failure to deliver possession." Canaday v. Krueger, 156 Neb. 287, 56 N. W. 2d 123 (1952).

The plaintiffs were entitled to the benefit of the implied covenant of quiet enjoyment. It was breached by their actual eviction from the premises through the actions of purchasers claiming through the defendants Minarik. Minariks could not evade their contractual obligation as lessors by selling and conveying the property to a third person. It is evident that plaintiffs may choose to pursue their legal

remedies against the parties with whom they dealt, leaving the matter of filing a third party action against the Minariks if they so desire.

The prevailing view supports the rule that for a breach of the covenant for quiet enjoyment resulting in eviction, the tenant is entitled to the value of the unexpired term, that is, the difference between the actual value of the unexpired term and the agreed rent, such value being measured usually by the rental value. Special damages which are within the contemplation of the parties and resulting directly and proximately from the breach of a covenant of quiet enjoyment are recoverable if they can be established with reasonable certainty. 49 Am. Jur. 2d, Landlord and Tenant, §§ 349, 350, pp. 362, 363.

" 'The measure of damages for the wrongful eviction of a tenant by his landlord * * * is ordinarily the rental value of the property for the unexpired term, less the amount of rent reserved by the lease. In a proper case special damages in addition may be awarded, where such damages are certain and the natural result of the wrong complained of.' " Jarman v. Sexton, 130 Neb. 453, 264 N. W. 305 (1936). See, also, Shutt v. Lockner, 77 Neb. 397, 109 N. W. 383 (1906).

Here the undisputed testimony of the plaintiffs regarding the value of their leasehold interests and the value of the improvements on leased lands which were lost as a direct result of the eviction clearly establishes damages exceeding the judgment for $4,999 in damages, which was limited to that amount by the jurisdiction of the municipal court.

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

AFFIRMED.

THELMA MARYMEE, APPELLANT, V. HUBERT MARYMEE, APPELLEE.

264 N. W. 2d 197

Filed April 5, 1978. No. 41417.

Divorce: Property. On review this court will not disturb a division of property made by the trial court unless it is patently unfair.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

Casey & Elworth, for appellant.

Dixon G. Adams, for appellee.

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

PER CURIAM.

This is an appeal from a dissolution of marriage decree. Petitioner, who filed this action, originally sought a legal separation and was permitted at trial to ask for a dissolution of marriage instead. Petitioner appeals from the decree of the District Court, attacking the division of property. We affirm the decree of the District Court.

The parties were married on June 7, 1974, and the action was filed on May 10, 1976. The marriage was the second for the respondent, 51, and the third for the petitioner, 53. Both parties have children from their previous marriages.

Petitioner brought into the marriage a four-plex apartment building in Omaha, Nebraska, some household furniture and appliances, a mink coat, and a 1965 Corvair. The apartment building was purchased by petitioner in 1970 for $36,000. Petitioner testified that it was worth $40,000 at the time of trial and was insured for $55,000. Petitioner testified that when she and respondent were married she worked at Brandeis, earning $98 per week net. She stated that she is no longer able to work because of arthritis and that she is on medication.

Respondent brought into the marriage his credit union balance of $9,834.93, some furniture, and a 1969 Oldsmobile. Respondent testified that he is employed by Mutual of Omaha and that his gross income for 1976 was $19,799. Respondent pays $150 per month child support for a 14-year-old daughter and has deducted from his paycheck $180 each month for house payments on a house owned previous to this marriage.

Subsequent to their marriage, respondent used approximately $6,000 of his credit union balance to purchase a home at 611 Washington Street, in Bellevue, Nebraska, for the parties. This house cost $29,500 plus $600 for legal fees. Additional expenses were $892.60 for some adjoining lots. The house was titled in petitioner and respondent's joint names. At the time of the trial the balance of the mortgage on the 611 Washington Street home was approximately $22,000 or $23,000, monthly mortgage payments being $231. Respondent estimated the current value of the house to be in the $30,000's. Petitioner testified that she put $5,000 into the house at 611 Washington Street. During the course of the marriage the 1965 Corvair was sold and a 1971 Volkswagen was purchased.

The District Court awarded petitioner: (1) Her apartment building, (2) a bank account in the Bank of Bellevue, (3) all the household furnishings and personal property which she brought into the marriage, (4) the 1971 Volkswagen, and (5) $5,000 payable in cash for her investments in the 611 Washington Street home. Respondent was awarded: (1) The residence at 611 Washington Street, (2) all his personal property, (3) the 1969 Oldsmobile, (4) the adjoining lots, and (5) his credit union balance.

"On review this court will not disturb a division of property made by the trial court unless it is patently unfair." Theye v. Theye, *ante* p. 206, 263 N. W. 2d 92. We find nothing patently unfair in the division of property made by the District Court.

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

AFFIRMED.

MATHEW E. PELZER, JR., APPELLEE, V. CITY OF BELLEVUE, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

264 N. W. 2d 653

Filed April 5, 1978. No. 41539.

1. **Municipal Corporations: Census: Apportionment.** Whenever an area is annexed to a city subsequent to the most recent federal census, the population of that area must be taken into account in any subsequent redistricting, in addition to the population of the city as determined by the federal census.
2. **Municipal Corporations: Census.** Where the most recent federal census does not contain detailed block by block information sufficient to determine the population of a specific portion of a census enumeration district, any material relevant evidence may be admitted to establish that population.

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

John E. Rice, for appellants.

D. L. Pelton, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

MCCOWN, J.

This is an action to challenge the validity of redistricting ordinances passed by the city council of Bellevue, Nebraska, upon the grounds that they violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; and that the city failed to comply with the provisions of section 5-108, R. R. S. 1943. On the initial trial in the District Court, the court sustained a motion to dis-

miss at the close of plaintiff's evidence. Upon appeal, this court determined that section 5-108, R. R. S. 1943, requires that the most recent federal census be used in determining whether election districts have substantially equal population, and remanded the cause to the District Court "for a new trial to determine if, according to the most recent federal census, the election wards of Bellevue are substantially equal in population in accordance with the principle of one man, one vote." See Pelzer v. City of Bellevue, 198 Neb. 19, 251 N. W. 2d 662.

Following retrial, the District Court determined that the 1974 special census was the most recent federal census; that election ward boundaries cannot be established solely by use of the 1974 census; that the population of the wards cannot be accurately determined on the basis of the 1974 special census; that there are substantial variations in population between the various election wards in the City of Bellevue as determined by the most recent federal census; and that an at-large election should be held. The court therefore declared the redistricting ordinances void and vacated and set aside the 1976 primary and general elections for city council. The court vacated the offices of the four city council members elected on November 2, 1976, and ordered a special "at large" election for those seats. The City of Bellevue has appealed.

The issue on the retrial here was whether, according to the 1974 special federal census, the four election ward districts of the City of Bellevue were substantially equal in population in accordance with the principle of one man, one vote. The 1974 special census showed the population of the City of Bellevue to be 21,145. A large housing development area was annexed to the City of Bellevue effective July 31, 1975, and the redistricting ordinances of October and November 1975, involved here, were enacted in an attempt to adjust and equalize the population of the

election districts of the city. The 1974 census was prior to the annexation and the population of the annexed area was included only as a part of a much larger area outside the city. The city took a census of the actual population of the annexed housing development which showed a population of 1,193. An expert witness also testified that the population of the annexed area was approximately 1,200. The District Court excluded the city's evidence because it was not derived from the 1974 special federal census. We hold that whenever an area is annexed to a city subsequent to the most recent federal census, the population of that area must be taken into account in any subsequent redistricting, in addition to the population of the city as determined by the federal census. The population of the City of Bellevue according to the most recent federal census was, therefore, 22,338 at the time of the enactment of the challenged ordinances. Absolute equality in population of the four election wards of the City of Bellevue would produce four election districts with a population of 5,584 persons each.

The 1974 special census was not made on a block by block basis but contained only total population figures in each of more than 30 separate census enumeration districts. Where boundary lines of voting districts and census enumeration districts are the same, the census figures may be directly applied. Where the boundary lines between voting districts differ from the boundary lines of census enumeration districts, the census figures cannot be applied directly, but must be applied indirectly by interpretation or supplemented by other evidence. There are three census enumeration districts of the 1974 special census which are affected.

The plaintiff divided the 1974 population of census enumeration districts 21 and 22 between ward 1 and ward 2 by determining the ratio of the 1970 census block counts on each side of the ward boundary line

and applying that same ratio to the 1974 count. The defendant made an actual house count of the houses on one side of the boundary line in each of the two districts and multiplied the number by the average number of persons per household established by planning and census officials, and divided the 1974 census population between wards 1 and 2 by that method.

The third census enumeration district involved was district 14 in which the boundary line between ward 4 and ward 2 cut off a small corner of the census enumeration district 14, placing almost all of district 14 in ward 2 while the small corner of the district was in ward 4. The plaintiff simply placed all 1,186 persons of census district 14 into ward 2, while the defendant used the same house count method and placed 95 persons in ward 4 and the remaining 1,091 in ward 2.

Under plaintiff's interpretation of the evidence, the population of the largest of the four wards was 388 persons above the mathematical ideal of 5,584 persons, or 6.95 percent above it, while the population of the smallest of the four wards was 320 persons, or 5.73 percent, below the ideal. On defendant's interpretation of the evidence, the largest ward had a population of 320.5 persons, or 5.70 percent, above the mathematical ideal, and the population of the smallest district was 225.5 persons, or 4.03 percent, below that ideal. Of the two remaining wards, both plaintiff's and defendant's evidence showed one of them to be 0.45 percent above the mathematical ideal. That ward is the one in which ward boundaries coincided in all respects with census enumeration boundaries. On the remaining ward, plaintiff's evidence showed the population to be 1.67 percent below the mathematical ideal, while defendant's evidence showed it to be 2.15 percent below the mathematical ideal. We believe the defendant's evidence provides a more accurate and logical application of the 1974 special federal census.

It is argued that the 1974 special census cannot be directly applied to determine the population of the election districts here; that only the 1974 federal census, without extrinsic evidence, can be considered; and, therefore, the redistricting ordinances are void. We disagree.

Where the most recent federal census does not contain detailed block by block information sufficient to determine the population of a specific portion of a census enumeration district, any material relevant evidence may be admitted to establish that population. For example, it was proper here to consider evidence showing how many of the 558 persons residing in census enumeration district 22, as shown by the 1974 census, lived in ward 2 and how many of such persons lived in ward 1. The boundary line between election ward 1 and election ward 2 was Washington Street, which bisects census enumeration district 22. The admission and consideration of such evidence complies with the statutory requirement that the population of the election districts be determined according to the 1974 federal census.

On the basis of the evidence in this record the population of the largest ward in the City of Bellevue was 5,905, and the population of the smallest ward in the City of Bellevue was 5,359. The total disparity between the largest and smallest wards was 9.73 percent of the mathematical ideal. A variance of 56 persons would alter those results by a full 1 percent.

Plaintiff's position is that a difference in population of approximately 500 persons between the largest and smallest election districts in the City of Bellevue constitutes a violation of the principle of one man, one vote.

Since Baker v. Carr, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, the one man, one vote principle has been a justiciable issue under the Equal Protection Clause. Gray v. Sanders, 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821, extended the concept of political

equality to all phases of state elections. In Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, the Supreme Court recognized that mathematical exactness or precision is hardly a workable constitutional requirement, and that the element of practicability must be considered. While the court rejected the idea that there is some fixed minimum deviation from equality that is permissible in every case, the court concluded that the facts of each case must be examined to determine whether the existing deviation is the product of proper state considerations. In Burns v. Richardson, 384 U. S. 73, 86 S. Ct. 1286, 16 L. Ed. 2d 376, the Supreme Court indicated that variations from a pure population standard might be justified, and that such state policy considerations as the integrity of political subdivisions, the maintenance of compactness, and contiguity in legislative districts, or the recognition of natural or historical boundary lines might be appropriately considered. The court, in Swann v. Adams, 385 U. S. 440, 87 S. Ct. 569, 17 L. Ed. 2d 501, quoted from Roman v. Sincock, 377 U. S. 695, 84 S. Ct. 1449, 12 L. Ed. 2d 620, noting that the Constitution permits "such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination."

In Kirkpatrick v. Preisler, 394 U. S. 526, 89 S. Ct. 1225, 22 L. Ed. 2d 519, the court recognized that while fixed numerical standards which excuse population variances could not be set without regard to the circumstances of each particular case, the extent to which equality may practicably be achieved may differ from state to state and from district to district. The court determined that the "as nearly as possible" standard requires that the state make a good faith effort to achieve mathematical equality.

The principle of one man, one vote is, of course applicable to local governmental bodies as well as to

state legislatures. See Avery v. Midland County, 390 U. S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45.

In Abate v. Mundt, 403 U. S. 182, 91 S. Ct. 1904, 29 L. Ed. 2d 399, the court noted that because of the smaller size of local population and legislative bodies, slightly greater percentage deviations from population equality may be tolerable for local government apportionment plans than for congressional or state plans. In that case the court upheld a total range of deviation of 11.9 percent from the mean district population.

In Mahan v. Howell, 410 U. S. 315, 93 S. Ct. 979, 35 L. Ed. 2d 320, the Supreme Court upheld a state legislative apportionment plan which involved a total deviation range from the mathematical ideal of 16 percent and said: "Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviation is permissible, and what is not."

In 1973, in two cases involving state legislative districts in which the deviation percentages were 7.83 percent and 9.9 percent, the Supreme Court determined that plaintiffs had failed to make a prima facie case of constitutional violation, and that no rational state interest need be shown. See, Gaffney v. Cummings, 412 U. S. 735, 93 S. Ct. 2321, 37 L. Ed. 2d 298; White v. Regester, 412 U. S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314. In the Gaffney case the Supreme Court noted particularly that census figures reflected population at only a single instant in time and were constantly changing and that "it makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted." The court noted that the work of state or local government in carrying out the task of reap-

portionment should not be invalidated under the Equal Protection Clause when only minor population variations among districts are proved.

In this case the evidence is virtually undisputed that the City of Bellevue made a good faith effort to reapportion the voting districts of the City of Bellevue to make them substantially equal in population. The evidence is also uncontradicted that the city, in preparing the apportionment plan here, sought to keep neighborhoods together, group major streets, move as few people as possible from one district to another, and change existing district lines as little as possible. All of these are legitimate considerations in carrying out a rational governmental policy of apportionment. The fact that a legislative body in adopting a reapportionment plan used an incorrect census, or an incorrect total population figure, does not invalidate the reapportionment if the districts created by the reapportionment are substantially equal in population as determined by the correct standards. Mathematical precision and exactness are impossible as a practical matter, and can be approached only within flexible limits. In a rapidly growing community such as Bellevue, even a satisfactory present solution may be fleeting.

The evidence here is convincing that the challenged ordinances established districts which were substantially equal in population as determined by the most recent federal census, and were in accordance with the requirements of section 5-108, R. R. S. 1943. On the evidence here the plaintiff has failed to make out a prima facie case of invidious discrimination under the Fourteenth Amendment. The challenged ordinances are legal, valid, and effective. The judgment of the District Court is reversed and the cause remanded to the District Court with instructions to dismiss plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. EMMETT LEE MACKEY, APPELLANT.

264 N. W. 2d 430

Filed April 5, 1978. No. 41550.

1. **Trial: Constitutional Law: Time.** A claim that a statute is unconstitutional must be raised at or before the time of trial, or it will be considered waived. Such a claim, first made in the motion for new trial, does not satisfy the requirement.
2. **Trial: Criminal Law: Attorneys at Law.** Defense counsel has discretion to formulate trial tactics whether or not to make objections to evidence and whether or not to call certain witnesses; the adequacy of his conduct of the defense will be measured according to a comparison with that of a lawyer with ordinary training and skill in the criminal law in his area.
3. **Criminal Law: Evidence.** Evidence examined and held sufficient to require the submission of a charge of felonious entry and attempt to steal for determination by the jury.
4. **Criminal Law: Lesser-Included Offenses.** A lesser-included offense may not be submitted with a greater charge, if such lesser offense includes any element irrelevant to such greater charge.
5. **Statutes: Criminal Law: Instructions.** An instruction stating that the elements of felonious entry under section 28-533, R. R. S. 1943, are (1) a willful and malicious entry with intent to steal, (2) a subsequent attempt to steal, and (3) the time and place of the offense, is proper.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Ronald G. Sutter, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

KUNS, Retired District Judge.

The defendant, Emmett Lee Mackey, was convicted of the felonious entry of a cafeteria in Gage County, Nebraska. He has appealed from the order overruling his motion for new trial. He assigns errors in the proceedings, as follows: (1) That sec-

tion 28-533, R. R. S. 1943, is unconstitutional; (2) that his court appointed counsel was inadequate; (3) that the evidence was insufficient to support the verdict; (4) that the trial court failed to instruct on a lesser-included offense; and (5) that instruction No. 5 given to the jury was erroneous.

The record shows the claim that section 28-533, R. R. S. 1943, was unconstitutional was not raised during the course of the trial but was assigned first in the motion for new trial. We have previously held that a claim of unconstitutionality of a legislative act must be raised at or before the time of trial or it will be considered waived. Presentation of such an issue for the first time in a motion for new trial does not satisfy the requirement that constitutional questions be properly and seasonably asserted. State v. Norwood, 194 Neb. 595, 234 N. W. 2d 601.

The conduct of the defense by counsel for the appellant is criticized because he did not object to certain testimony referring to appellant's conduct as "robbery" on the ground that it was hearsay, that he did not cross-examine one of the complaining witnesses properly, and that he should have called appellant as a witness in his own behalf. The standard by which the adequacy of the conduct of the defense by counsel is measured is that of a lawyer with ordinary training and skill in the criminal law in his area and the extent to which the record shows conscientious protection of the interest of his client. The record fails to indicate any respect in which original counsel for the appellant failed to meet community standards of training and skill in the practice of criminal law. An examination of the record in the light of the specific complaints shows only that counsel used tactics which seemed appropriate to him at the stage of the proceedings when the necessary decisions were made. No disloyalty to the client is shown or contended. After the conclusion of the trial and while the jury was deliberat-

ing, appellant requested the assignment of new counsel, and the request was granted before the motion for new trial was heard. At the hearing on motion for new trial, the new counsel examined his predecessor at length, showing that there were differences of opinion concerning the conduct of the defense.

In State v. Bartlett, 199 Neb. 471, 259 N. W. 2d 917, it was stated: "The decision to object or not to object is part of trial strategy and, accordingly, we grant due deference to the discretion of defense counsel to formulate trial tactics. 'Effectiveness of counsel is not to be judged by hindsight.' State v. Phillips, 186 Neb. 547, 184 N. W. 2d 639." The claim of inadequacy of counsel is not supported by the record.

Next, appellant argues the insufficiency of the evidence to go to the jury or to support the verdict. Lawrence Lambert, the owner of the cafeteria, and his wife, Norma, testified that on October 21, 1976, they were sitting therein. The cafeteria was closed, except that they expected a late-arriving customer. At one end of the main dining room, there was a balcony used for office purposes, access to which was by a stairway from the kitchen. Mrs. Lambert saw the appellant standing on the balcony, holding a bag in which the day's cash receipts were kept, and looking at or handling the contents; and she called the police while Mr. Lambert accosted the appellant who had returned the bag to the file drawer in which it had been kept, and descended the stairway to the kitchen. Appellant apparently entered through the back door, since neither of the Lamberts had seen him come through the front door used by their customers. Appellant stated to Mr. Lambert that he had not taken anything, but had been looking for a telephone. There was no telephone in the office area, and the appellant had used a telephone book in a nearby beauty shop a few minutes previously.

Officers arrested appellant just outside the building. The State charged the appellant with felonious entry and an attempt to steal. When the total situation described by the witnesses is considered, it is clear that the evidence was sufficient to take the case to the jury.

The circumstances of the entry upon the premises by a door not intended for public use, the presence of appellant in an office area, the opening of a filing cabinet drawer and removal of the money bag therefrom, and appellant's declaration that he was looking for a telephone in a place where there was none are sufficient to furnish rational support for a verdict of the jury. State v. Harig, 192 Neb. 49, 218 N. W. 2d 884. The trial court was correct in overruling the motion for dismissal and submitting the case to the jury.

The appellant requested that the trial court submit to the jury a charge of trespass, as a lesser-included offense. The trial court denied the request and refused the instruction submitted as a part of appellant's requests. A lesser-included offense is one with such elements that the commission of the greater offense is also a commission of the lesser, without the addition of any element irrelevant to the greater. State v. Bernth, 196 Neb. 813, 246 N. W. 2d 600; State v. Colgrove, 197 Neb. 375, 248 N. W. 2d 780. In a prosecution for trespass under section 28-588.01, R. R. S. 1943, the State is required to negate two exceptions: That the entry was "other than in an emergency" and that defendant had entered "without being invited, licensed or privileged to do so." These exceptions are entirely irrelevant to the offense defined in section 28-533, R. R. S. 1943. The requested instruction was correctly refused.

Instruction No. 5, given to the jury, submitted the following elements of the offense charged:

"1. That the defendant did wilfully and maliciously, in the daytime, enter a kitchen, towit, the

Homestead Cafeteria, intending at that time to steal property therein;

"2. That having entered said premises, the defendant attempted to steal and carry away personal property belonging to Lawrence S. Lambert; and

"3. That the aforesaid occurred on or about October 21, 1976, in Gage County, Nebraska."

Appellant argues that the combination of the references to an "intent" to steal and an "attempt" to steal allowed the jury to draw an improper inference that a subsequent attempt to steal might show a previous intent to steal, existing at the time of the entry. This argument overlooks the duty of the jury to consider and weigh all the testimony in reaching its findings upon the several issues submitted by the court. There is nothing in the instruction which suggested to the jury that an "attempt" to steal indicates an "intent" at any specific previous time. The jury was left free to reach a possible finding that the initial entry was proper and free from intent, but that a later attempt to steal resulted from a decision and intention formed subsequent to entry. The instruction given by the trial court follows our statements and holding in State v. Baker, 183 Neb. 499, 161 N. W. 2d 864.

None of the assignments of error can be sustained. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN S. BARRETT, APPELLANT.

264 N. W. 2d 434

Filed April 5, 1978. No. 41654.

Courts: Rules of Court: Appeal and Error. The Supreme Court will take judicial notice of all rules of District, Separate Juvenile, County, Municipal, and Workmen's Compensation Courts on file with the Clerk of the Supreme Court.

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

Robert C. Sigler, for appellant.

Paul L. Douglas, Attorney General, Gary P. Bucchino, Omaha City Prosecutor, and Richard M. Jones, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

SPENCER, J.

Defendant was convicted in municipal court for operating a motor vehicle during a period of suspension or revocation. He prosecuted an appeal to the District Court where a judgment of conviction was affirmed. On appeal to this court he alleges the trial court committed reversible error in denying him a jury trial, and that the evidence was insufficient to sustain his conviction. The jury trial was properly denied. We affirm.

Defendant was arraigned on the charge in the Omaha municipal court on August 25, 1976. He entered a plea of not guilty and trial was set for September 17, 1976. He filed a motion requesting a jury trial on September 7, 1976. This motion was overruled on September 8, 1976, as being untimely filed.

Section 24-536, R. R. S. 1943, provides: "Either party to any case in county or municipal court, except criminal cases arising under city or village ordinances and traffic infractions, and except any matter arising under the provisions of the Nebraska Probate Code, may demand a trial by jury. In civil cases, the demand must be in writing and must be filed on or before answer day. All provisions of law relating to juries in the district courts shall apply to juries in the county and municipal courts and the district court jury list shall be used, except that jur-

ies in the county and municipal courts shall consist of six persons."

The above section provides only for the filing of a written demand in a civil case. It is silent on the subject of when a demand for a jury trial must be made in a misdemeanor case.

From State v. Nielsen, 199 Neb. 597, 260 N. W. 2d 321, filed December 14, 1977, we know the municipal court has adopted a court rule to correct this void. That case was predicated on a rule of the municipal court which provides: "Parties desiring jury trials in criminal cases must request the same in writing at the time of arraignment or no later than 14 days prior to the time the case has been set for trial by the court."

The order of the municipal court denying a motion for a jury trial in this instance is in relevant part as follows: "This matter coming on for hearing on the Court's own motion after discovering that a Request for Jury Trial had been filed herein, and the Court being fully advised in the premises, finds as follows:

"That the Request For Jury Trial was filed on September 7, 1976 and that answer day had passed and that said request for jury trial was not timely filed."

The request for jury trial was not timely filed, not because answer day had passed, but because it was filed less than 14 days before trial. This record does not contain a copy of the municipal court rule. In the past this court has not taken judicial notice of rules of practice of other courts unless they were incorporated in the bill of exceptions. Simmons v. Murray, 189 Neb. 695, 204 N. W. 2d 800 (1973).

The municipal judge who entered the order finding the request for a jury trial was made out of time should have included the court rule in the record, as was done in Nielsen. However, the appellant is an attorney with many years of practice in the municipal court, and he should have been familiar with the

reason for the denial of his request. Because this court rule has been so recently before us, we take judicial notice of it and affirm the ruling thereon. However, this is subject to the right of the appellant to assert and file a showing on motion for rehearing that the municipal court rule involved in this case is significantly different than the rule in State v. Nielsen, *supra*, of which we take judicial notice.

We have today adopted a court rule directing all District Court, Separate Juvenile Court, County Court, Municipal Court, and Workmen's Compensation Court judges to file and to maintain on file with the Clerk of the Supreme Court a copy of the rules in force in that District, Separate Juvenile, County, Municipal, and Workmen's Compensation Courts. Since these rules will be filed pursuant to our order and as a part of the official record of the Clerk of the Supreme Court, we will hereafter take judicial notice of them.

Defendant's second assignment of error is patently frivolous. Two witnesses produced by the State swore under oath that they saw defendant driving a motor vehicle at the time and place alleged. To rebut this testimony defendant produced five witnesses, all of whom when asked the specific question if defendant was operating an automobile on July 26, 1976, said respectively: (1) "I wouldn't know for sure." (2) "I don't know for sure." (3) "No, I don't." (4) "I can't even remember what happened this July, let alone last July. No I wouldn't know at all." The other witness answered, "I don't know that he was."

When the defendant was asked by his own counsel as to whether or not he was driving a motor vehicle on July 26, 1976, he answered, "Not that I can remember. I can't remember exactly where I was on that particular day." There is no question, the evidence was sufficient to sustain the conviction.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE V. CLIFFORD DAVIS, APPELLANT.

264 N. W. 2d 198

Filed April 5, 1978. No. 41688.

1. **Criminal Law: Sentences: Appeal and Error.** When the punishment of an offense created by statute is left to the discretion of the trial court, to be exercised within certain prescribed limits, a sentence imposed within these limits should not be disturbed on appeal unless the record reveals an abuse of discretion.
2. **Criminal Law: Sentences.** It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively, as opposed to concurrently.

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

Clifford Davis, pro se.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

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

WHITE, C. THOMAS, J.

This is an appeal from the resentencing of the defendant pursuant to the decision and order of this court in State v. Davis, 199 Neb. 165, 256 N. W. 2d 678. In the above case we affirmed the convictions of the defendant for possession of a controlled substance with intent to deliver, a violation of section 28-4,125, R. R. S. 1943, and for being a felon in possession of a firearm, a violation of section 28-1011.15, R. R. S. 1943.

In originally sentencing the defendant for the above crimes, the trial court sentenced the defendant as an habitual criminal. Under the terms of the habitual criminal statute, section 29-2221, R. R. S.

1943, the penalty of the defendant for the crime or crimes charged may be enhanced upon the finding he comes within the terms of the statute. The defendant was sentenced to two 15 to 45 year terms in the Nebraska Penal and Correctional Complex. These terms were to run concurrently. In accordance with our holding that the defendant was found to be an habitual criminal pursuant to a defective information, we ordered the sentences to be set aside and the cause remanded for proper sentencing. On resentencing, the District Court gave defendant a sentence of 10 years on the charge of unlawful possession with intent to deliver a controlled substance and a 5 year term on the charge of possession of a firearm by a felon. The sentences are to run consecutively.

The defendant challenges the authority of the court to impose consecutive sentences on resentencing where concurrent sentences were originally imposed. The defendant relies primarily on North Carolina v. Pearce, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656, to support his argument. The defendant's reliance is unfounded. North Carolina v. Pearce, *supra*, held that a defendant, who is retried, following the overturning of his conviction, should not receive a more severe sentence than initially imposed unless the record affirmatively supports the trial court's decision to impose more severe punishment. It was also held that due process of law requires that vindictiveness against a defendant for having successfully attacked his first conviction plays no part in the sentence he receives after new trial. Here, the defendant was not retried nor did he receive a more severe sentence. There is no evidence that the penalties imposed on resentencing arose from vindictiveness of the sentencing court toward defendant.

Section 28-4,125 (2), R. R. S. 1943, provides for sentencing of a minimum of 1 year to a maximum of 10

years upon conviction for intent to deliver a controlled substance. The defendant received 10 years. Illegal possession of a firearm by a felon carries a maximum prison term of 5 years under the provisions of section 28-1011.18, R. R. S. 1943. The defendant received 5 years on that charge. When the punishment of an offense created by statute is left to the discretion of the trial court, to be exercised within certain prescribed limits, a sentence imposed within these limits should not be disturbed on appeal unless the record reveals an abuse of discretion. See State v. Stahl, 197 Neb. 683, 250 N. W. 2d 639. The trial court stated the reason for imposing maximum sentences was the defendant's extensive criminal record. The fact that the sentences are consecutive rather than concurrent does not constitute an abuse of discretion. It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively, as opposed to concurrently. See, State v. Tweedy, 196 Neb. 251, 242 N. W. 2d 629; State v. Rodman, 192 Neb. 403, 222 N. W. 2d 109.

The sentences of the District Court are affirmed.

AFFIRMED.

NORMA M. SPRADLIN ET AL., APPELLEES, V. GWENDOLYN I. MYERS, APPELLEE, IMPLEADED WITH AID INSURANCE SERVICES, APPELLANT.

264 N. W. 2d 658

Filed April 12, 1978. No. 41175.

1. **Actions: Abatement, Survival, and Revival.** As a general rule, actions in contract or in tort, and actions involving personal property, survive to or against the personal representative of a deceased party and ordinarily a cause of action involving realty passes to the heirs of the person having the cause, and survives against the heirs of those against whom the liability exists, although the personal representative may continue the action when he is authorized by statute to do so.

2. **Actions: Abatement, Survival, and Revival: Statutes.** Section 25-1410, R. R. S. 1943, provides that upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representative, the revivor shall be in his name; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names.
3. **Actions: Abatement, Survival, and Revival: Waiver.** Where the subject matter of an action is personal property, the action may and should, after the death of plaintiff, be revived in the names of his personal representatives, and not in the names of his heirs, devisees or legatees, but if defendant consents or fails to object properly to a revival or continuance of the action in the name of the heir or heirs-at-law, instead of the personal representative, he waives the right to complain.
4. **Estates: Abatement, Survival, and Revival.** Under our system of practice, where a party dies or his authority as a representative ceases, two methods of revivor coexist.
5. _____: _____. A conditional order of revivor may issue and be served and the order made final unless cause be shown against it, or the court may substitute the new party and supplemental pleadings may be filed and summons served.
6. _____: _____. If the conditional and final order method of revivor be pursued, the proper method of traversing the claim, of the person in whose name revivor is attempted, is by showing cause against the absolute order. An issue is thus tendered, and if the court makes the order absolute, that order becomes res judicata as to the right of the person named to proceed with the action, and the issue cannot be again made and tried with the main case.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

William E. Gast of Emil F. Sodoro Law Offices, for appellant.

Stanley H. Foster and L. W. "Jim" Weber, for appellees Spradlin.

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

WHITE, C. J.

The sole question on this appeal is whether the action was properly revived. On September 28, 1972, plaintiff, William W. Spradlin, filed a petition seek-

ing damages for injuries sustained as the result of a collision between an automobile he was operating and one being operated by the defendant, Gwendolyn I. Myers. On November 2, 1973, plaintiff filed an amendment to his petition naming the defendant, AID Insurance Services, as a party defendant under the uninsured motorist's provision of an insurance contract issued to him.

On January 29, 1976, while the case was pending, attorneys for the plaintiff filed a suggestion of death which read as follows: "Comes now Richard L. Ramey, and suggests to the Court that William W. Spradlin, Plaintiff, died on May 12, 1975. There are not sufficient assets in his estate to justify a probate proceeding and his estate will not be probated. His heirs at law are Norma M. Spradlin, his widow; William W. Spradlin, Margaret M. Smith, and Anedra Newton, his children." Filed at the same time as the suggestion of death was a motion for revivor, seeking to have the action revived in the names of the heirs-at-law.

On this same date, the District Court issued a conditional order of revivor, as follows: "The heirs of law of William W. Spradlin, having suggested to the Court that the Plaintiff is now deceased since this action was commenced, and that they are the sole and only heirs at law of the Plaintiff; and the Court being full advised in the premises, on motion of the Plaintiff it is suggested that this action be revived in the name of the heirs at law, and proceed against the Defendants unless they show cause against said revivor on or before the 1st day of March, 1976."

Neither defendant challenged the conditional order of revivor, and on March 8, 1976, the District Court entered an order of revivor, reviving the action in the name of Norma M. Spradlin, William W. Spradlin, Margaret M. Smith, and Anedra Newton, plaintiffs, against the defendants, it appearing to the court that such persons "should be substituted as his

personal representatives and successors to his interests."

On May 20, 1976, defendant, AID Insurance Services, filed a motion to dismiss, contending that the original plaintiff in the case was deceased and that the action had not been properly revived. Defendant's motion was overruled. The case was then tried to the court on October 19, 1976, on the issue of liability only. Prior to commencement of the trial, counsel for the defendant, AID Insurance Services, noted his continuing objection to the court's jurisdiction. The court found in favor of the plaintiff and against the defendant on the issue of liability. Defendant AID Insurance Services has appealed. We affirm the judgment of the District Court.

We first note that plaintiff's cause of action survived and did not abate on his death. § 25-1401, R. R. S. 1943; § 25-1403, R. R. S. 1943; Webster v. City of Hastings, 59 Neb. 563, 81 N. W. 510.

Defendant points out that plaintiff's action, one involving injury to his personal estate and not involving realty, descended upon his death to his personal representative and not to his heirs-at-law. This general rule is stated in 1 Am. Jur. 2d, Abatement, Survival and Revival, § 107, p. 125: "As a general rule, actions in contract or in tort, and actions involving personal property, survive to or against the personal representative of a deceased party. And ordinarily a cause of action involving realty passes to the heirs of the person having the cause, and survives against the heirs of those against whom the liability exists, although the personal representative may continue the action when he is authorized by statute to do so." Nebraska recognizes this distinction. See, Buford v. Dahlke, 158 Neb. 39, 62 N. W. 2d 252 (1954); Rakes v. Brown, 34 Neb. 304, 51 N. W. 848 (1892); Keefe v. Grace, 142 Neb. 330, 6 N. W. 2d 59 (1942); Urlau v. Ruhe, 63 Neb. 883, 89 N. W. 427 (1902).

Section 25-1410, R. R. S. 1943, provides: "Upon

the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. *Where his right has passed to his personal representative, the revivor shall be in his name;* where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names." (Emphasis supplied.)

The defendant argues that where the right of action passes to the personal representative of the deceased, as an action of the nature of plaintiff's would under our law, then, according to our statutory scheme, the revivor must be in the name of the personal representative and cannot be in the names of the heirs-at-law, as was done here. The action not having been properly revived, the District Court, defendant contends, was without jurisdiction to continue the action following the death of the original plaintiff.

Plaintiffs, in addition to arguing that the action was properly revived, contend that the defendant waived its right to object, is estopped from objecting, or is otherwise precluded from objecting to the revivor. Plaintiffs base these contentions on defendant's failure to object to the conditional order of revivor, allowing it to become final, and defendant not raising an objection to the revivor until more than 1 year after the date of the original plaintiff's death. Section 25-1414, R. R. S. 1943, provides that an order of revivor shall not be made in the names of the representatives or successors of the plaintiff without the consent of the defendant, after the expiration of 1 year from the time the order might have been first made.

"Where the subject-matter of an action is personal property, the action may and should, after the death of plaintiff, be revived in the names of his personal representatives, and not in the names of his heirs, devisees or legatees; but if defendant consents or

fails to object properly to a revival or continuance of the action in the name of the heir or heirs at law instead of the personal representative, he waives the right to complain." 1 C. J. S., Abatement and Revival, § 163, p. 218.

The first question to resolve is the effect of defendant's failure to object to the conditional order of revival. Did defendant, by this failure, waive its objections to the revivor, or is the defendant estopped from asserting improper revivor?

Section 25-1406, R. R. S. 1943, provides: "The revivor shall be, by a conditional order of the court if made in term, or by a judge thereof if made in vacation, that the action be revived in the names of the representatives or successor of the party who died, or whose powers ceased; and proceed in favor of or against them."

Section 25-1408, R. R. S. 1943, states: "If the order is made by consent of the parties, the action shall forthwith stand revived; and if not made by consent, the order shall be served in the same manner, and returned within the same time, as a summons, upon the party adverse to the one making the motion, and if sufficient cause be not shown against the revivor, the action shall stand revived."

In Missouri Pacific Ry. Co. v. Fox, 56 Neb. 746, 77 N. W. 130 (1898), an action was revived first by the widow of the deceased. The widow remarried and her powers as administratrix ceased. Fox, who appeared to be her successor, applied for a conditional order of revivor which in due time was made absolute. The court stated: "The defendant sought leave to file a supplemental answer alleging the cessation of Mrs. Thompson's powers as administratrix, and leave to do so was denied. It then, by objections to the evidence, sought to exclude proof of Fox' authority and to deny his right. Under our system of practice, where a party dies or his authority as a representative ceases, two methods of re-

vivor co-exist. A conditional order of revivor may issue and be served and the order made final, unless cause be shown against it, or the court may substitute the new party and supplemental pleadings may be filed and summons served. (Fox v. Abbott, 12 Neb. 328; Rakes v. Brown, 34 Neb. 312.) If the former method be pursued, the proper method of traversing the claim of the person in whose name revivor is attempted is by showing cause against the absolute order. An issue is thus tendered, and if the court make the order absolute, that order becomes res judicata as to the right of the person named to proceed with the action, and the issue cannot be again made and tried with the main case. (Hendrix v. Rieman, 6 Neb. 516.)''

Hendrix v. Rieman, 6 Neb. 516 (1877) involved an action upon a promissory note brought by one S. D. Rieman. During the pendency of the action the original plaintiff died and the action was revived in the name of Jennie Rieman as administratrix. To the motion and proceedings for revivor, Hendrix specially appeared and filed objections to the revivor. Hendrix' objections were overruled and exceptions duly taken. Before the trial commenced, Hendrix was given leave to file an answer denying that Jennie Rieman was the administratrix of the estate of S. D. Rieman. On appeal, Hendrix insisted that the court erred in sustaining the motion for revivor of the action. The court held: ''The statute provides the mode and regulates the practice in cases of revivor of actions. The mode of procedure, when not by consent, is by motion and conditional order of the court, if made in term, or by a judge thereof, if made in vacation; and the statutory provisions very plainly indicate that the question of revival of the action in the name of the administrator must be finally determined on the hearing of the case, upon the motion and conditional order and answer thereto of the adverse party. And that this is

the correct interpretation of the statute seems quite clear from the fact that no step can be taken in the prosecution of the action until there is a revival of the action by the substitution of the proper representative in the place of the deceased party. And this judgment or final order of revivor, unless reversed or vacated on error, is conclusive, and cannot be reviewed on the subsequent trial of the cause; and therefore the plea of ne unques administrator, subsequently pleaded to the action, is bad, and may be treated as surplusage."

The conditional order of revival was issued on January 29, 1976. There is no allegation by defendant of improper notice, nor any reason given why it did not respond to the conditional order of revivor. On March 8, 1976, the District Court entered an order of revivor, upon the default of the defendant, in the names of the plaintiffs. On May 13, 1976, defendant, AID Insurance Services, filed an objection to plaintiffs' certificate of readiness for trial and on May 20, 1976, filed a motion to dismiss alleging for the first time that the case had been improperly revived. Defendant's motion to dismiss was overruled and the case proceeded to trial with defendant taking a continuing objection on grounds of improper revival. Following the judgment for the plaintiffs on the issue of liability, the defendant filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial contending again that the action was improperly revived.

Under the authorities previously quoted from, defendant was required to raise any objections it may have had to the revivor by showing cause against the conditional order. Once the conditional order was made final, the defendant was precluded from subsequently calling into question the propriety of the revivor. Fox v. Abbott, *supra;* Hendrix v. Rieman, *supra.*

Had defendant filed objections to the conditional

order of revivor, and had the conditional order of revivor been made final over defendant's objections, the defendant on appeal could have challenged the overruling of its objections to the conditional order. Defendant, however, filed no objections to the conditional order of revivor and permitted it to become final. Its subsequent efforts to challenge the revivor are of no avail. The District Court had jurisdiction. § 25-1408, R. R. S. 1943.

Even if defendant were not precluded on appeal from asserting that the action was improperly revived, we are convinced that the action of the District Court reviving the action in the manner it did should be affirmed.

Defendant's argument is that the original plaintiff's cause of action was by nature one which passed to his personal representative on his death. Section 25-1410, R. R. S. 1943, states that a right which passes to the personal representative *shall* be brought in his name. Since the action was revived in the name of the original plaintiff's heirs-at-law, the revivor was improper. There being no proper revivor, the action abated with the death of the original plaintiff and the District Court was without authority to proceed following his death.

Defendant's contention would have merit except that under the circumstances of this case there was no such personal representative to whom the right should have passed. The original plaintiff's estate was too small to be probated. The appointment of an administrator ad litem could have been sought but we find nothing which compelled such an action.

In 1 C. J. S., Abatement and Revival, § 162, p. 216, it is stated: "Although the action is one which ordinarily should be revived in the names of the personal representatives of plaintiff after his decease, his heirs may, under the statutes of some jurisdictions, revive the suit or be made parties plaintiff where no one can be found who will administer on the estate,

or where there is no administration and no necessity for any, all debts of the estate having been paid."

Section 25-1410, R. R. S. 1943, states: "Where [the right] has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names." Section 25-1405, R. R. S. 1943, states: "Where one of the parties to an action dies * * * if the right of action survive in favor of or against his representatives or successor, the action may be revived, and proceed in their names."

Under the circumstances of this case, where there was no probate and no personal representative, the heirs-at-law were the original plaintiff's successors in interest to his action, and it could be revived in their names.

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

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein because it transfers the original jurisdiction of a county court in a probate matter to the District Court. The county courts of this state have exclusive original jurisdiction in all matters of probate and administration. Lewin v. Lewin, 174 Neb. 596, 119 N. W. 2d 96 (1962).

The subject matter of the action is an automobile accident which occurred March 30, 1972. The original plaintiff died May 12, 1975, so it is evident it is not a Lord Campbell action of the widow and the next of kin. Rather, any recovery herein would be an asset first available to the creditors for payment of debts, with only the remainder going to the heirs-at-law, as determined by the county court.

In my judgment, the plaintiffs are not the real parties in interest, and this issue has been raised at every stage of the proceedings since prior to the trial herein. I would hold the action must be re-

vived in the name of a personal representative, appointed by the county court.

The basis on which the trial court took jurisdiction on behalf of the alleged heirs is that there are not sufficient assets in the estate to justify a probate proceeding and the estate will not be probated. On its face this is an absurdity. The action itself is an asset of the estate. The prayer of the petition is for $23,712.70.

The trial court found for the plaintiffs and against the defendant on the issue of liability, so there is a substantial asset in the estate. The extent of liability is still to be tried. How is a recovery to be distributed? According to the laws of descent and distribution? Or, will it be distributed equally to the alleged heirs?

As we said in Murray v. Omaha Transfer Co., 98 Neb. 482, 153 N. W. 488 (1915), which concerned a rehearing on an action for personal injuries where both the Lord Campbell or death act and the estate were involved: "Under our statutes the wife has an interest in the property and rights of her husband at his decease, of which he cannot deprive her by any act of his. His creditors also have an interest which he cannot ignore. His administrator represents all of those interests." Here, however, the death act is not involved, so the rights of creditors, subject to statutory allowances, take precedence.

A pending tort claim is a chose in action and a part of the deceased's personal estate. In my judgment, the court lacked subject matter jurisdiction herein. The alleged heirs could not revive the action in their names, and the court did not have authority to do so. The law is well settled, jurisdiction over the subject matter cannot be conferred by consent or failure to object. See Plunkett v. Parsons, 143 Neb. 535, 10 N. W. 2d 469 (1943).

O. WM. VON SEGGERN, ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF VICTOR L. GRAF, DECEASED, APPELLEE, V. WALTER J. FREELAND, APPELLANT.

264 N. W. 2d 436

Filed April 12, 1978. No. 41335.

Property: Covenants: Leases. An option to purchase real estate contained in a lease agreement is not terminated by the death of the lessee during the term and before the exercise of the option, in the absence of express limitation.

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

Thomas A. Wagoner, for appellant.

O. Wm. Von Seggern of Cunningham, Blackburn, Von Seggern & Livingston, for appellee.

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

MCCOWN, J.

This is an action for specific performance of a contract for the sale of real estate contained in a lease option agreement. The District Court granted specific performance and directed the defendant to convey the real estate to the plaintiff pursuant to the terms of the written agreement. The defendant has appealed.

The facts are largely stipulated. The defendant, Walter J. Freeland, was the owner of an 80-acre tract of land in Howard County, Nebraska. Sometime in 1970, Victor L. Graf approached Freeland seeking to purchase the land. The defendant first told Graf he was not interested in selling the land. After further discussions Graf told the defendant that he intended to introduce a higher grade of cattle into the area and he needed a place for them. The parties reached an oral agreement to lease the land for 5 years with an option to purchase at the end of

the lease. The defendant referred Graf to a law firm, who drafted a written farm lease with option to purchase. It was executed and acknowledged by Graf and Freeland on December 15, 1970. The lease was for a period of 5 years from the 15th day of December 1970, to the 14th day of December 1975, and the annual rental of $600 per year was payable in advance on the 15th day of December of each year. As additional rental the lessee agreed to pay all real estate taxes assessed against the premises during the term of the lease.

Paragraph 12 of the lease contained an option to purchase the premises upon the expiration of the term of the lease for the sum of $10,000 in cash. It required that written notice of the desire to exercise the option be given at least 6 months prior to the expiration of the lease. The final paragraph of the agreement provided: "In the event that the Lessee exercises his option, the Lessor agrees to convey such premises to the Lessee free and clear of all encumbrances."

The land was farmed by the Victor L. Graf ranch corporation from December 15, 1970, until September 19, 1974, when Victor L. Graf died. Rental payments were duly tendered and accepted by the defendant during that time and all tax payments were duly made. After Victor L. Graf's death, the farming operations continued and the 1974 and 1975 rental and tax payments were made by the estate of Victor L. Graf, or his surviving widow, and the rental payments were accepted by the defendant.

On June 6, 1975, the special administrator of the estate of Victor L. Graf, deceased, the plaintiff here, gave written notice to the defendant of the exercise of the option. The notice stated: "(T)he Estate of Victor L. Graf intends to, and hereby does exercise the option of Victor L. Graf to purchase from you the following described real estate, to-wit: (Legal description) for the price of $10,000.00 in cash, which

sum along with the outstanding rent will be tendered on or before December 15, 1975. All done pursuant to a Farm Lease with Option to Purchase signed by you and Victor L. Graf and dated the 15th day of December, 1970."

Prior to December 15, 1975, plaintiff tendered a certified check in the amount of $10,000 to the defendant, together with a warranty deed form for the defendant's signature. The tender was refused and this action followed.

The defendant first contends that the failure to keep and maintain show cattle on the land was a violation of the terms of the lease and justifies the refusal to grant the equitable remedy of specific performance. There is no merit to the contention. Even if there had been a factual dispute as to whether there was an actual breach of some specific terms of the lease, defendant's acceptance of the rentals and benefits of the lease without objection would constitute a waiver. See Randall v. Erdman, 194 Neb. 390, 231 N. W. 2d 689.

Defendant also contends that the purchase option was intended to be personal to Victor L. Graf and could not be exercised by his estate or his heirs. The argument is that because the agreement provides for the manner in which the option might be exercised upon the death of Freeland but made no reference to the death of Graf, it indicates an intention that the option would not survive Graf's death. The argument is unconvincing. The lease itself provides: "(T)he Lessee may assign this Lease to Victor L. Graf and Mary Ellen Graf as joint tenants or to a corporation organized by either or both of them in which the stock in such corporation is solely owned by the Lessor (sic) and his wife or either of them."

The law is well settled in this jurisdiction that an option to purchase real estate contained in a lease agreement is not terminated by the death of the les-

see during the term and before the exercise of the option, in the absence of express limitation. Jamson v. Poulos, 184 Neb. 480, 168 N. W. 2d 526.

Defendant's final contention is that plaintiff's tender of the purchase price and demand for conveyance by warranty deed made in December 1975 constituted an alteration or addition to the purchase option and was not an acceptance but was a counteroffer, which was never accepted by the defendant. The defendant relies upon cases such as Master Laboratories, Inc. v. Chesnut, 154 Neb. 749, 49 N. W. 2d 693. That case is clearly distinguishable from the present one.

The exercise of the option in this case was made by the letter of June 6, 1975, which had no limitations whatever but, instead, was phrased in the exact language of the purchase option agreement. That letter was an unconditional and effective acceptance of the option and constituted a complete and binding contract between the parties.

The second distinction between the Master Laboratories case and this one is that in the Master case the option was entirely silent as to the character of the conveyance required. In this case the option agreement bound the defendant to convey the premises free and clear of all encumbrances. Of necessity, warranties were involved. In any event, the issue of the form of deed demanded was not raised in the pleadings nor testimony, and was not argued in the trial court, nor raised in a motion for a new trial. A question not presented to or passed on by the trial court will not be considered on appeal. Schwaninger v. Schwaninger, 192 Neb. 681, 223 N. W. 2d 829.

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

AFFIRMED.

BETHESDA FOUNDATION, A NONPROFIT CORPORATION, APPELLEE, V. COUNTY OF SAUNDERS, STATE OF NEBRASKA, APPELLANT.

264 N. W. 2d 664

Filed April 12, 1978. Nos. 41353, 41354, 41355.

1. **Property: Taxation.** Property owned and used exclusively for religious, educational, or charitable purposes is exempt from taxation when such property is not owned or used for financial gain or profit to either the owner or user.
2. **Property: Taxation: Words and Phrases.** The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation.
3. **Taxation: Words and Phrases.** The concept of charity is broad enough to include practical enterprises for the good of humanity operated at a modest cost to those who receive benefits.
4. **Corporations: Taxation: Statutes.** A nursing home owned and operated by a nonprofit corporation is exempt from taxation under section 77-202, R. R. S. 1943, when it is not owned or used for financial gain or profit to either the owner or user.

Appeals from the District Court for Saunders County: HOWARD V. KANOUFF, Judge. Affirmed.

William D. Sutter and Loren Lindahl, for appellant.

Stephen T. McGill, Ronald R. Volkmer, and Eugene T. Hackler, for appellee.

Moore, Moore & Peters, for amicus curiae Ashland-Greenwood School Dist.

Burke, Doerr, Erickson, Green, Grodinsky, Heaney, Hotz, McEachen, Rhodes, Sederstrom, & Seidler, for amicus curiae Eleven Omaha Attorneys.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

BRODKEY, J.

The issue presented in this appeal is whether a nursing home located in Saunders County, and owned and operated by the Bethesda Foundation,

was entitled to tax exempt status in 1972, 1974, and 1975 on the ground that it was owned and used exclusively for charitable purposes. The board of equalization of Saunders County denied Bethesda's application for tax exemption as a charitable organization in each of those years. Bethesda appealed to the District Court, which found that the property in question was owned and used exclusively for charitable and religious purposes, and that it was not owned or used for financial gain or profit to either the owner or the user. The District Court concluded that the board of equalization had erred in denying tax exemption to the nursing home. The County of Saunders has appealed to this court, contending that the District Court erred in concluding that the nursing home was exempt from taxation. We affirm.

The Bethesda Foundation is a Nebraska nonprofit corporation organized exclusively for charitable and religious purposes, and its specific purpose is to own and operate nonprofit homes for the physical, psychological, and spiritual care of elderly persons. Bethesda's articles of incorporation provide that no part of the earnings of Bethesda shall inure to the benefit of the directors, officers, or other private persons, except for reasonable compensation or fees for services rendered. The articles of incorporation also provide that upon dissolution of the corporation its assets shall be disposed of exclusively for the purposes of the corporation, or to organizations organized and operated exclusively for charitable, educational, religious, or scientific purposes so as to qualify for tax exemption under the Internal Revenue Code.

Bethesda operates more than 20 nursing homes in 7 states. Accounting, payment of salaries to employees, and general administrative tasks for all the nursing homes are performed at a central office in Millard, Nebraska. If revenue at a particular nursing home exceeds expenses, the net gain is used

elsewhere in the Foundation to offset net losses of homes where expenses exceed revenue. Bethesda maintains one consolidated annual balance sheet for all its operations, and, as an entity, its expenses have exceeded its revenue in past years. In 1975, for example, Bethesda had losses of more than $1,000,000, and projected losses in 1976 were $400,000. To offset these losses, Bethesda has sought contributions from the public.

In 1971, Bethesda acquired the Ash Manor Nursing Home in Ashland, Nebraska. Bethesda replaced an antiquated structure with a new building, and Ash Manor is now a modern, 91-bed facility. It is licensed by the Department of Health of the State of Nebraska as an Intermediate Care Facility I. The admission policy of the home is nondiscriminatory, and the only requirement for admission is certification by a physician that the patient is in need of nursing care. Ash Manor accepts applicants on a "first come, first serve" basis, and ability to pay is not a consideration for admission.

Every person living at Ash Manor requires nursing care, which is provided by 2 registered nurses, 4 licensed practical nurses, 23 nurse aides, and 2 physical therapists. Much of the care administered to patients at Ash Manor is analogous to hospital care, and many of the patients would require hospitalization if they were not in Ash Manor. Many of the patients are not ambulatory, and many must be handfed.

Patients who are able to pay are charged $15, $16.25, or $17.50 per day, depending on the degree of care they require. At the time of trial, Ash Manor had 35 private pay patients. The other 56 patients received Medicaid benefits in the amount of $12.71 per day, but this Medicaid reimbursement does not cover the cost of caring for Medicaid patients. No patient has ever been removed from the home for refusal or inability to pay, and no law suit has ever

been commenced to collect payment from a patient.

Accounting statements indicate that Ash Manor's expenses exceeded revenue by approximately $3,700 in 1975. Two statements for 1973 and 1974 indicate that revenue exceeded expenses by about $44,000 and $28,000 in those years, but those figures do not reflect a ratable share of general office overhead or interest on general obligation debts allocable to Ash Manor, as did the 1975 figures. Bethesda's chief executive officer testified that if the latter two considerations were taken into account, there would have been little, if any, net income at Ash Manor in 1973 and 1974. Any excess revenue which did exist would be used to cover losses at other Bethesda nursing homes. Employees at Ash Manor are compensated at rates comparable to those paid in similar institutions. The administrator, for example, receives $900 per month.

The evidence at trial also showed that religion plays an important role at Ash Manor. An interdenominational religious service is held every week, and there are daily Bible study sessions. The staff provides transportation for those patients who wish to attend a local church. Pastors from local churches agreed that there was a religious atmosphere at Ash Manor.

Property owned and used exclusively for religious, educational, or charitable purposes is exempt from taxation when such property is not owned or used for financial gain or profit to either the owner or user. Art. VIII, § 2, Constitution of Nebraska; § 77-202, R. R. S. 1943. It is the primary or dominant use, and not an incidental use, of the property which is controlling in determining whether property is exempt from taxation under section 77-202, R. R. S. 1943. Lincoln Woman's Club v. City of Lincoln, 178 Neb. 357, 133 N. W. 2d 455 (1965). If the property in question is used for no other purposes than those which are educational, religious, and charitable, the conditions of exemption have been complied with, irre-

spective of the proportion which any one of these distinctive purposes may bear to the others. Lincoln Woman's Club v. City of Lincoln, *supra;* Ancient & Accepted Scottish Rite v. Board of County Commissioners, 122 Neb. 586, 241 N. W. 93 (1932). The question presented in the present case is whether primary or dominant use of Ash Manor was for religious and charitable purposes in the tax years in question.

In Evangelical Lutheran Good Samaritan Soc. v. County of Gage, 181 Neb. 831, 151 N. W. 2d 446 (1967), this court determined that a nursing home was entitled to tax exemption in a case with facts similar to those in the present case. In Good Samaritan the owner of the nursing home was a nonprofit corporation organized for purposes similar to those for which Bethesda was organized, and which operated a number of institutions in several states. The nursing homes in Good Samaritan provided nursing care to patients similar to that provided by Ash Manor, and the requirements of the patients in both cases are analogous. The nursing home in Good Samaritan, like Ash Manor, had both private pay and welfare patients, and sometimes revenue exceeded expenses. Surplus revenue at one home would be used to offset losses at another home.

In Good Samaritan this court concluded that the nursing homes were charitable institutions, noting that the concept of charity was broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive benefits. We found that nursing homes are analogous to hospitals which are universally classed as charitable institutions. The rule adopted by this court in Good Samaritan is one followed in other jurisdictions. See, City of McAllen v. Evangelical Lutheran Good Samaritan Soc., 530 S. W. 2d 806 (Tex., 1975); Annotation, Nursing Homes as Exempt from Property Taxation, 45 A. L. R. 3d 610.

Appellant attempts to distinguish this case from Good Samaritan on the grounds that Bethesda has been involved with profit-making ventures and has used revenue from its nursing homes for the financial gain or profit to officers of Bethesda. Appellant relies primarily on Bethesda's association with a construction company and with an aviation company. The construction company, Turcon, Inc., was formed by officers of Bethesda for the purpose of building nursing homes for Bethesda at cost. After constructing numerous nursing homes for Bethesda at cost, as well as occasionally performing work for other organizations, Turcon went out of business in 1972. At that time Bethesda absorbed the company's assets and debts. Although the debts absorbed were substantial, the founder of Bethesda, who was a shareholder in Turcon, made a gift to Bethesda of real estate which had a value exceeding the debts of the construction company. There is no evidence that Turcon was used by officers of Bethesda as a conduit for syphoning off funds from Bethesda. In fact, the evidence indicated that the shareholders of Turcon lost their funds used as capital when Turcon was formed.

The aviation company was formed by Bethesda as a means to minimize the cost of maintaining airplanes used by Bethesda employees for business purposes. The purpose of the company was to form a charter service to produce income when Bethesda's planes were idle, and thereby offset the cost of the planes. The company was never successful, and Bethesda was terminating its operations at the time of trial. There is no evidence that the aviation company was used as a conduit for placing Bethesda funds in the hands of private parties.

We do not believe that Bethesda's association with the two companies distinguishes this case from Good Samaritan. The issue in this regard is whether the Ash Manor property is being owned and used for fi-

nancial gain or profit to either the owner or user. The association with the companies was for the purpose of minimizing Bethesda's costs, and did not in fact result in financial gain or profit to either Bethesda or the officers of Bethesda.

Appellant also argues that the chief executive officer of Bethesda, Reverend Charles Turner, has obtained unwarranted personal benefits from Bethesda. Appellant relies on such incidents as Turcon having built a house for Turner at cost in 1968, Bethesda paying the cost of renting an auditorium where Turner gave a speech, and Bethesda loaning money to Turner's former church. None of these is compelling in view of the fact that there is no evidence that Turner himself received financial gain or profit from Bethesda. It should be noted that Turner has contributed land, money, and services to Bethesda since it was founded. At no time has he received compensation at a rate higher than that received by officers in comparable institutions, and in many years he has received little or no compensation.

We conclude that the Good Samaritan case is controlling. Under the reasoning of that case, we conclude that the Ash Manor property is owned and used exclusively for charitable purposes within the meaning of section 77-202, R. R. S. 1943. The record does not support the view that the property is owned or used for financial gain or profit to either the owner or user. Therefore the judgment of the District Court is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein. What I predicted in my dissent in Evangelical Lutheran Good Samaritan Soc. v. County of Gage, 181 Neb. 831, 151 N. W. 2d 446 (1967), is coming true in this case because this case goes even further than Good Samaritan. There, I said: "If this opin-

ion stands, every nursing home in the state, by incorporating as a nonprofit corporation, can avoid taxation and still drain off all profits in salaries and expenses."

The Bethesda Foundation operates other nursing homes and businesses. Its operating revenue and expenses are all controlled by the central office of the Foundation and all its separate institutions are shown on one consolidated annual balance sheet and Internal Revenue Service form. If one nursing home operation shows a net gain from operations, this gain is used somewhere within the Foundation to offset those operations of the Foundation which show a net loss. While the evidence shows the Foundation has been having serious financial problems, the evidence also shows that Ash Manor Nursing Home, standing by itself, has in fact been a profitable operation.

Although the Foundation is organized as a nonprofit corporation, it owns and has been involved with various profit-making ventures. Specifically, the Foundation has been engaged in farming operations in Central City, Nebraska; and the sporting goods business and the commercial laundry business, both in Ainsworth, Nebraska. The witness didn't know whether these were profitable businesses, but they neither lost nor made any large sums. The Foundation has bought and sold nursing homes at various times, including those organized on a profit basis.

The Foundation presently owns all the stock of B. F. Aviation which is a private profit corporation. B. F. Aviation operates a charter airline service for private charter as well as for the Foundation, and at least 50 percent of its business is with customers other than the Foundation. The Foundation owned three airplanes before B. F. Aviation was formed. It now owns five airplanes which are presently worth somewhere in the neighborhood of $600,000, and the

record indicates it is contemplating purchasing another aviation company. The founder of the Bethesda Foundation and members of his family are officers of B. F. Aviation. B. F. Aviation has not been profitable to date. Money from profitable segments of the operation of the Foundation, such as the nursing home involved herein, which have been funneled through the central office of the Foundation, have been used to finance B. F. Aviation.

In addition to the profit-oriented enterprises above described, the Foundation has had a close association with a private corporation called Turcon, Inc., which was in the construction business. This corporation is of particular interest because it was operated and primarily owned by petitioner's founder, Mr. Charles Turner. In addition to building nursing homes for the petitioner, this company also engaged in many private construction activities, including the construction of Mr. Turner's personal home at cost; the construction of sewer lines; and a swimming pool for the city of Bellevue. Turcon also loaned money to its officers, including Mr. Turner. Eventually, Turcon was absorbed by the Foundation and Turcon's assets were transferred to the Foundation. Of particular interest in this case is that the Foundation, on a form filed with the Internal Revenue Service, took a bad debt expense in excess of $151,000. A portion of this amount was attributable to money owed by Turner to the Foundation when Turcon was phased out. Mr. Turner not only headed both the Foundation and Turcon but he also employed members of his family at Turcon.

It is important to keep in mind that in interpreting and applying constitutional and statutory provisions relating to exemption from taxation, the rule of strict construction applies. It is the burden of the taxpayer to show that the property involved is clearly within the claimed exemption. I cannot bring myself to believe that money from nonprofit corpo-

rations can be used in any way to support a profit enterprise and the nonprofit corporation be eligible for tax exemption.

The constitutional provision involved herein, Article VIII, section 2, provides in part as follows: "The Legislature by general law may exempt * * * property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user."

It is to be noted that the Legislature may only provide exemption if the property is owned and used exclusively for educational, religious, charitable, or cemetery purposes. The word "exclusively" is one of general understanding and certainly should preclude the exemption granted herein.

In Todd v. County of Box Butte, 169 Neb. 311, 99 N. W. 2d 245 (1959), this court said: "Statutes exempting property from taxation are to be strictly construed, and one contending that his property is exempt from such tax must show clearly that he is within the exceptions provided by statute."

Quoting from the majority opinion herein: "In Good Samaritan this court concluded that the nursing homes were charitable institutions, noting that the concept of charity was broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive benefits." In this respect it is important to note that the charges at Ash Manor are equal to those of non tax-exempt nursing homes. Furthermore, it is to be noted that when Ash Manor receives an indigent person it subsequently applies for and always receives Medicaid payments retroactive to the time that person became a resident. The charity dispensed by Ash Manor is no more nor less than that which will be dispensed by all nursing homes, whether tax exempt or otherwise. Tax exemption, therefore, makes these nonprofit institutions more competitive

than the private operators with whom they compete, and could eventually eliminate those operators.

The intent of the law is not to exempt every nonprofit corporation which may be of some benefit to mankind. In the instant case the facts demonstrate that, although the nursing home was organized on a nonprofit basis, it is so similar to nursing homes being operated on a profit basis that an exemption should not be granted.

By the majority opinion this court imposes a burden on the taxpayers of the communities where these so-called nonprofit nursing homes are located to help support any business organized for profit or otherwise which the Bethesda Foundation sees fit to operate.

As I suggested at the outset, by the mere expedient of incorporating as a nonprofit corporation, every nursing home in the state may compel the taxpayers of the community in which it is located to support its enterprise. The majority opinion goes too far -- much too far.

WHITE, C. J., and KUNS, Retired District Judge, join in this dissent.

YVONNE FLEURY, APPELLEE, V. MARVIN CHRISMAN, APPELLANT.

264 N. W. 2d 839

Filed April 12, 1978. No. 41395.

1. **Trusts: Frauds, Statute of: Property.** The statute of frauds embodied in section 36-103, R. R. S. 1943, does not prevent any trust in land arising by operation of law. § 36-104, R. R. S. 1943.
2. **Trusts: Property: Fraud.** A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.
3. **Trusts: Property: Equity.** A constructive trust may arise by op-

eration of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of the legal title.

4. **Trusts: Evidence: Proof.** The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character.
5. **Property: Principal and Agent: Trusts.** Where one employed to act as agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money.
6. **Trusts: Limitations, Statute of: Time.** The statute of limitations does not begin to run in the case of a resulting or constructive trust growing out of a consensual arrangement until the trustee clearly repudiates the trust. The time when the statute of limitations commences to run must be determined on the facts in each case.
7. **Property: Laches.** Laches does not grow out of the mere passage of time. It is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties.

Appeal from the District Court for Cedar County: FRANCIS J. KNEIFL, Judge. Affirmed.

Vincent J. Kirby, for appellant.

Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellee.

Heard before SPENCER, MCCOWN, CLINTON, and BRODKEY, JJ., and COADY, District Judge.

CLINTON, J.

This is an action in equity to impress a constructive trust upon an undivided one-half interest in a quarter section of land in Cedar County, Nebraska, for an accounting of rents and profits, and for partition of the land. The defendant answered by general denial and by pleading the affirmative defenses of the statute of frauds, and that the cause of action was barred by the statute of limitations as well as laches. After trial on the merits, the court found

that the defendant held an undivided one-half interest in trust for the plaintiff by virtue of a constructive trust which had ripened into an express trust because of the defendant having acknowledged the trust in writing. The court ordered that the property be partitioned, and reserved for future hearing and determination the matter of accounting of rents and profits.

The defendant appealed from the decree and here argues the following assignments of error: (1) The evidence does not support the finding of the court, and (2) the plaintiff's cause is barred by the statute of limitations and laches. We affirm.

The plaintiff, Yvonne Fleury, and the defendant, Marvin Chrisman, are brother and sister. Their father died intestate on February 16, 1956, and the real estate in question descended in equal shares to them and their brother, Daryl. Gordon Chrisman, an uncle, managed the property for the three cotenants until his death in 1962. Daryl then desired to sell the land. Marvin suggested to Yvonne that the land be conveyed to a corporation, Fairfax Fund, Inc., owned by him, and that the corporation borrow money by increasing or refinancing the existing mortgage in order to buy Daryl's interest and then the two would own the property. He would manage it and pay Yvonne her share of the net income and when the land was later sold account to her for the profit on the sale.

In December 1963 and May 1964 the three cotenants executed a deed to the land in which Fairfax Fund, Inc., was named as grantee. Fairfax was a foreign corporation and it was discovered that no loan could be made to it. The deed was returned by Marvin to Yvonne, apparently without delivery to the corporation and without recording. In 1965 the three parties, in accord with the oral agreement between Yvonne and Marvin, executed a deed conveying the property to Marvin subject to the unpaid bal-

ance of the mortgage in the amount of $6,200. Daryl was paid for his one-third interest in the property. The inference from the evidence is that Marvin paid Daryl from his own funds and not by borrowing on the security of the land for no new mortgage was executed or recorded.

Previous to the conveyance to Marvin, he apparently undertook management of the farm and rendered to Daryl and Yvonne an accounting for the year ending April 1, 1963, which showed a small profit from income and which credited each of the parties with a net of $100. Among the expenses listed was an item for interest paid to Fairfax Fund, Inc., of $48. Marvin had earlier submitted a bill for his services under date of August 23, 1962. For the year 1963 he submitted an accounting in the name of Fairfax Fund, Inc., which referred to a check enclosed for one-half of the profit and showed reimbursement to himself for $500 advanced. For the years 1964 and 1965, he transmitted to Yvonne checks in the amount of $1,650 and $835, together with an accounting for those years. In 1968 he executed and delivered to Yvonne a promissory note calling for payment on demand of the sum of $4,950, together with a real estate mortgage on the land which he had executed. Yvonne testified that he told her at the time he was involved in a divorce proceeding and this would protect her interest.

Thereafter Marvin made no further payments to Yvonne, but did file irregularly unverified "accountings" from 1971 to 1975. In 1975 he wrote a letter to Yvonne which, among other things, showed that he claimed interest owing to him of $35,000. The basis of the claim for interest does not appear.

Yvonne filed this action on May 18, 1976. Summons was immediately issued and was served on Marvin on May 20, 1976.

The contentions of Marvin, although not explicitly developed in his brief, seem to be these: (1) Since

Yvonne conveyed to Marvin only a one-third interest in the property, she can, at most, assert only an interest to that extent, and this interest cannot stand because the statute of frauds requires that the creation or declaration of a trust in land be in writing. (2) Marvin advanced the money for the purchase of Daryl's one-third interest and title came directly to Marvin, therefore he has, in any event, a two-thirds interest in the property free of any claim of constructive trust. (3) Yvonne cannot recover her one-third interest in the property because her cause is barred by the statute of limitations and by laches.

The deed by which legal title to the land was conveyed to Marvin was absolute in form and contains no words creating or declaring a trust of any undivided interest therein. The position of Yvonne is that the circumstances give rise to a constructive trust, arising by operation of law, and that the statute of frauds does not bar determination of Yvonne's title and her right to partition.

No estate or interest in land, including a trust therein, may be "created, . . . or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, . . . or declaring the same." § 36-103, R. R. S. 1943. Section 36-103, R. R. S. 1943, does not "prevent any trust from arising . . . by . . . operation of law." § 36-104, R. R. S. 1943. See, also, Restatement, Trusts 2d, § 44, p. 113.

We have defined a constructive trust in the following language: ". . . a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property." Box v. Box, 146 Neb. 826, 21 N. W. 2d 868. A constructive trust may arise by operation of law where legal title is acquired by virtue of a confi-

dential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of the legal title. Koefoed v. Thompson, 73 Neb. 128, 102 N. W. 268. "The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character." Musil v. Beranek, 160 Neb. 269, 69 N. W. 2d 885. See, also, Campbell v. Kirby, 195 Neb. 610, 239 N. W. 2d 792.

In the case before us, it is certain that the circumstances give rise to a constructive trust and that the proof meets the tests laid down in Musil v. Beranek, *supra*.

That Yvonne reposed trust and confidence which gave rise to a confidential relationship by reason of which Marvin acquired legal title is clear from the following circumstances. Marvin is an older brother of Yvonne. They were tenants in common. Marvin undertook as Yvonne's agent, even before the conveyance to him, to manage the farm and, as is clear from his charges for services, did so for a consideration and expected to be paid. He is the one who suggested the title and management arrangement. He claimed to be knowledgeable in the matters he undertook as is evidenced by contents of his letters to Yvonne and his control and implementation of legal details such as the negotiations with Daryl, the causing of the preparation of the various deeds, as well as the note and mortgage which he later gave to Yvonne. That these circumstances create a confidential relationship is clear from our holdings in the following cases: O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540 (brother and sister); Windle v. Kelly, 135 Neb. 143, 280 N. W. 445 (tenants in common); Koefoed v. Thompson, *supra* (partners

and cotenants); Johnson v. Hayward, 74 Neb. 157, 103 N. W. 1058 (principal and agent).

That the terms of the agreement are proved not only by clear, convincing, and satisfactory evidence, but conclusively, appear from the following details of evidence in addition to that which we have already summarized. Yvonne's version of the terms of the agreement are uncontradicted by evidence. Various writings prepared by Marvin and signed or initialed by him are in evidence. They cover the period beginning with the initial agreement, down to and including the time when Yvonne first consulted an attorney in 1975. These writings contained numerous recitals which are acknowledgements by Marvin of Yvonne's interest and include the following: "Sis" (Yvonne) is "in"; "Yvonne Fleury is also to share in any increase or decrease in value of property relative to the purchase price of $21,250"; "Property is to be sold at expressed wish to do so of either Yvonne Fleury or the Fairfax Fund, Inc."; "owned jointly by my sister and myself"; "Our land has increased in value"; "buy up your share of the land"; "pay you the difference in gain when land is sold later."

Marvin also submitted to Yvonne an inventory of capital investments made on connection with the management of the land which included expenditures for grain bins and farm machinery. He, in writing, offered to partition the land in kind by drawing a line east to west and flipping a coin to determine who got which tract. In 1975 Yvonne consulted an attorney and he wrote a brief letter to Marvin concerning management of the land, identifying it by legal description and requesting an itemized statement of income and disbursements. The letter also stated: "From your letters, you apparently concede that she owns a half interest." Marvin responded, promising an itemized statement, and did not dissent from the assertion that he conceded

Yvonne's ownership of a half interest.

We now consider Marvin's contention relative to the portion of Yvonne's interest in the land which has its origin in the conveyance from Daryl and for which Marvin advanced the purchase money. As to that undivided one-sixth interest the circumstances are such that the relationship, rather than being that of constructive trust, fits, we believe, more aptly into one of the categories of resulting trust usually described as a purchase money trust. In this case the agreement was that Marvin would take title in his own name, borrow money on the security of the land, and pay Daryl. He was Yvonne's agent for that purpose. In this instance he did not borrow the money from a third party, as was contemplated, and mortgage the land as security, but furnished it himself. Since he held the legal title he had security for this loan. Yvonne had furnished security for her part of the purchase price. The situation is not in substance different than if Yvonne had advanced the money herself, or if Marvin had borrowed from a third party.

Where one employed to act as agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money. Johnson v. Hayward, *supra*. See, also, Hoehne v. Breitkreitz, 5 Neb. 110; Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786. In the last-cited case the court described the trust as being a constructive trust. However, the facts are such that it could have been called either a resulting or a constructive trust.

We now consider the defenses of the statute of limitations and laches. As to the defense of the statute of limitations, Marvin relies upon our holding in Bend v. Marsh, 145 Neb. 780, 18 N. W. 2d 106, where we said: "In the case of a constructive or implied trust, except where the trust is imposed on the

ground of actual fraud which is not immediately discovered, or there has been a fraudulent concealment of the cause of action, the statute begins to run in favor of the party chargeable as trustee as soon as the trust relation is created, or from the time when the wrong is done by which the trustee becomes chargeable, or the time when the beneficiary knew or ought to have known thereof and can assert his rights; not from the time when demand is made on the trustee, or the trust is repudiated by him, for no repudiation of an implied or constructive trust is ordinarily necessary to mature a right of action and set the statute in motion." The above statement of the rule as applied to the facts in Bend v. Marsh, *supra,* is, without doubt, correct. In that case the trust arose from a broken promise. The constructive trust was one arising ex maleficio. The rule is otherwise when the trust grows out of a consensual arrangement. In the latter case the statute does not begin to run until there has been a repudiation of the trust. In Dewey v. Dewey, 163 Neb. 296, 79 N. W. 2d 578, we said, quoting from Restatement, Trusts, § 219, p. 267, Comment on Subsection (1) b: " 'The length of time necessary to bar the beneficiary from holding the trustee liable for breach of trust depends upon the circumstances. In the absence of special circumstances the beneficiary is barred if the period of the Statute of Limitations applicable to actions at law in analogous situations has run.' " The analogous statute in this case is the one barring claims for recovery of real estate and the period of limitation is 10 years. In the case before us, until about 1975 there were no facts from which a repudiation could be inferred. The rule applicable in this case is: The statute of limitations does not begin to run in the case of a resulting or constructive trust growing out of a consensual arrangement until the trustee clearly repudiates the trust. The time when the statute of limitations commences to run must be determined

on the facts in each case. Jirka v. Prior, 196 Neb. 416, 243 N. W. 2d 754; Dewey v. Dewey, *supra*.

The defense of laches is not supported by the evidence. "Laches does not grow out of the mere passage of time. It is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties." Dewey v. Dewey, *supra*. See, also, Bend v. Marsh, *supra*. " 'Where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin; certainly, as between the immediate parties to the transaction.' " Schurman v. Pegau, 136 Neb. 628, 286 N. W. 921.

AFFIRMED.

CAROL MOTIS, APPELLEE, V. THOMAS B. MANNING ET AL., APPELLANTS.

264 N. W. 2d 844

Filed April 12, 1978. No. 41454.

1. **Trial: Negligence: Evidence: Insurance.** The fact that a party is indemnified for loss by an insurance company is irrelevant to the issue of negligence and it is reversible error to permit the plaintiff to show the fact of insurance.
2. **Trial: Mistrial.** A motion for mistrial is ordinarily timely if made at the first reasonable opportunity.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Reversed and remanded.

Barlow, Johnson, DeMars & Flodman, for appellants.

Daniel E. Bryan of Heinisch & Bryan Law Office, for appellee.

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

CLINTON, J.

This is an action, growing out of the collision of two automobiles, for personal injury received by the plaintiff and for medical expenses incurred and loss of consortium by the plaintiff's husband. The trial judge instructed the jury that the defendants were guilty of negligence which, as a matter of law, was the proximate cause of the collision and submitted to the jury the issue of the cause, nature, and extent of personal injury and the amount of damages. The jury returned a verdict for the plaintiff in the amount of $24,990.35. The defendants have appealed and make the following assignments of error: (1) The trial court erred in denying the defendants' motion for a mistrial which was founded upon the fact that one of the plaintiff's medical witnesses made unresponsive statements implying the existence of liability insurance. (2) The verdict is excessive. We find that the first assignment is well taken and we reverse and remand for a new trial.

The injury suffered by the plaintiff was that commonly referred to as a whiplash. There is also evidence of low back pain. There is a conflict in the medical testimony as to the extent and permanence of the injuries suffered.

During direct examination of the medical witness, who was also a treating doctor, one of the subjects being discussed was the possibility of spurs developing on the cervical vertebrae. He was then asked a question concerning the cause of spurring and responded: "This is an interesting point, and this is why, why I feel that any cervical whiplash, and the vast majority of cervical whiplash that I see in the office are signed away before any claim is really made on the insurance company." Shortly thereafter a brief recess was taken. Later during cross-examination by the defense counsel, he had occasion to ask the witness the meaning of the term asymptomatic. The witness responded: "Asymptomatic means that she is without symptoms, and at that

time I reported to an insurance company that -- is this all right?" Defense counsel then stated: "Your Honor, I wonder if the Witness could be instructed to answer the question specifically?" and the witness responded: "Okay, sure. I was just trying to be helpful."

The court then, in the presence of the jury, delivered a rather lengthy admonition to the witness and instructed the jury "to disregard any mention of insurance because in the end they will never know whether there is insurance or there isn't insurance, and it is not a proper subject to consider. Therefore, put it out of your mind, and the doctor is instructed not to mention it again."

When the plaintiff rested her case the defendants made the motion for mistrial. After consulting the plaintiff's counsel as to whether he would prefer a mistrial to proceeding and giving the defendants a possible ground for reversal upon appellate review, the trial court denied the motion. Counsel's response, if any, does not appear in the record.

The record further shows that during the recess between the direct and cross-examination above referred to, the court had informed plaintiff's counsel that he should instruct the witness not to mention insurance and that the court would if he did not. It also shows that counsel did, after the first incident, caution his witness.

The plaintiff does not deny that the admission of the evidence of liability insurance is, under our decisions, irrelevant to any issue in this case and inadmissible, but argues that it is not clear what kind or whose insurance was involved, that counsel was not reponsible for the nonresponsive answers of the witness, that defendants made no objection to the evidence and no motion to strike and that their motion for mistrial was not timely, and in any event that the error is harmless and the defendants are not shown to have been prejudiced.

We have many times held the fact that a party is indemnified for loss by an insurance company is irrelevant to the issue of negligence and it is reversible error to permit the plaintiff to show the fact of insurance. Fielding v. Publix Cars, Inc., 130 Neb. 576, 265 N. W. 726. See, also, Bergendahl v. Rabeler, 131 Neb. 538, 268 N. W. 459; Sandomierski v. Fixemer, 163 Neb. 716, 81 N. W. 2d 142. Conversely, a defendant may not show that he does not carry liability insurance. Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A. L. R. 642.

It is very clear from the witness' statements that liability insurance was being referred to. The first statement, "signed away before any claim is really made on the insurance company," can refer only to liability insurance. It is clear from the second comment that reference was to an insurance company involved in this case. Since a liability insurance carrier for the plaintiff could not be involved, there is no uncertainty about the reference.

It is no doubt true that counsel for the plaintiff was not the cause of the witness' nonresponsive statements. However, if such errors are to be avoided, it can, for the most part, come about only through prior admonition of one's own witnesses. A reading of the witness' entire testimony makes it plain that he had an unbounded enthusiasm for his party's interest and for publicizing to the jury his own expertise. The direction that his effort to be "helpful" was taking is not subject to much doubt. The fact that a party did not cause his witness to inject the irrelevant matter cannot make it less harmful.

The plaintiff's argument that the defendants made no immediate objection and that a motion for mistrial was not timely is made primarily in reliance on Law v. Gilmore, 171 Neb. 112, 105 N. W. 2d 595; and Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315. The latter case has been cited in the annotations for the proposition that unexpected and unresponsive

answers are not grounds for mistrial. However, a reading of the case indicates that the opinion there was founded upon a waiver by the defendant in not making a motion for mistrial and in taking his chances on a favorable jury verdict. In the cited cases the defendant either did not object in any way, or did not make a motion for a mistrial and elected to take his chance. In this case the matter was called to the court's attention at the first recess within a few minutes of the first incident and the defendants made their motion for a mistrial shortly after the second incident and as soon as the plaintiff had rested her case. A motion for a mistrial is ordinarily timely if made at the first reasonable opportunity. Sandomierski v. Fixemer, *supra;* Graham v. Simplex Motor Rebuilders, Inc., 191 Neb. 320, 215 N. W. 2d 641.

If the only issue before the court were the claim of excessiveness of the verdict, we would hold that it was not excessive. There was considerable evidence of pain and suffering, disability, inability to engage in leisure activities, and evidence of consequential monetary damage because of inability to do work for her husband which she had previously been able to perform. This evidence, if accepted by the jury, would perhaps have justified even a larger verdict. On the other hand, the nature and degree of disability was a subject of conflicting expert testimony. The fact that the jury was informed of the existence of liability insurance may well have affected the amount of the verdict. We therefore find the error prejudicial and reverse the judgment and remand the cause for a new trial.

REVERSED AND REMANDED.

THE ELGIN MILLS, INC., A CORPORATION, APPELLEE, V. OMER HOFFMAN, APPELLANT.

264 N. W. 2d 438

Filed April 12, 1978. No. 41465.

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.

Appeal from the District Court for Antelope County: MERRITT C. WARREN, Judge. Reversed and remanded for a new trial.

Brogan & Stafford, for appellant.

Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellee.

Heard before SPENCER, BOSLAUGH, and WHITE, JJ., and RIST and KELLY, District Judges.

KELLY, District Judge.

This action was commenced in the District Court for Antelope County. The action was tried before a jury on the 17th day of March 1977. Plaintiff brought suit against the defendant on a written contract for the sale and purchase of grain. The contract was entered into May 29, 1974. The defendant agreed to sell to the plaintiff 50,000 bushels of No. 2 yellow corn at an agreed price of $2.20 per bushel.

The plaintiff, a grain elevator located in Elgin, Nebraska, specified in the written contract that delivery should be made during October, November, or December 1974, at the buyer's option. Plaintiff subsequently made demand upon the defendant to deliver the corn, but the defendant refused to make delivery for the reason that he had not produced 50,000 bushels of corn. Defendant offered to make delivery of 40,000 bushels of corn if the plaintiff would agree that this would satisfy the contract.

The plaintiff refused. No delivery was made and suit was brought for enforcement of the contract.

After all the evidence was in, the court sustained a motion for directed verdict made by the plaintiff and entered judgment for the plaintiff and against the defendant in the sum of $41,400. The amount was arrived at by determining that the plaintiff was forced to cover the contract by paying $3.02 per bushel for 10,000 bushels and $3.03 per bushel for 40,000 bushels. The amount of damages being the difference between the prices the plaintiff had to pay to cover the contract and the agreed delivery price of $2.20 per bushel.

The defendant has appealed to this court asserting some five separate assignments of error. Because of the finding of this court, only one assignment of error has been considered. The judgment is reversed and the cause remanded for a new trial.

In the case of Hansen v. Hasenkamp, 192 Neb. 530, 223 N. W. 2d 44, our court stated as follows: "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. Hoffman v. Jorgensen Awnings, Inc., 178 Neb. 261, 132 N. W. 2d 867."

We must, therefore, consider the evidence of the defendant insofar as the same would be construed in the light most favorable to him.

The defendant alleged in his amended answer that he was induced to sign the contract in question by the fraud and misrepresentation of the officer of the plaintiff corporation, to wit: One Lambert Vanderheiden. The testimony at the trial consisted primarily of testimony of the president of the plaintiff corporation, Mr. Vanderheiden, and the defendant. If the testimony of the defendant were believed, a jury

could reasonably have found that the defendant came to the place of business of the plaintiff for the purpose of purchasing old railroad rails which he intended to use to construct a cattle gate. The defendant was not previously acquainted with the plaintiff. The plaintiff's president stated that he had no railroad rails available and engaged the defendant in a conversation concerning the future sale of grain to the plaintiff.

The defendant's evidence further showed that he had only been engaged in raising corn for three seasons prior to May 29, 1974. The defendant's evidence, if believed, would further show that the plaintiff made an offer to purchase the corn at the agreed price of $2.20 per bushel and stated to the defendant that the price would surely be lower in the fall. The defendant's evidence would further show that the defendant made inquiry as to what would happen if he did not raise 50,000 bushels of corn, and the President of plaintiff told him not to worry about that, that he had sufficient corn stored in his storage bins.

In a trial of this nature, it is the province of the jury to determine the weight and credibility of the testimony of witnesses and further to determine the facts. If believed, the defendant's evidence could show that he was the victim of fraud or misrepresentations made by the plaintiff which improperly induced him to enter into the contract.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. ERNEST H. BRITT, III, APPELLANT.

264 N. W. 2d 670

Filed April 12, 1978. No. 41589.

1. **Criminal Law: Affidavits: Searches and Seizures.** Where an affidavit in application of a search warrant to search a residence for controlled substances is based on information supplied by an informant, the court must be informed of some of the underlying circumstances from which the informant concluded that the contraband was where he claimed it to be, and some of the underlying circumstances from which the applicant concluded that the informant was credible or his information reliable.
2. **Criminal Law: Controlled Substances: Evidence.** Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knows of the existence and nature of the narcotics at the place where they were found, but mere presence at a place where a narcotic drug is found is not sufficient.
3. _____: _____: _____. Ordinarily, when narcotics or contraband materials are found on a defendant's premises, the evidence is deemed sufficient to sustain a conviction for unlawful possession in the absence of any reasonable explanation for their presence.
4. **Criminal Law: Weapons and Firearms.** Under the statutory exception in section 28-1001, R. R. S. 1943, one may carry a weapon concealed on or about his person when engaged in a lawful business, calling, or employment, and when the circumstances are such as to justify a prudent person in carrying a weapon for defense of his person, property, or family.
5. _____: _____. Carrying a weapon in a bag held in the hand or placed under the arm constitutes concealment of a weapon on or about one's person.
6. **Appeal and Error.** On appeal this court considers only those errors assigned and argued in an appellant's brief.

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

Paul E. Watts, Gerald E. Moran, Robert C. Sigler, and Julianne M. Dunn, for appellant.

Paul L. Douglas, Attorney General, and Jerold V. Fennell, for appellee.

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

BRODKEY, J.

Ernest H. Britt, III, defendant and appellant herein, was charged with possession of cocaine in violation of section 28-4,125 (3), R. R. S. 1943; and with carrying a concealed weapon in violation of section 28-1001, R. R. S. 1943. Prior to trial the defendant moved to suppress evidence seized by police officers acting pursuant to a search warrant on the ground that the officers had not supplied adequate information to the municipal court to permit the issuance of a warrant. This motion was overruled. A jury found the defendant guilty as charged, and the trial court overruled his motions for a directed verdict. Defendant has now appealed to this court, contending that (1) the evidence was insufficient to establish beyond a reasonable doubt that he was in actual or constructive possession of cocaine; (2) the motion to suppress should have been sustained because the affidavit and application for the search warrant were constitutionally defective; and (3) the trial court should have dismissed the charge of carrying a concealed weapon because defendant fell within a statutory exception found in section 28-1001, R. R. S. 1943, and was not carrying a weapon on or about his person. We affirm the judgment of the District Court.

The relevant facts are as follows. Defendant had been under surveillance by Omaha police officers for suspected dealings in controlled substances. On December 7, 1976, police officers applied for a search warrant to search 4001 Wirt Street, defendant's alleged residence, for cocaine. In support of the application, the officers stated, in relevant part, that they had made a "controlled buy" of cocaine from the residence within the last 72 hours; and that an informant had been in the residence within the last 72 hours and had advised police that the defend-

ant was selling cocaine from the residence, and that he had seen what appeared to be cocaine. The officers stated that the informant "has proven his reliability in the past by giving Officers of the Vice & Narcotics Unit information that has resulted in the arrests of partys (sic) for the possession of controlled substances and the confiscation of illegly (sic) possessed controlled substances." The testimony at the suppression hearing indicated that the "controlled buy" was made by use of an informant, whom the police kept under observation while he entered the residence and returned with cocaine. The informant who made the "controlled buy" was not the same one who provided police with the other information set forth in the application for a search warrant.

As the police approached the residence to serve the "no-knock" warrant at 11:45 a.m., the defendant appeared at the front door with a gym bag in his hand. The defendant observed the officers, and hastily closed the door to the house. The police followed, and found the defendant flushing a toilet. A search of the house disclosed plastic tubes and a small film container in which residue of cocaine was found. One of the plastic tubes was on top of an air conditioner in the living room. The film container was on the kitchen table. Police also discovered telephone bills and a medical bill addressed to the defendant at 4001 Wirt Street, the residence being searched. An officer discovered a loaded revolver in a bag which defendant was carrying when first seen by police officers as he was exiting the house.

The residence at 4001 Wirt Street is owned by one Glenette Allison, defendant's girl friend. Both she and the defendant acknowledged that the defendant stayed at the residence 2 or 3 nights a week. Allison stated that the phone was in defendant's name because a phone in her name was disconnected when bills were not promptly paid. Allison stated that the

defendant, to her knowledge, did not use or possess cocaine because he did not like the drug. Both the defendant and Allison stated that his residence was with his mother, and not at 4001 Wirt Street. Defendant's mother and sister also so testified. The defendant denied that the cocaine found by police was his. Finally, defendant stated that he had the gun, found in the gym bag, because he was carrying a large amount of money to be used for payment of bills and to be deposited in the bank.

Defendant contends that the affidavit and application for the search warrant were defective because "the informant's reliability is not sufficiently established nor is it clear how he knows what he knows in this particular situation." He further argues that the statement as to the "controlled buy" was discredited at the hearing on the motion to suppress because the buy was made by an informant, and not by police officers. These arguments are unpersuasive.

The tests for determining the validity of an affidavit to obtain a search warrant based on an informant's information are set forth in Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964): "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, * * * the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, * * * was 'credible' or his information 'reliable.' " Although there is nothing in the affidavit in this case concerning the reliability of the informant who made the "controlled buy," there is with respect to the informant who provided the other information to the police. In State v. Davis, 199 Neb. 165, 256 N. W. 2d 678 (1977), an affidavit containing statements like those in the present

affidavit concerning the information provided by, and the reliability of, the second informant were found to meet the tests set forth in Aguilar v. Texas, *supra*. In the present case, the statements in the affidavit with respect to the second informant support the issuance of a warrant, even ignoring the portion of the affidavit concerning the "controlled buy" and the first informant. The underlying circumstances from which the officers concluded that the second informant was reliable were set forth in the affidavit. The affidavit was clearly sufficient, and defendant's contentions to the contrary are without merit. State v. Davis, *supra*.

Defendant next contends that the evidence was not sufficient to show that he had actual or constructive possession of the cocaine. "The rule is that evidence the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession." State v. Foster, 196 Neb. 332, 242 N. W. 2d 876 (1976). We have held that proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found, but mere presence at a place where a narcotic drug is found is not sufficient. State v. Faircloth, 181 Neb. 333, 148 N. W. 2d 187 (1967); State v. Bartlett, 194 Neb. 502, 233 N. W. 2d 904 (1975). Ordinarily, when narcotics or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence. State v. Rys, 186 Neb. 341, 183 N. W. 2d 253 (1971). The jury in this case was instructed in accordance with these principles.

We believe that the evidence in this case was suffi-

cient to permit the jury to conclude beyond a reasonable doubt that the defendant was in actual or constructive possession of the cocaine with the requisite guilty knowledge. The defendant was admittedly living at the residence where the cocaine was found at least 2 or 3 nights per week. The telephone was in his name, and he received mail there. The containers in which cocaine was found were in plain view in the living room and the kitchen. Although the defendant did not own the residence, legal ownership is not the test. On these facts we conclude that the evidence, obviously believed by the jury, was sufficient to establish the link between the defendant and the cocaine. See State v. Foster, *supra*.

Defendant argues that his conviction for carrying a concealed weapon should be reversed because he falls within a statutory exception set forth in section 28-1001, R. R. S. 1943. That section prohibits one from carrying a weapon "concealed on or about his person." That section provides, however, that "if it shall be proved from the testimony * * * that the accused was, at the time carrying any weapon or weapons as aforesaid, *engaged in any lawful business, calling or employment, and the circumstances in which such person was placed at the time aforesaid were such as to justify a prudent person in carrying the weapon or weapons aforesaid, for the defense of his person, property or family,* the accused shall be acquitted or discharged." (Emphasis supplied.) The term "calling" is defined as "The activity in which one customarily engages as a vocation or profession." Webster's Third New International Dictionary.

In this case the defendant stated that he was carrying the gun in the gym bag because he needed it for protection. Defendant stated that he had $100 in cash and a $150 money order on the day in question, and that he needed protection while he paid bills and deposited the funds in the bank. Defendant also

stated that he was in a high-crime area, and needed protection for that reason.

Similar arguments were raised, and rejected, in State v. Goodwin, 184 Neb. 537, 169 N. W. 2d 270 (1969), in which we noted that the statutory exception applies only when one is engaged in a lawful business, calling, or employment, and when the circumstances are such as to justify a prudent person in carrying the weapon for defense of his person, property, or family. The evidence in this case was clearly sufficient to permit the jury to conclude that the statutory exception did not apply to the defendant, as defendant was not engaged in a "business, calling, or employment."

Defendant's final contention is that the revolver, which was in a zipped gym bag carried by the defendant, was not concealed "on or about his person." He relies on State v. Goodwin, *supra,* in which we stated that the words "concealed on or about the person" mean "concealed in such close proximity * * * as to be convenient of access and within immediate physical reach." In that case we determined that a pistol locked in the glove compartment of an automobile was concealed on or about the person of the driver.

Although there is some authority to the contrary, the rule in a majority of jurisdictions is that the defendant's carrying of a weapon in a bag, bundle, traveling bag, or other similar article which is held in the hand or placed under the arm constitutes concealment of a weapon on or about his person. See, Annotation, 43 A. L. R. 2d, "Offense of Carrying Concealed Weapon as Affected by Manner of Carrying or Place of Concealment," 492, § 12 (a), at p. 534; 79 Am. Jur. 2d, Weapons and Firearms, § 11 at p. 16. In People v. Foster, 32 Ill. App. 2d 462, 178 N. E. 2d 402 (1961), the court held that carrying a gun in an athletic type zipper bag constituted concealment of a weapon on or about the defendant's person. Courts

have also held that carrying a weapon in a briefcase constitutes carrying a concealed weapon on or about one's person. See, Rogers v. State, 336 So. 2d 1233 (Fla. App., 1976), cert. dismissed, 348 So. 2d 952 (Fla., 1977); People v. Pugach, 15 N. Y. 2d 65, 255 N. Y. S. 2d 833, 204 N. E. 2d 176 (1964), cert. denied, 380 U. S. 936, 85 S. Ct. 946, 13 L. Ed. 2d 823 (1965). Under these authorities, as well as State v. Goodwin, *supra,* it is apparent that the evidence the defendant was carrying a revolver in a gym bag was sufficient to permit the jury to conclude that he was carrying a concealed weapon "on or about his person."

At oral argument in this case, counsel for the defendant raised other issues not argued in his brief. On appeal to this court, however, this court considers only those errors assigned and argued in an appellant's brief. State v. Downtown Books, Inc., 196 Neb. 473, 244 N. W. 2d 63 (1976); Rule 8a 2 (3), Revised Rules of the Supreme Court of Nebraska, 1977. We have reviewed the assignments of error argued in defendant's brief, and find them to be without merit. Therefore the judgment of the District Court is affirmed.

AFFIRMED.

LORRAINE GREENFIELD, APPELLEE, V. MARLIN GREENFIELD, APPELLANT.

264 N. W. 2d 675

Filed April 12, 1978. No. 41648.

Divorce: Infants: Parent and Child. The determination of custody and fixing of child support rests in the sound discretion of the trial court, and in the absence of an abuse of discretion will not be disturbed on appeal.

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

Ronald J. Palagi, for appellant.

Sandra K. Olejniczak, for appellee.

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

COLWELL, District Judge.

Respondent appeals from an order modifying a decree of dissolution which required him to now pay child support in the sum of $75 a month for each of his two minor sons, ages 5 years and 10 years. The children are in the physical custody of petitioner, with the legal custody retained in the District Court. See Greenfield v. Greenfield, 199 Neb. 648, 260 N. W. 2d 493. At the time the original decree of dissolution was entered on March 5, 1976, respondent was without resources and employment, and that decree did not require him to pay child support, all in accordance with a written agreement between the parties.

On June 23, 1977, petitioner filed her application for modification of decree alleging that she was in need of child support, respondent's present earning capacity was sufficient to contribute to the support of the minor children, and a material change in the circumstances of the parties and the best interests of the minor children required the decree to be modified; and praying that respondent should pay a reasonable sum for child support. Issues were joined after notice, and hearing was had on the issue of child support on July 26, 1977. Petitioner established that she had been continuously employed since the day of the original decree and her net income had increased from $500 to about $600 a month. The living expenses of herself and the two minor children had also increased about $100 a month. The record is not clear as to the amount of this increase attributable to the two minor children. Respondent stipulated that the expenses of the petitioner were fair and reasonable, except the expense claimed by the petitioner for food.

Respondent has remarried and he now has regular

employment as an auto body repairman with net earnings of about $867 a month. His living expenses are about $725 a month. The trial court took judicial notice of the pleadings that respondent desired custody of the two minor children, and also his admission that his income was sufficient to support the two children in his home.

"In the matter of child support while the father has the primary responsibility to support his children, the trial court should not ignore the ability of the mother. It has the responsibility of adjusting the equities between the parties. * * * Pervading all questions concerning rights of the respective parents, the paramount consideration is the best interests and welfare of the children. The determination of custody and fixing of child support rests in the sound discretion of the court and in the absence of an abuse of discretion will not be disturbed." Kockrow v. Kockrow, 191 Neb. 657, 217 N. W. 2d 89. Subsequent changes in child support may be made by the court when required after notice and hearing. See § 42-364, R. S. Supp., 1976.

Respondent claims as error the finding by the trial court that there was a change of financial circumstances of petitioner. He does not object to the court's finding that he is capable of contributing to the support of his two minor children.

The record clearly supports a finding of a material change in the abilities of both parties to contribute to the support of their two minor children, and the trial court's order modifying the original decree to require respondent to contribute child support in the amount of $75 per month for each child. The trial court did not abuse its discretion.

Respondent's other assignments of error are without merit.

On July 25, 1977, respondent filed with his answer a separate cross-application alleging a change of circumstances as to the petitioner being a fit and

proper custodial parent, and prayed for a change of custody of the two minor children from petitioner to respondent. This cross-application was ordered for hearing on August 24, 1977, on which date the respondent failed to appear, and his application was dismissed without hearing.

The issue of child custody in this case was considered by this court in Greenfield v. Greenfield, *supra*. In our decision there we said: "In view of the otherwise satisfactory care of the children and the trial court's belief that the objectionable conduct has ended, we only modify the trial court's order to the extent that physical custody of the minor children remain with appellee. Legal custody is placed in the District Court, with the suggestion that the court require periodic visits in the home by the welfare department of the county."

Most of the record before us and respondent's brief relates to the fitness of petitioner as a custodial parent, the details of which are not recited here since child custody was not an issue in this appeal. It is sufficient to say that the record suggests that petitioner continues to occupy a home with the two minor children and a man, Donny Ring, not her husband, under circumstances which may be harmful to the morals of the two minor children. We take notice of these matters and conclude that the best interests of the two minor children require further consideration and an evidentiary hearing on the issue of their physical custody. The District Court shall forthwith use its summary powers and, after notice to all parties, set this cause for further hearing on the issue of the physical custody and the best interests of the two minor children. See, § 42-364, R. S. Supp., 1976; Benson v. Benson, 190 Neb. 87, 206 N. W. 2d 51; Francis v. Francis, 195 Neb. 417, 238 N. W. 2d 468.

Petitioner is allowed $350 for the services of her attorney in this court.

AFFIRMED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ALTON WAYNE BRUNS, APPELLANT.

265 N. W. 2d 210

Filed April 12, 1978. No. 41659.

1. **Criminal Law: Trial: Witnesses.** The asking of improper questions of a witness to which objections are sustained by the court do not constitute prejudicial error in the absence of a showing that defendant was thereby deprived of a fair and impartial trial.
2. **Criminal Law: Presentence Reports.** A court may order a presentence investigation in any case.
3. **Criminal Law: Sentences.** In passing sentence, it is proper for the trial court to take into consideration other offenses that have been committed by an accused.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

William B. Zastera, for appellant.

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

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

SPENCER, J.

Defendant prosecutes an appeal from his conviction for assault and battery. He assigns as error the failure to grant a mistrial, the refusal to sentence him at his request without a presentence investigation, and the excessiveness of the sentence. We affirm.

Following a presentence investigation, defendant was sentenced to a term of 120 days in the county jail. On appeal to the District Court the conviction was upheld but the sentence was reduced to a term of 60 days in the county jail.

The charge is the result of an altercation which occurred in a Nebraska City tavern. The evidence shows defendant purchased a beer for the complaining witness, Larry Schreiner. When Schreiner refused to drink it, defendant began pulling his head

back by the hair. Schreiner came off the bar stool he was sitting on and a fight ensued. The testimony is conflicting as to whether defendant or Schreiner struck the first blow.

Both parties testified concerning previous scuffles they had been involved in together. At one point the prosecutor asked defendant whether a criminal charge had been filed as the result of one of these incidents. Defendant's objection to the question was sustained and no answer was given. Defendant moved for a mistrial, which was overruled.

A police officer who investigated the disturbance was asked if he had made a recommendation concerning the filing of the complaint. Over objection he testified he could not recall but he did remember talking to the prosecutor. He was then asked if he accompanied Schreiner to court for the purpose of offering testimony in support of the issuance of a warrant. At this point defendant interposed an objection and moved for a mistrial. The objection was sustained but the motion for mistrial was overruled.

Defendant also moved for a mistrial following closing arguments, asserting the prosecutor had made improper remarks to the jury concerning his thoughts about preparing the complaint. The motion was overruled. Closing arguments were not recorded and defendant made no attempt to preserve the record.

Following the return of the jury verdict defendant requested that he be sentenced immediately. The State offered no objection. The court, however, declined to immediately sentence the defendant and ordered a presentence investigation.

While the questions propounded by the prosecutor were improper, and defendant's objections were properly sustained, they do not appear to provide a sufficient basis for the granting of a mistrial. The following language from State v. Kirby, 185 Neb. 240, 175 N. W. 2d 87 (1970), is appropriate: " 'The asking

of improper questions of a witness to which objections are sustained by the court do not constitute prejudicial error in the absence of a showing that defendant was thereby deprived of a fair and impartial trial.' "

Section 29-2261, R. R. S. 1943, so far as material herein, provides: "(1) Unless it is impractical to do so, when an offender has been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation.

"(2) A court may order a presentence investigation in any case."

While the court should not impose sentence in any felony without a presentence investigation, the court is specifically authorized to order a presentence investigation in any case. Defendant in this instance contends that he is being punished for prior misdeeds. This court stated in State v. Welton, 190 Neb. 600, 210 N. W. 2d 925 (1973): " 'In passing sentence, it is proper for the trial court to take into consideration other offenses that have been committed by an accused.' "

Defendant has an extensive misdemeanor record, including three previous assault and battery convictions. To ignore this record in passing sentence would be a dereliction of duty.

On defendant's record, the 120-day sentence imposed by the county court would not have been excessive in this case. The District Judge, in his discretion, saw fit to reduce it to 60 days. While we would have affirmed the county court sentence, we cannot say that the District Judge abused his discretion in reducing it to 60 days.

There is no merit to any of defendant's assignments of error. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JACK LEE ERNEST, APPELLANT.

264 N. W. 2d 677

Filed April 12, 1978. No. 41704.

1. **Criminal Law: Affidavits: Searches and Seizures.** An affidavit for a search warrant based on information concerning an event occurring 7 months previously is not insufficient where the evidence sought was in the nature of mementos or keepsakes.
2. **Criminal Law: Affidavits: Searches and Seizures: Evidence.** An affidavit for a search warrant which lists three possible locations where the evidence might be found is not insufficient where the person believed to be in possession of the evidence has no permanent address but is known to stay at each of the locations and keep personal belongings at each place.
3. **Criminal Law: Records: Evidence: Habitual Criminals.** An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.
4. **Criminal Law: Hearings: Due Process: Habitual Criminals.** The presence of the defendant is required at an evidentiary hearing on a charge of being an habitual criminal and a sentencing hearing.

Appeal from the District Court for Dawes County: ROBERT R. MORAN, Judge. Sentence vacated and cause remanded for further proceedings.

Paul E. Watts, Gerald E. Moran, Robert C. Sigler, and Julianne M. Dunn, for appellant.

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

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

BOSLAUGH, J.

The defendant was charged with second degree arson, burglary, and with being an habitual criminal. He was found guilty on all counts and sentenced to imprisonment for 30 years, the sentence to run concurrently with an Iowa sentence. He has appealed and contends the trial court erred in overruling his

motion to suppress, in overruling his motion to dismiss the habitual criminal count, and in finding him to be an habitual criminal and sentencing him when he was not present in court.

The record shows that the defendant set fire to a tavern in Chadron, Nebraska, on October 13, 1976, by breaking a hole in the roof of the building and pouring gasoline into the building which was then ignited. The State presented the testimony of a companion of the defendant who was an eyewitness to the crime. The evidence was clearly sufficient to sustain a finding of guilty on the arson and burglary counts and the defendant does not contend otherwise.

The motion to suppress was directed at evidence seized on May 13, 1977, pursuant to a warrant issued in Omaha, Nebraska. The evidence consisted of photographs taken by the defendant and his companion while in South Dakota and two newspapers containing a story of the fire purchased by the defendant in Chadron after the fire. The affidavit upon which the warrant was issued listed three locations where the evidence might be found, all of which were residences where the defendant was known to stay from time to time. The evidence was found at the first address listed, the home of the defendant's mother.

The defendant contends the affidavit was insufficient because it was made on May 13, 1977, some 7 months after the crime and listed only possible locations where the evidence might be found. The items which were sought were in the nature of mementos and the lapse of time is not as significant as it might be in the case of contraband or the fruits of a crime. Because of the fact the defendant had no permanent residence but stayed at the home of his mother, the home of his father, and the home of a girl friend, and kept personal belongings at all three places, it was probable that the items sought would be found in one of these places. Under the particular facts of

this case we conclude that the defendant's contention that the affidavit was insufficient was without merit.

In support of the habitual criminal charge the State produced certified copies of three previous felony convictions of the defendant in this state which satisfied the statutory requirements. The defendant's contention that this proof was inadequate is without merit. See State v. Micek, 193 Neb. 379, 227 N. W. 2d 409.

The defendant failed to appear in court in person at the time fixed for sentencing. The record indicates the defendant had requested a continuance of the sentencing hearing which was denied. The defendant then dismissed an appeal that was pending before the Supreme Court of Iowa and surrendered to Iowa authorities so that he could avoid imprisonment in the Nebraska Penal and Correctional Complex where the husband of his companion on the trip to Chadron and South Dakota was imprisoned. The trial court felt that these facts amounted to a voluntary waiver by the defendant of his right to be present for sentencing and, over objection by defendant's counsel, found the defendant was an habitual criminal and sentenced him in his absence.

Sections 29-2201 and 29-2202, R. R. S. 1943, relating to allocution indicate clearly that sentencing should take place in the presence of the defendant. There is much authority to the effect that a sentence imposed in the absence of the defendant is generally void. See 21 Am. Jur. 2d, Criminal Law, § 304, p. 330.

Rule 43 of the Federal Rules of Criminal Procedure requires that the defendant be present at the imposition of sentence. In prosecutions for offenses punishable by fine or imprisonment for not more than 1 year, or both, the court may impose sentence in the defendant's absence if the defendant has given his written consent.

In State ex rel. Shetsky v. Utecht, 228 Minn. 44, 36 N. W. 2d 126, the Supreme Court of Minnesota held that a sentence was void where it had been imposed upon a defendant in his absence after he had voluntarily absented himself from the trial after the proceedings had begun. The court cited both Federal Rule 43 and section 291 of the American Law Institute's Code of Criminal Procedure which provide that the defendant shall be present when a sentence of death or imprisonment is pronounced, and if such a sentence is pronounced in his absence, he shall be resentenced when his presence is secured.

In United State v. Behrens, 375 U. S. 162, 84 S. Ct. 295, 11 L. Ed. 2d 224, the court held that a sentence imposed on a defendant in his absence was erroneous. See, also, Pollard v. United States, 352 U. S. 354, 77 S. Ct. 481, 1 L. Ed. 2d 393.

It has been suggested that a defendant may be sentenced in his absence only in the most extraordinary circumstances, where it would otherwise work an injustice, and then only under appropriate safeguards such as a waiver in open court or by affidavit. United States v. Brown, 456 F. 2d 1112.

The defendant's absence in this case was voluntary in the sense that he chose to surrender to the Iowa authorities to avoid imprisonment in the Nebraska Penal and Correctional Complex at this time. The case is no different in principle from that of a defendant who deliberately fails to appear at the time fixed for sentencing. In such a situation it is generally held that the absence is not a sufficient waiver and sentence can not be imposed until the defendant is present in court.

The finding that the defendant is an habitual criminal and the sentence thereon are vacated and the cause remanded to the District Court for further proceedings.

SENTENCE VACATED AND CAUSE
REMANDED FOR FURTHER PROCEEDINGS.

KEVIN L. CLINE, APPELLANT, V. CYNTHIA J. CLINE, APPELLEE.

264 N. W. 2d 680

Filed April 19, 1978. No. 41331.

Divorce: Parent and Child: Infants. In a default divorce case where facts, existing at the time of the decree, affecting the custody and best interests of children, have not been called to the attention of the court, the court may, upon a subsequent application for modification, consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody.

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

Richard E. Gee, for appellant.

Gwyer Grimminger, for appellee.

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

MCCOWN, J.

Cynthia J. Cline filed a motion to modify the decree in a divorce proceeding by changing the custody of the minor child of the parties from her husband, Kevin L. Cline, to her. The District Court modified the divorce decree; placed physical custody of the child in the wife; provided for child support; and granted specified visitation rights to the husband. The husband has appealed.

Kevin L. and Cynthia J. Cline were married November 7, 1971. They had one daughter, Heather, who was born July 11, 1974. The parties separated in September 1975, and the husband filed a petition for divorce in October 1975, praying that custody and control of the child be placed in him with reasonable visitation rights "to be arranged through the parties." His wife was not represented by counsel but signed a voluntary appearance prepared by his lawyer which was filed in the divorce proceeding. The divorce petition was set for hearing in the District

Court on December 17, 1975. The husband appeared with his attorney but the wife did not appear at the trial. The husband was the only witness. The court then entered a default decree dissolving the marriage; granted the custody of the child to the husband subject to the right of reasonable visitation; and awarded each party the property then in his possession.

On January 19, 1976, the wife filed a motion to modify the divorce decree on the ground that her husband had orally assured her that if she did not "cause any problems" he would see that she got custody of the child. The motion alleged that the wife would have appeared with counsel and contested the right of custody at the hearing of December 17, 1975, but for the fact that she relied on the promises of her husband. The motion was set for hearing on February 5, 1976.

Basically the testimony of the wife at the hearing in February was that her husband had promised to give her custody of the child after January 1, 1976, by which time he expected to have been settled in Lincoln, Nebraska, where he had moved sometime before the December 17, 1975, trial. She was convinced that there was no necessity to appear at the trial on December 17, 1975. Her husband denied that he had ever promised her custody of the child, but conceded that he had told her on December 16, 1975, that he would rather have her go to court the next day instead of him, but he said he was only joking. He conceded that custody of the child had been discussed on several occasions before the trial, but testified that he did not "come right out and tell" his wife she could have custody of Heather, and he did not think he had implied to her that she could have custody. All the witnesses agreed that both the husband and the wife were fit and proper parents and could and would take proper care of the

child, who was approximately a year and a half old at the time of the divorce proceedings.

At the conclusion of the hearing on February 5, 1976, the District Court took the matter under advisement pending receipt of a report from the welfare department.

On August 8, 1976, a further hearing was held by the District Court on the motion for modification. The evidence at that hearing showed that both husband and wife had remarried in June 1976; that both were employed; and that both had established homes which would be suitable for caring for Heather. There is virtually no dispute in the record that both parties are fit and proper persons to have the custody of the child. The evidence also established that they had been sharing custody of Heather during the pendency of the proceedings, but both agreed that it was not good for the child to shift her back and forth.

At the conclusion of the August hearing the court found it was in the best interests of the minor child that the decree of divorce be modified. The court retained legal custody of the child and granted physical custody to the wife until further order of the court; ordered the husband to pay $85 per month child support; and provided for specified visitation rights to the husband. The court stated for the record that the court was convinced the wife thought she would have custody of the child after January 1, 1976, by the agreement with her husband, and that the only reason she did not appear at the divorce hearing on December 17, 1975, was she did not feel it was necessary for her to be in court.

It is the position of the husband that the divorce decree of December 17, 1975, is res judicata and not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree, and that there was no such

change here. See Gray v. Gray, 192 Neb. 392, 220 N. W. 2d 542.

In Bartlett v. Bartlett, 193 Neb. 76, 225 N. W. 2d 413, this court held that the discovery of material facts which existed but were unknown to the court and the opposing party and could have not been ascertained with reasonable diligence, which, if known to the court, might have warranted the entry of a different decree, are changed circumstances which the court will consider in an application for a change of child custody.

Perkins v. Perkins, 198 Neb. 401, 253 N. W. 2d 42, supports the conclusion that when a party obtains a divorce by default and fails to bring to the court's attention matters concerning children and custody that the court should be aware of, subsequent discovery of those facts constitutes a material change of circumstances.

The judicial focus in cases such as this has been on what the trial court actually knew at the time of entry of the custody decree and not on what the parties knew or should have known which was not produced at the time of trial. This court has continually adhered to the principle that the best interests of the child are the governing considerations in determining custody. Modern authority supports the view that where facts affecting the custody and best interests of children existing at the time of the decree awarding custody are not called to the attention of the court, and, particularly in default cases, where the issues affecting custody have not been fully tried, the court, upon a proper motion for modification, may consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody. See, Annotation, 9 A. L. R. 2d 623; Warren v. Warren, 191 N. W. 2d 659 (Iowa, 1971); Stewart v. Stewart, 86 Idaho 108, 383 P. 2d 617.

The Annotation in 9 A. L. R. 2d 623, at page 626,

states: "Modification of custody awards upon a showing of facts prior to the decree not presented to the court has frequently been allowed where the facts relied upon are that one of the parties, by fraud, misrepresentation, or duress, has induced the other party to permit an uncontested decree and custody award to be entered." In the case before us the facts establish sufficient misrepresentation and misunderstanding to place the case within the ambit of that rule also.

The argument that there was no material change in circumstances occurring subsequent to the entry of the decree awarding custody also ignores the fact that there were two evidentiary hearings in this case before the entry of the order of modification. The evidence at the second hearing established that both husband and wife had remarried and both husband and wife had changed residences and had established new homes. Custody of the child had been transferred back and forth on a substantially equal division of time, which both parties agreed was probably not good for the child. The evidence introduced at both hearings on the motion to modify all tended to establish facts which were unknown to the court at the time the divorce decree awarding custody was entered. The evidence was, therefore, admissible and properly considered by the trial court, regardless of whether or not it was known or available to the parties at the time of the entry of the original decree awarding custody.

The District Court did not abuse its discretion in modifying the divorce decree as to custody in the best interests of the child. The court's action is supported by the evidence in the record. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE TRUMAN STEVENSON, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. JAMES JACKSON, APPELLANT.
264 N. W. 2d 848

Filed April 19, 1978. Nos. 41370, 41371.

1. **Criminal Law: Confessions.** Police deception is not sufficient to make an otherwise valid confession inadmissible unless it is such as to produce a false or unworthy confession.
2. **Criminal Law: Confessions: Due Process.** The trial court is not required to submit to the jury for determination whether the Miranda warnings were given prior to statements of the defendants.
3. **Criminal Law: Attorney and Client: Conflict of Interests.** If, in the representation of more than one defendant, a conflict of interest arises, the mere existence of such a conflict vitiates the proceedings, even though no actual harm results.
4. _____: _____: _____. Representation of two codefendants in a joint trial, where the confession of each was introduced into evidence and the confessions implicated the other defendant, raises a conflict of interest on behalf of the single defense attorney.

Appeals from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for new trial.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellants.

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

Heard before SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

WHITE, C. THOMAS, J.

On July 24, 1976, a vacant residence at 2120 Lothrop Street, Omaha, Nebraska, caught fire and was substantially damaged. The defendants, Lee Truman Stevenson and James Jackson, were arrested, charged, and convicted of arson in the first degree at a joint trial. At trial, the defendants were represented by an assistant public defender.

After the fire was extinguished, on inspection by an acting battalion chief and the arson bureau, a plastic container containing a small quantity of gasoline was found in the house. The place where the fire started had the blisters on painted surfaces and markings characteristic of a fire accelerant. The house gave off a strong odor of gasoline. Thus, from the beginning, the fire department and the police investigators knew the fire was intentionally set. The fire was set on the second floor of the home. Apparently a large quantity of gasoline was used. In the opinion of the arson investigator, the fumes arising from such an amount of gasoline would cause a flash explosion, resulting in the burning of anyone who struck a match in the upstairs.

At about 11:45 p.m., or 15 minutes after the fire was reported, an arson investigator who had not yet been to the scene and a sergeant of the Omaha police department were summoned to Lutheran Hospital in Omaha, where, shortly before, the defendants had been admitted suffering from severe burns over 50 to 75 percent of their bodies. Defendant Jackson had been sent to St. Joseph's Hospital. An interview with all burn victims is a standard procedure of the arson squad. At the time of the interview with the defendants, they were in the intensive care units of the hospitals suffering from first, second, and third-degree burns. Permission was obtained from an attending physician and the defendants were interviewed. The defendants at this time were neither under suspicion nor under arrest. The defendant Stevenson was interviewed first. Stevenson stated that three men "confronted" him and Jackson, took them to the Lothrop Street house, and set them afire. Essentially the same story was told by Jackson.

Defendants assign as error the admission of this exculpatory evidence. The interrogations were neither prolonged nor accusatory. Since the defend-

ants were not in custody, Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, does not apply. Although the defendants did move to suppress other statements made to police officers, they did not ask to suppress these statements prior to trial. The defendants' objections are without merit.

The defendant Stevenson further told the arson investigator that he knew one of the persons who had assaulted him, but that he wouldn't disclose the identity to anyone unless it would be Officers O'Donnell and Thompson of the Omaha police department whom he knew. On July 25, 1976, Officer Thompson received a message at the police station to contact the defendant Stevenson in the University Hospital. Sometime between 4 p.m. and 6 p.m., Officer Thompson went to see the defendant Stevenson. The defendant, in the presence of one Linda Williams, told the officer that several people had tried to "get him" recently and that he and his friend, defendant Jackson, were taken to the Lothrop Street house at gunpoint. The gunmen poured gasoline in the house, ignited it, and ran from the house. Stevenson and Jackson then broke out a window, ran from the house, and were picked up by Linda Williams in Stevenson's car 2 blocks from the house.

The following day, July 26, Officers Thompson and O'Donnell returned to the University Hospital to again talk to Stevenson. Stevenson repeated the story told the previous day. Later that evening the officers contacted defendant Jackson at St. Joseph's Hospital in the intensive care section. The officers, apparently by prearrangement, told the defendant Jackson that Stevenson had "told us the truth in regards to the fire." In response, Jackson stated that "Yes, he set fire to the house to make money on an insurance deal." Thereupon the defendant Jackson, in the presence of a nurse on duty, was given the warnings dictated by Miranda v. Arizona, *supra*, waived each of the rights, and proceeded to give a

statement implicating himself and defendant Stevenson. The statement suggested that the defendant Stevenson was the originator of the scheme. Substantial details were obtained from Jackson, including the source of the gasoline and the plastic container used by the defendants.

Counsel for the defendant, at a pretrial motion to suppress, objected to the admissibility of the statement based on the involuntariness of the statement under Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, and the failure to give the Miranda warnings prior to any questioning. At trial, defense counsel objected on behalf of defendant Stevenson citing Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476. All objections were overruled.

After completing the interview with Jackson, the officers returned to the University Hospital and contacted Stevenson. He was immediately given the Miranda warnings and informed of the Jackson statement. Stevenson admitted participation in the setting of the fire, generally confirming the opinion of the arson investigator as to the method of setting the fire and the consequences to the arsonists. The only significant difference in the statement was that it was Jackson who was the active partner, that he had "taken the deal over."

Defendants assign as error: (1) Admission into evidence of the confessions made by the defendants to police; (2) failure to instruct on the Miranda issues presented by the evidence; and (3) overruling the defense objection to consolidation of the defendants' cases for trial.

Neither of the defendants Stevenson nor Jackson were in custody at the time the police and fire department arson investigator questioned them on any of the occasions. It is true that after the interrogation of Jackson at St. Joseph's Hospital suspicion was then focused on Stevenson; however, it is well to

note that in the case of Stevenson, when the suspicion was focused on him, prior to the taking of any statement, the Miranda warnings were given. This part of the objection is without merit.

The important thrust of the defendants' argument concerns the circumstances under which the statements were taken. The defendants were each patients in the intensive care units of hospitals. Statements were taken less than 48 hours from the time of severe burn injuries covering 50 to 75 percent of their bodies. The defendants were under medication and were in pain. There was an indication that one of the defendants was subjected to more pain than the other by reason of the fact that the morphine used to control the pain was ineffective due to the defendant's suspected heroin withdrawal. The State produced the officers who testified that they were given permission to talk to the defendants, that each of the defendants, although appearing to be in pain, answered coherently, recognized them, and appeared to be under no compulsion.

The evidence as to the defendants' treatment and physical condition was introduced by the State as part of the total circumstances surrounding the taking of the statements. Although reference is made in the defendants' arguments to the physical condition and the ability of the defendants to voluntarily respond, none of the attending physicians or nurses who were on duty at or during the time of the defendants' hospitalization in the critical period were called as witnesses. The court, at a hearing to determine voluntariness, in accord with Jackson v. Denno, *supra*, determined that the admissions were the product of rational intellects and free will. See State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66. The court further determined that the Miranda warnings were given. The evidence shows conclusively that the Miranda warnings were given even though, as

stated above, under strict construction of the rule, the warnings were not required.

The defendants further complain that the police used fraud and trickery to induce Jackson to confess, implicating the defendant Stevenson and that the Stevenson admissions were a fruit of the impermissible fraud or trickery. The general rule is that police deception is not sufficient to make an otherwise valid confession inadmissible, unless it is such as to produce a false or untrustworthy confession. See, Frazier v. Cupp, 394 U. S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684; McIntosh v. State, 105 Neb. 328, 180 N. W. 573. The investigators simply told Jackson that Stevenson had told them the truth about the origin of the fire. There is no evidence of any threats or coercion and no evidence whatever that the form of the deception suggested the answer. The trial court was correct in concluding that the deception did not render the confession inadmissible. Defendants' first assignment of error is without merit.

The contention of the defendants that the trial court was required to submit to the jury the determination whether the Miranda warnings were in fact given to the defendants is without merit. This court determined in State v. Scott, *ante* p. 265, 263 N. W. 2d 659, that it was not error for the trial court to refuse to give NJI No. 14.52A, concerning the giving of the Miranda warnings, which was the instruction requested by the defendants.

Defendants' third assignment of error presents a more difficult situation. A short history of the proceedings in this matter will be helpful. The defendants, at the first stages of their proceedings, were represented by a private attorney with whom they had some disagreement and the court permitted that defense counsel to withdraw prior to any proceedings in the District Court. Thereafter, two members from the staff of the public defender's office of Douglas County, Nebraska, were appointed, one for

each of the defendants. There were several delays in setting trial, and both members of the public defender's staff appeared at all subsequent proceedings up to trial. However, within 1 week of the scheduled date for trial, one of the defense lawyers was hospitalized. The trial court appointed the remaining lawyer to inquire of the defendant Stevenson whether he would object to the assistant public defender representing him, as well as the defendant Jackson. There is no mention in the record of defendant Stevenson's response. At all times in the proceedings, the defendants had objected to the consolidation of the two cases for trial. The deputy county attorney successfully resisted the attempt to sever, arguing to the court that the purpose of the State in prosecuting the cases together was that the defendants' confessions *would tend to corroborate each other.* This occurred in spite of the fact that the deputy county attorney well knew, and the court appropriately instructed at trial, that the admissions of each defendant were to be considered evidence only as against that defendant and not as against his codefendant.

At trial, the confessions of each of the defendants were admitted in evidence. Each of the defendants then took the stand and repudiated his confession. There was no inquiry by the assistant public defender of either of the defendants as to the differences, although minor, between those statements, the motives for confessing, or the differences that each attached in relative blame for the incident to the other.

Defendants rely on Bruton v. United States, *supra.* In Bruton it was held that admission of a codefendant's confession which implicated defendant at joint trial constituted prejudicial error even though trial court gave instruction that the confession could only be used against codefendant and must be disregarded with respect to defendant. There the code-

fendant did not take the stand; thus, the defendant was foreclosed from his constitutional right to confront witnesses against him. This is not a situation as existed in Bruton v. United States, *supra*, as here there was a full opportunity for defense counsel to examine each confessing defendant. The difficulty of this case is not in the lack of an opportunity for defense counsel to confront his clients' accusor, but in the fact he was the attorney for two codefendants, each of whom was accusing his other client. In State v. Montgomery, 182 Neb. 737, 157 N. W. 2d 196, the assistant public defender was representing both the appellant Montgomery and a codefendant Foster on a charge of robbery. Montgomery's codefendant Foster gave a statement which was offered and received in evidence. The confession, which was inculpatory in nature, placed the entire responsibility on his codefendant Montgomery. The court observed in that case that: "There is some danger of prejudice in any trial involving multiple defendants, but severance should be denied in the absence of a showing of prejudice against which the trial court will not be able to afford protection. State v. Brown, 174 Neb. 387, 118 N. W. 2d 328."

In State v. Montgomery, *supra*, this court does suggest that there was an attempted retraction by Foster. "It is true Foster did not testify against appellant, but Foster's statement was admitted into evidence and appellant's attorney, who was also Foster's attorney, could not effectively examine Foster about it without prejudicing appellant's rights. As a result, appellant's counsel is rendered impotent on the most damaging evidence presented in the trial. By this conflict, appellant was denied effective assistance of counsel. Counsel, recognizing the problem, before its offer moved to strike all reference to appellant from the statement, or in the alternative to grant a severance. This motion should have been sustained."

The State attempts to distinguish State v. Montgomery, *supra*, by the suggestion that since both parties have confessed and implicated the other that the case is distinguishable from State v. Montgomery, *supra*. In the case of a joint trial, it is well to remember that the confession of a codefendant is not admissible against the defendant. While we are not prepared to state in what manner an attorney, if separate attorneys had represented each of the defendants, could have or may have attacked the separate confessions of his fellow codefendant, we are equally unprepared to suggest that no such attack was possible. As stated in State v. Montgomery, *supra*: " 'If, in the representation of more than one defendant, a conflict of interest arises, the mere existence of such a conflict vitiates the proceedings, even though no actual harm results.' " See, also, Commonwealth ex rel. Whitling v. Russell, 406 Pa. 45, 176 A. 2d 641.

The United States Supreme Court very recently addressed the issue of representation of two or more defendants by a single defense attorney in a consolidated trial. Holloway v. Arkansas, (46 U. S. L. W. 4289, April 3, 1978). In Holloway, three defendants, represented by a single defense attorney, were tried together despite the protests of the attorney. Prior to trial, the defense attorney moved the court for appointment of separate counsel "on the grounds that one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them." The motion was denied and the defendants subsequently convicted. On appeal, the Arkansas Supreme Court, in affirming the conviction, held that reversible error can only occur in the single representation of codefendants when the record shows some material basis for an alleged conflict of interest.

Mr. Chief Justice Burger, writing for the majority

in Holloway, held that the trial judge's failure either to appoint separate counsel or to take adequate steps to ascertain whether the risk of a conflict of interests was too remote to warrant separate counsel deprived the defendants of the guarantee of "assistance of counsel" under the Sixth Amendment. Relying on Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680, the court also held that whenever a trial court improperly requires joint representation, over timely objection, reversal is automatic, and prejudice is presumed regardless of whether it was independently shown.

We are not prepared to state that it would have been appropriate, in any circumstances, for the public defender's office to represent the two defendants, even if they were represented by two separate attorneys on the staff of the public defender's office. We hold that the representation of two codefendants in a joint trial where the confession of each was introduced into evidence and the confessions implicated the other raises a conflict of interest on behalf of the attorney. The trial court which ordered the attorney to represent the two codefendants abused its discretion in so ordering and refusing to order a severance.

Other errors assigned in the case were examined and found to be without merit.

REVERSED AND REMANDED FOR NEW TRIAL.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein. These cases are not controlled by State v. Montgomery, 182 Neb. 737, 157 N. W. 2d 196 (1968). In that case there was prejudice in not granting a separate trial. Here there was not. Here, both defendants repudiated their confessions. To suggest that separate attorneys would have cross-examined either defendant about his confession other than to attempt to sustain his repudiation is absurd. There is no question that both of the defendants were together. No competent attorney defending one of

them would attempt to prove that the other committed the crime while his client watched.

Both defendants were interested in repudiating their confessions. This their counsel attempted to do. Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476, is not applicable because the defendants were subject to cross-examination, although, as suggested, there would be no cross-examination on the confession.

Defendants objected to a joint trial, not to joint representation by the same attorney. This case is not controlled by Holloway v. Arkansas, 46 U. S. L. W. 4289. That case specifically involved a request for separate counsel. The evil the court addressed was joint representation by one counsel of conflicting interests. There, the attorney objected to joint representation by court appointment of three defendants because of possible prejudice. Here, Jackson's attorney, when Stevenson's attorney became ill, was requested to visit with Stevenson to see if Stevenson wished Jackson's attorney to represent him also. Stevenson had an opportunity to object to this representation. No objection was made. Here, the attorney, who was requested to ascertain whether ot not a conflict of interest existed, did not suggest one. Further, no motion for severance was made after the public defender was asked to represent both defendants.

Mr. Justice Powell, in Holloway v. Arkansas, *supra*, said: "While disavowing a per se rule of separate representation, the Court holds today that the trial judge's failure in this case 'either to appoint separate counsel or take adequate steps to ascertain whether the risk was too remote to warrant separate counsel' worked a violation of the guarantee of 'assistance of counsel' embodied in the Sixth and Fourteenth Amendments."

In this case, however, the trial court provided an opportunity to ascertain whether or not a conflict of

interest existed. None was shown. Further, there is nothing in the record in the trial of this case which would indicate that the rights of either defendant were prejudiced by the joint representation. In the absence of an objection to a joint trial, in the absence of defendant Stevenson's objection to his representation by Jackson's attorney, the majority opinion gratuitously gives a new trial to two obviously guilty arsonists.

METROPOLITAN UTILITIES DISTRICT OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT, V. FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION, APPELLEE.

264 N. W. 2d 854

Filed April 19, 1978. No. 41384.

1. **Contracts.** It is only when there is uncertainty, indefiniteness, or ambiguity in a contract that it is open to construction.
2. _____. 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. Any ambiguity or doubt as to its meaning must be resolved against the party preparing the contract.
3. **Guaranty: Guarantor-Guarantee.** If an obligee in a guaranty draws it in a form requiring explanation, the guarantor is a favorite of the law in the interpretation of the ambiguous provision.
4. _____: _____. A guarantor is entitled to stand upon the letter of his contract. His guaranty is not to be extended by a strained construction of the language used.

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

C. S. Brubaker, W. L. Strong, and Merlin E. Remmenga, for appellant.

John P. Ford and Larry R. Forman of Schmid, Ford, Mooney, Frederick & Caporale, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

WHITE, C. THOMAS, J.

This is an appeal from the grant of a summary judgment in favor of the defendant in an action by plaintiff Metropolitan Utilities District against defendant Fidelity and Deposit Company of Maryland on a written guaranty. Plaintiff appeals. We affirm.

In January 1972, Damark Properties, Inc., entered into a contract with the plaintiff Metropolitan Utilities District of Omaha. The contract provided that the district would install a number of gas mains in Eldorado, a subdivision owned by Damark which is located at approximately 144th Street and West Dodge Road, Omaha, Nebraska. The estimated cost of this work was $26,768. Damark agreed "to construct and equip, as hereinafter set forth, within three years from the completion of the installation of said gas mains, the following:

"1. Properties abutting said distribution main that will provide gas-burning appliances with a total annual gas revenue of $13,384.00 within three years from the completion of the main. This total revenue must be guaranteed and secured by surety bond, deposit in escrow, or cash deposit, as hereinafter provided." A corporate surety bond furnished by the defendant was deposited in the total sum as provided by the contract of $26,768.

The agreement goes on to provide: "If the Applicant complies with the terms of this agreement, and produces the required revenue at the end of the three-year period, the District will release the bond or deposit in escrow or refund the cash deposit, as the case may be.

"For the purpose of determining compliance herewith, the amount of revenue produced shall be computed at the end of the three-year period and credit given as follows:

"1. $125.00 for each single-family residence equipped and connected as provided herein.

"2. The annualized revenue derived from each

commercial building. Commercial buildings shall include apartments, offices, retail shops, and similar commercial structures."

The parties agree that 71 single-family residences were connected to the gas mains within the 3-year period. No commercial structures were connected.

Actual revenue generated by the 71 single-family residences in the year immediately prior to the expiration of the 3-year period was well in excess of the $13,384. The defendant, therefore, contended that it had fulfilled the terms of the agreement and the District Court sustained its motion for summary judgment. The plaintiff, however, contends that the amount which determines compliance is governed by the last-quoted paragraph which allows a $125 credit for each single-family residence. The number of houses, 71, times the $125 figure equals $8,875, which is well below the $13,384 figure. Plaintiff contends the defendant owes it $9,018. This figure is arrived at through the language of another clause of the contract: "In the event Applicant fails to produce the required revenue in accordance with this agreement, the District shall be entitled to an amount equal to the estimated cost ($26,768.00) of the gas mains, less twice the annual revenues produced at the end of the three years from the completion of the mains." The difference between the cost of the mains ($26,768) and double the annual revenue as computed by the plaintiff ($8,875 x 2) is $9,018.

The plaintiff first assigns as error the granting of defendant's motion for summary judgment, since the hearing thereon was admittedly not held until after the expiration of 10 days as provided in section 25-1332, R. R. S. 1943. The plaintiff had originally filed its motion for summary judgment on March 1, 1977, and the same was set for hearing on March 14, 1977. The defendant, appellee herein, filed its motion for summary judgment on March 11, 1977, and called its motion up for hearing on March 14, 1977.

Without deciding the point whether upon the motion of one party to an action for summary judgment, such judgment may be granted to the opposing party, it is sufficient to say that the plaintiff cannot be heard to raise its objection to the hearing on the defendant's motion for summary judgment in this court. The circumstance with regard to defendant's objection on the plaintiff's objection went as follows: "Mr. Remmenga: With regard to Exhibit 8, I have one other objection. It was not offered or served upon me prior to today as required by Chapter 25, Article 1332, the Nebraska statutes. * * * Incidentally, also for the record, I would object to the hearing on the defendant's motion for summary judgment for the reason that it was not filed more than ten days prior to this date.

"THE COURT: Well, let me tell you this: If you persist on that objection, I am going to set it up for whenever the ten days run because, technically, you are 100% right. When did you file this thing?" Thereafter, although there was other dialogue with respect to exhibits between the court and counsel for the plaintiff, the counsel neither persisted in his objection nor indicated to the court that he intended to abandon it. Indeed, he continued to proffer a further exhibit in evidence which he successfully argued the admissibility of. The dialogue and actions of plaintiff's attorney constituted a waiver of his objection to defendant's motion for summary judgment. Therefore, plaintiff's contention is without merit.

The trial court in its memorandum opinion determined that revenue is defined as "income; an item of income; a source of income." It pointed out that in the first paragraph in controversy, the word revenue is not followed by any such words as "as hereinafter defined" or "as defined below" and, as so used, it would be apparent that revenue in excess of the $13,384 has been generated and the defendant must

prevail. It is, however, also apparent that if the term revenue, as further defined in the second paragraph under controversy, were to be considered as limited by $125 for each house, then the plaintiff should prevail. We are faced with an alternative argument by plaintiff herein. On the one hand, plaintiff maintained in the District Court, and in this court on appeal, that there exists no genuine issue of fact; therefore, the instrument, plain on its face, entitles plaintiff to judgment as prayed for in the petition and that a motion for summary judgment in its favor ought to have been sustained. On the other hand, in attacking the granting of the motion for summary judgment in favor of the defendant, the plaintiff asserts that there is a genuine issue of fact, that the contract is ambiguous, and that extrinsic evidence ought to be received to explain the meaning. We reject the plaintiff's arguments.

The plaintiff contends that in order to give effect to the entire contract, the term "total annual gas revenue" must be reconciled and limited to the provisions determining "compliance" with the revenue requirements.

The defendant points out that the words "total annual gas revenue," cannot be reconciled with any words of limitation, without destroying the clear meaning of the words, which mean the amount of the charges actually made by the district during the year immediately preceding the expiration of the 3-year period. It is the defendant's contention that the $125 figure becomes operable only "in the event the applicant fails to produce the required revenue." The required revenue having been produced, the provision does not come into operation.

We believe the meaning of the term "revenue" as used in the contract is ambiguous and the trial court was correct in its interpretation. It is only when there is uncertainty, indefiniteness, or ambiguity in a contract that it is open to construction. See Smith

v. Bailey, 105 Neb. 754, 181 N. W. 926. We do not feel the ambiguity is of such a nature as to require the introduction of extrinsic evidence as argued by the plaintiff.

We take note, as did the District Court, that the instrument was drafted by the plaintiff, as is apparent from the printed form and context. "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." Any ambiguity or doubt as to its meaning must be resolved against the party preparing the contract. Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc., 195 Neb. 292, 237 N. W. 2d 645. See, also, Lyman-Richey Sand & Gravel Co. v. State, 123 Neb. 674, 243 N. W. 891. That principle is peculiarly applicable to guaranties. See Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc., *supra*.

The defendant here was the guarantor who furnished the surety bond required by the plaintiff. If an obligee in a guaranty draws it in a form requiring explanation, the guarantor is a favorite of the law in the interpretation of the ambiguous provision. See City Nat. Bank of Lincoln v. Denslow, 114 Neb. 600, 209 N. W. 254. A guarantor is entitled to stand upon the letter of his contract. His guaranty is not to be extended by a strained construction of the language used. See McCormick Harvesting Machine Co. v. Regier, 54 Neb. 528, 74 N. W. 957.

The guarantor was held to be entitled to the more restrictive interpretation of the contract by the trial court. We agree.

AFFIRMED.

HENRY L. PAGE ET AL., APPELLANTS, V. JANET I. ANDREASEN ET AL., APPELLEES.

264 N. W. 2d 682

Filed April 19, 1978. No. 41386.

1. **Fraud.** The essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage.
2. **Fraud: Trial: Evidence.** Fraud is never presumed but must be established by the party alleging it by clear and satisfactory evidence.
3. **Summary Judgments: Trial.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity of expense and delay of trial, those cases where there is no genuine claim or defense.
4. **Summary Judgments: Trial: Pleadings.** When the allegations of the pleadings have been pierced by a movant for summary judgment and resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted.

Appeal from the District Court for Dodge County: MARK J. FURHMAN, Judge. Affirmed.

Michael O. Johanns of Peterson, Bowman, Coffman & Larsen, for appellants.

Robert M. Hillis of Yost, Schafersman, Lamme & Hillis, for appellee Orval Andreasen.

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

SPENCER, J.

This is an action by the buyers of a registered paint horse to recover damages for misrepresentation because the horse purchased had been freeze altered to enhance the white markings on the horse. This action was brought against the owner and seller of the horse, Janet I. Andreasen and her father, Orval Andreasen. The trial court granted a sum-

mary judgment to Orval Andreasen and plaintiffs appeal. We affirm.

Plaintiffs purchased Deano's Cryin Time, a registered paint horse, from Janet I. Andreasen for $900. Janet was the sole owner of the horse from the time it was foaled. She lived with her parents on their acreage. The horse was kept on the acreage in a pasture rented to Janet. Payment for the horse was made by check, made out solely to Janet. The check was deposited in her personal savings account, although her father and mother were listed as joint owners of the account. The record is undisputed that all deposits and withdrawals to the account were made solely by Janet.

During the negotiations for the sale of the horse, Mrs. Page made three trips to the Andreasen acreage. On the last two trips she was accompanied by Mr. Page. Orval Andreasen was present during one of the latter trips. All the negotiations were between plaintiffs and Janet I. Andreasen. Orval testified he did not enter into the negotiations or discuss the horse with the plaintiffs, with the exception of some general conversation about it. The depositions of all the parties are a part of the record herein. There is no evidence that Orval ever represented to either of the Pages that he had any ownership interest in the horse.

The testimony of Henry L. Page as to his conversation with Orval Andreasen is as follows: "Q- Could you — did you ever see Mr. Andreasen? A- Yes, I did. Q- And any conversation with Mr. Andreasen? A- Yes. Q- Regarding the horse? A- Yes, the horse was the subject. Q- Could you tell me the extent of your conversation and what was said? A- Not specifically. Q- Not specifically? A- We talked about the horse and what a nice horse it was."

Linda Page's testimony as to her conversation with Orval Andreasen is as follows: "Q- All of those negotiations took place with Janet, is that correct?

A- Most of it, other than what his comments were in between. Q- What type comments did he make? A- Well, he wanted to know one time if I wanted to see the registration papers and I said, 'No, there is no need to really look at her registration papers.' I didn't have to see. I didn't know for what reason I had. You don't have to see those until you take the horse home. And just general conversation with him. Q- Did he ever tell you that the horse was his? A- I don't recall. I don't recall that."

The above testimony is the only direct evidence adduced by the Pages to support their claim of fraudulent misrepresentations made to them by the defendant Orval Andreasen. They argue this evidence is more than sufficient to raise an inference that Orval is liable to them on their petition by virtue of his close relationship with his daughter Janet, and his connection with the facts and circumstances surrounding the subject matter of the action.

They state in their brief: "As pointed out in the statement of facts, the evidence presented by plaintiffs shows: (1) that the horse was kept and cared for on Orval Andreasen's farm; (2) that the purchase money paid by the plaintiffs for said horse was deposited in an account upon which Orval Andreasen's name appeared; (3) that Orval Andreasen was present during at least a part of the negotiations between plaintiffs and defendants, and made comments during such negotiations; (4) that Orval Andreasen took an active interest in the raising and showing of paint horses with his daughter, Janet Andreasen; (5) that Orval Andreasen was named the breeder of the subject horse on its certificate of registration; and (6) that Orval Andreasen worked closely with the codefendant, Janet Andreasen, in registering and showing paint horses.

"In view of this evidence, there is certainly an inference to be drawn therefrom that Orval Andreasen, by virtue of his close association with Janet An-

dreasen and the subject horse, was an agent, co-conspirator, or joint tort-feasor with the defendant, Janet Andreasen."

The essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage. Bellairs v. Dudden, 194 Neb. 5, 230 N. W. 2d 92 (1975).

Fraud is never presumed but must be established by the party alleging it by clear and satisfactory evidence. McGinty v. McGinty, 195 Neb. 281, 237 N. W. 2d 855 (1976).

It is evident the plaintiffs are attempting to sustain their action for fraud against Orval Andreasen by virtue of the fact that he is the father of Janet, who is an adult and who is living in his home. Plaintiffs are attempting to impose a liability by association.

Orval was the owner of the mare which foaled Deano's Cryin Time. Because of that fact, he is named as the breeder of the horse on its certificate of registration. The horse was registered by its owner, his daughter, who was a member of the American Paint Horse Association. He has never been a member, although a horse owned by him, Deano's Pride, was registered. The registration was made in his name by his daughter.

Orval has owned and shown quarter horses for a period of 25 years. He is a member of the Quarter Horse Association. The dam of Deano's Cryin Time, Deano's Pride, is the only paint horse he has owned. His daughter has been closely involved with him over the years in raising and showing quarter horses. The daughter's testimony is to the effect

that Deano's Pride was bought with her money although she registered it in her father's name.

Analyzing the evidence set out above in plaintiff's statement of the facts, we find nothing to even suggest an ownership of Orval Andreasen in Deano's Cryin Time. The horse was kept and cared for on his acreage, but the pasture in which the horse was kept was rented by Janet, and she was the one who took care of the horse.

The purchase money paid by the plaintiffs for the horse was by check payable to Janet I. Andreasen. It was deposited in an account on which Orval Andreasen's and his wife's names appeared as joint tenants. This fact is undisputed. However, Janet is the only one who made deposits and withdrawals from that account since its inception. It would not be unusual for an unmarried woman living at home to have her parents' names on her account as joint tenants.

Plaintiffs claim Orval was present during at least part of the negotiations and made comments during such negotiations. These negotiations took place at his home, but he was present on only one occasion. His comments on that occasion are set out above. There is nothing in them which would in any way indicate more than a fatherly interest in the transaction.

The record does not sustain the claim that Orval Andreasen took an active interest in raising and showing of paint horses with his daughter Janet. The record would indicate he has owned only one paint horse and that was Deano's Pride, the dam which foaled the horse in question.

Orval Andreasen is named as the breeder of the subject horse on its certificate of registration. The owner of the sire would ordinarily be named as the breeder rather than the owner of the dam. The registration papers were filed by Orval's daughter who was a member of the American Paint Horse Association.

A review of the depositions of the parties shows Janet I. Andreasen to be the sole owner of Deano's Cryin Time. Orval Andreasen made no material representations to the plaintiffs regarding Deano's Cryin Time and took no active part in its sale. Janet alone negotiated the sale of the horse to the plaintiffs.

In support of his motion for summary judgment, Orval Andreasen submitted the affidavit of the defendant, Janet I. Andreasen. It is not disputed in any way. Nowhere in the record do the plaintiffs set out any facts which could support an inference that an agency relationship existed between Janet and her father. Nowhere in the record do the plaintiffs maintain, or even assert, that they were led to believe that Orval and Janet were principal and agent. Plaintiffs were asked in interrogatories to set out a detailed statement of all evidence plaintiffs would offer to support their claim against the defendants. They did not list any witness or set forth any evidence which in any way would tend to prove an actual or apparent agency relationship between Orval and his daughter.

The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity of expense and delay of trial, those cases where there is no genuine claim or defense. Pfeifer v. Pfeifer, 195 Neb. 369, 238 N. W. 2d 451 (1976).

When the allegations of the pleadings have been pierced by a movant for summary judgment and resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted. Gerdes v. Spetman, 197 Neb. 406, 249 N. W. 2d 210 (1977).

On the record herein, the motion of Orval Andreasen for summary judgment was properly sustained. The judgment is affirmed.

AFFIRMED.

ALVINA A. REMMERS, APPELLANT, V. TERRY LEE REMMERS, APPELLEE.

264 N. W. 2d 857

Filed April 19, 1978. No. 41408.

1. **Divorce: Parent and Child: Infants.** 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.
2. _____: _____: _____. In the matter of child support, while the father has the primary responsibility to support his children, the trial court should not ignore the ability of the mother. It has the responsibility of adjusting the equities between the parties.
3. **Divorce: Alimony: Property.** A judgment of the trial court fixing the amount of alimony or making distribution of property will not be disturbed on appeal unless it is patently unfair on the record.
4. _____: _____: _____. In determining the question of alimony and division of property, 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 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.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed as modified.

Jack L. Craven, for appellant.

Anne P. Carstens, for appellee.

Heard before WHITE, C. J., BOSLAUGH, and WHITE, JJ., and WARREN and KORTUM, District Judges.

WHITE, C. THOMAS, J.

This is an appeal from a property division and child-support award entered by the District Court in a marriage dissolution action. Appellant-wife appeals, alleging that the trial court abused its discretion in the property division and in awarding child support of $100 per month per child until the child reaches the age of 19 years or is emancipated. Custody of the children was awarded to appellant.

The parties were married in 1958. Three children,

ages 18, 15, and 12 at the time of trial, were born of the marriage. The three children resided at home. The wife had been a full-time housewife until May 24, 1976, when she became employed by Hy-Gain Electronics. She took employment with Dorsey Laboratories during a temporary layoff at Hy-Gain Electronics. She then returned to Hy-Gain Electronics where she was again laid off.

The husband farms 770 acres of land in Lancaster and Gage Counties, of which he and the appellant own 150 acres in joint tenancy. The balance of 620 acres is rented from his father and aunt. Two hundred forty-seven acres of the rented land are irrigated, 113 acres are in dryland crops, and 260 acres of pasture and hay ground are used jointly with others. The acreage rented is based upon two-fifths share of crops to the landlords and three-fifths to appellee as tenant. Fertilizer is shared on a 40-60 basis. The farmland and home where the parties resided is rented from the husband's father at $3,000 annually.

The trial court awarded to the appellant a 1970 Ford automobile on which she is to assume the indebtedness. No value was given for this automobile. The appellant also received a 1974 Oldsmobile which is used by the parties' son and valued at $3,700. She received household goods valued at approximately $3,500 and $60 in her checking account. In addition, the appellee was ordered to pay alimony of $14,000. This sum was to be paid as follows: $1,000 on September 1, 1977, and $1,000 each March 1 and September 1 thereafter until the requisite amount is paid. Appellant was allowed to remain in the farm home until March 1, 1978; at that time the appellee could resume occupancy. The appellee was ordered to pay the electrical bills of the residency while it was occupied by the appellant.

The appellee was awarded the 150 acres of real estate owned by the parties and was to assume the in-

debtedness thereon. This property was valued by the appellee at $60,000. Less the mortgage debt of $31,175, the net value of the land is $28,825. The appellee's father gave him $6,600 to make the down-payment on the land. The machinery received by appellee was valued at $36,000, less an indebtedness of $23,178, for a net value of $12,822. The appellee's herd of cattle he received has a net value of $866. The appellee received a 1976 Cadillac automobile valued at $12,000, less an indebtedness of $3,500, for a net value of $8,500. A 1976 Ford pickup truck, having a net value of $325 after indebtedness, and a 1950 refurbished Ford automobile, for which no value was given, were also awarded to appellee. The appellee received $476 in his checking account and stock in farmers' cooperative elevators valued at $4,974.

The appellant was receiving a gross salary of $120.80 per week at Hy-Gain Electronics. She testified that she was eligible for unemployment which she felt she would be receiving in a short time. The appellee's income tax statements show income for the years 1974, 1975, and 1976 as follows: 1974, a gross income of $65,795.45 and a net income of $17,636.31; 1975, a gross income of $59,428.79 and a net income of $7,324.99; 1976, a gross income of $56,122.78 and a net income of $8,943.01.

The appellant assigns as error the admittance into evidence of exhibit 6. Exhibit 6 is a three-page statement prepared by appellee showing his assets and liabilities. The exhibit is an itemized statement of value and indebtedness as reflected in the testimony of the parties at trial. Some of the figures, such as the depreciation of machinery and the operating expenses of farming, are reflected in income tax statements received into evidence. Since the exhibit in issue is essentially a summary of testimony already in evidence when such exhibit was received, the trial judge did not err in receiving it.

The appellant's other assignments of error relate generally to the amount of child support awarded and the division of property. 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. See Mangum v. Mangum, 197 Neb. 350, 249 N. W. 2d 207. The appellant testified the food bill for her and the children runs $200 to $250 a month and clothing expenses are generally $50 per month. Medication for the children runs approximately $15 per month. In the matter of child support, while the father has the primary responsibility to support his children, the trial court should not ignore the ability of the mother. It has the responsibility of adjusting the equities between the parties. See Kockrow v. Kockrow, 191 Neb. 657, 217 N. W. 2d 89. The record shows the appellant is capable of being gainfully employed and contributing to the support of the children. In light of this circumstance, we cannot say the trial court abused its discretion.

A judgment of the trial court fixing the amount of alimony or making distribution of property will not be disturbed on appeal unless it is patently unfair on the record. See Grummert v. Grummert, 195 Neb. 148, 237 N. W. 2d 126. The record discloses that the parties had net assets totaling $57,448. This amount includes the value of the farmland, cattle, Cadillac and Oldsmobile automobiles, pickup truck, farm machinery, household goods, money in the parties' checking account, and the stock in the grain cooperatives. The $6,600 downpayment the appellee's father gave him to make the downpayment on the land has been deducted from the net value of the land in the above figures. The appellant received assets totaling $21,260, which include the $14,000 alimony, the Oldsmobile automobile, and household goods. The appellee has received $36,188.

In determining the question of alimony and division of property, 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 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. See § 42-365, R. S. Supp., 1976. Here, the marriage was of significant duration. The appellant made valuable contributions to the marriage by managing the house and caring for three children. We note the limited earning capacity of the appellant because of her current lack of marketable skills. We feel the trial court abused its discretion in not allowing the appellant a more equitable share of the value of the net assets the parties accumulated. We hold that the appellant is entitled to a $6,000 additional property settlement. This sum is to be paid in $500 installments commencing September 1, 1978, and $500 each March 1 and September 1 thereafter, until paid. Any delinquent installments on these payments shall draw 8 percent annual interest. Appellant is awarded $1,000 attorney's fee for services in this court.

The decision of the District Court is affirmed as modified.

AFFIRMED AS MODIFIED.

ALVENA TIETSORT, APPELLANT, V. JERALD RANNE ET AL., APPELLEES, FARMERS INSURANCE GROUP, GARNISHEE-APPELLEE.

264 N. W. 2d 860

Filed April 19, 1978. No. 41409.

1. **Courts: Statutes: Time.** Section 25-2001, R. R. S. 1943, specifically grants the power to the District Court to vacate or modify its own judgments after term time for the reasons stated therein.

2. **Courts: Parties: Judgments: Time.** Within 3 days after the rendition of any judgment, except judgments by default rendered in divorce or separate maintenance cases, where proper service has been obtained or an appearance of the defaulting party has been made, the clerk of the court shall send a post card by United States mail to each party who has made an appearance in the action, or to his attorney or attorneys of record, advising that a judgment has been rendered and the date of rendition thereof.

Appeal from the District Court for Wayne County: EUGENE C. MCFADDEN, Judge. Affirmed.

Vincent J. Kirby, for appellant.

George H. Moyer, Jr., of Moyer, Moyer & Egley, for appellee Cavner.

Kennedy, Holland, DeLacy & Svoboda by Daniel P. Chesire, for garnishee-appellee.

Heard before SPENCER, MCCOWN, CLINTON, and BRODKEY, JJ., and COADY, District Judge.

SPENCER, J.

Alvena Tietsort appeals from an order of the District Court setting aside a default judgment after the term in which it was entered against Gerald Cavner, and dismissing a garnishment action against Farmers Insurance Group without prejudice. We affirm.

This case originated when the plaintiff and her husband filed a petition in the District Court for Wayne County on June 22, 1973, against Jerald Ranne as defendant. They sought to recover for property damage and loss of income resulting from Ranne's crashing an automobile into their greenhouse on March 26, 1973. Ranne was never served with process in the action.

On January 3, 1974, following the death of her husband, plaintiff filed an amended petition which named Gerald Cavner as an additional defendant. The petition alleged that the automobile driven by Ranne had been leased by Gerald Cavner and was being driven by Ranne within the scope of his employment by Cavner in a business operated under

the name and style of Salesway Company, with their main place of business at 8990 West Dodge Street in Omaha, Nebraska. The sheriff of Douglas County was unable to locate either of the defendants for service of process.

On April 1, 1974, summons for Gerald Cavner was delivered to the Secretary of State for constructive service upon him at R. R. # 7, Council Bluffs, Iowa, as provided by section 25-530, R. R. S. 1943. An affidavit filed by plaintiff's attorney states that a copy of the process, notice of service, and a copy of the petition and praecipe were mailed to defendant Cavner at R. R. # 7, Council Bluffs, Iowa, by certified mail. Cavner's address actually was R. R. # 3, Council Bluffs, Iowa. This service never reached Cavner.

On January 14, 1975, a special appearance on behalf of Gerald Cavner was filed by his attorneys. On April 30, 1975, George H. Moyer, Jr., Madison, Nebraska, who filed the special appearance for Cavner, wrote plaintiff's attorney as follows: "Dear Vince: I note from the Motion Calendar of Wayne County that our Special Appearance will come up for hearing on May 7.

"Please be advised that this Special Appearance may be overruled if we are allowed twenty days to plead further.

"Thank you."

On May 7, 1975, the hearing on the special appearance was continued to June 4, 1975, at 10 o'clock a.m. The record does not indicate on whose motion the continuance was granted, but we assume it was the plaintiff's. On June 4, 1975, at 9:05 a.m., George H. Moyer, Jr., filed a motion for leave to withdraw as counsel for the defendant, Gerald Cavner. His affidavit in support of the motion stated that he had made repeated demands upon the defendant for a retainer, which had not been paid; that he had requested Cavner to call his office and discuss the case

with him; that Cavner had failed and refused to do so; wherefore he was requesting leave to withdraw. Attached was an affidavit that he had served a copy of the foregoing motion for leave to withdraw upon all interested parties, including plaintiff's counsel, and upon Gerald Cavner by addressing the same to Cavner at Salesway Company, 8990 West Dodge Street, Omaha, Nebraska, the same being the last address of said defendant known to him.

On the same day, the 4th of June 1975, at 1:30 p.m., after the motion to withdraw had been served and filed, a journal entry was filed stating the attorneys for the parties had appeared before the judge; that the special appearance was overruled; and that the defendant Cavner was given 20 days from that date in which to further plead. Cavner's attorney had not appeared as stated in the entry. On July 2, 1975, counsel for defendant Cavner was given leave to withdraw.

On the 15th day of August 1975, plaintiff filed a motion against both defendants for default judgment. Certificate of service of plaintiff's counsel indicates that the motion was mailed by certified mail to Cavner at the Omaha address where he had been employed, where service had originally been attempted but had not been completed. On September 3, 1975, the hearing on the default judgment was continued until October 8, 1975, supposedly at the request of plaintiff's counsel. On October 8, 1975, a default judgment was rendered against both defendants in the amount of $15,695. Subsequently, garnishment process was served on Farmers Insurance Group.

On November 17, 1976, defendant Cavner filed a motion to vacate and set aside the default judgment entered against him, setting out that he was an employee of Salesway Company which had gone bankrupt; that he had never received any of the communications from his attorney, addressed to the ad-

dress of Salesway Company; and that he was never served with any summons herein. Defendant further stated he had never received any notice of the trial set for October 8, 1976, and had a meritorious defense to this action which is set out in the answer attached to his motion.

On January 25, 1977, the judge issued an order requiring plaintiff to show cause on February 2, 1977, why the judgment entered against defendant Ranne should not be vacated and set aside, and scheduled a hearing on defendant Cavner's motion to vacate the judgment entered against him for that time.

On February 2, 1977, the plaintiff appeared by her attorney and the judgment of October 8, 1975, as to the defendant Jerald Ranne, the driver of the automobile involved in the accident, was vacated and set aside. The motion to vacate the judgment against Cavner, Ranne's alleged employer, was continued to March 2, 1977. On March 2, 1977, the default judgment against Cavner was vacated and set aside, and the motion to dismiss the garnishment proceedings without prejudice was sustained.

It is undisputed no proper and sufficient service was had on either defendant previous to the time Cavner's motion for special appearance was overruled, and he was given 20 days to plead. His attorney did not appear although the journal entry states otherwise. The journal entry was drawn by plaintiff's counsel on the basis of the letter from Cavner's attorney. The journal entry signed by the court contained the following language: "The Court, in consideration of the files *and the agreement of the parties* finds that said Special Appearance should be and the same is hereby overruled, AND IT IS SO ORDERED." (Italics supplied.) A copy of this order was sent to Cavner's counsel who had withdrawn, and no objection was made to it. It would certainly appear to be negligence on the part of Cavner's attorney to permit a journal entry of this type

to remain of record if it did not express his understanding. The fact that no retainer had yet been received is not a sufficient reason to fail to protect a record even though permission to withdraw was granted.

We have no doubt Cavner's attorney did not intend to enter a general appearance. We doubt that he intended his letter to be used for that purpose. The entry was procured by plaintiff's counsel pursuant to Moyer's letter. He is the one who prepared the entry which stated the special appearance was overruled by agreement. We would interpret Moyer's letter to mean he did not care to argue the special appearance and had no objection to its being overruled. We assume he expected to file an answer reserving the special appearance. However, agreeing to the overruling of a special appearance on the record and requesting further time to plead enters a general appearance. It is one thing to submit a special appearance without argument and quite another to agree it should be overruled.

Cavner's attorney should have made a record that he did not expect plaintiff's attorney to use his letter to have an entry journalized showing an agreement to overrule the special appearance. This should have been done immediately upon the receipt of a copy of the entry. No such showing has been made herein. The failure to do so is the type of conduct which sometimes makes the general public suspicious of collusion between attorneys. While we are confident that is not present in this instance, the slipshod manner of representation does raise a question. We assume this is one of the irregularities found by the trial judge in setting aside the default judgment to permit a trial on the merits.

We assume the trial court, inasmuch as the default was set aside after term on motion, did so pursuant to sections 25-2001 and 25-2003, R. R. S. 1943. Section 25-2001, R. R. S. 1943, specifically grants the

power to the District Court to vacate or modify its own judgments after term time for the reasons stated therein. We believe subsection (3) is applicable herein. It provides "for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order." We agree with the trial court, the default should be set aside so that the case may be tried on its merits.

Defendant Cavner's affidavit and answer set out a meritorious defense. It is evident the trial judge found Cavner had no knowledge of his counsel's withdrawal or of the motion for a default judgment. If we assume that a general appearance had been entered for Cavner, the clerk of the District Court was required to comply with section 25-1301.01, R. R. S. 1943, which at the time pertinent herein, was as follows: "Within three days after the rendition of any judgment, except judgments by default rendered in divorce or separate maintenance cases, where proper service has been obtained or an appearance of the defaulting party has been made, the clerk of the court shall send a post card by United States mail to each party who has made an appearance in the action, or to his attorney or attorneys of record, advising that a judgment has been rendered and the date of rendition thereof."

The judgment was entered October 8, 1975. Stamped on the judgment entry is what we believe to be a certificate of service. However, the imprint is so poor that much of it is practically illegible. It does indicate, however, a date, the 13th day of October 1975, which is 5 rather than 3 days after the entry of the default judgment. If an attempt was made to comply with section 25-1301.01, R. R. S. 1943, it was not done within the time specified by that section. Even so, the question remains, was it mailed to the attorney who no longer was an attorney of record, or was it mailed to Cavner? The record would indicate it was the former which would not be notice

to Cavner. Cavner no longer had an attorney of record so notice to him was necessary.

If the postcard was mailed to Cavner, there is nothing in the record to indicate to what address it was sent. If sent to Cavner, which we doubt, we would assume it probably was sent to the same address used by plaintiff's attorney for the notice to take default judgment. This was the business address of Cavner's employer where plaintiff had originally attempted to have Cavner served by the sheriff of Douglas County. Plaintiff knew from previous attempts that Cavner could not be found at that address. We realize this address was taken from the affidavit of Cavner's attorney. It was evident, however, that it was not a home address but rather an address at a place of business of a bankrupt company in Omaha, Nebraska. The failure to properly comply with section 25-1301.01, R. R. S. 1943, is at least an irregularity which prevented Cavner from receiving proper notice if his attorney, who was no longer of record, had entered a general appearance for him. The combination of irregularities herein was sufficient to permit the trial judge to vacate the default judgment rendered October 8, 1975. See Simmons v. Lincoln, 176 Neb. 71, 125 N. W. 2d 63 (1963), where we held when the party did not learn of an order overruling a motion for new trial because of a failure to comply with section 25-1301.01, R. R. S. 1943, the order should be vacated.

Defendant was not an owner but an employee of Salesway Company which went bankrupt during the spring of 1975. The other defendant, Jerald Ranne, was also employed by the same company. Cavner denies that Jerald Ranne was ever employed by him in any capacity. The record indicates Cavner left the employ of Salesway Company when it became bankrupt during the spring of 1975. This was several weeks before his attorney withdrew his appearance. The record would indicate mail directed to

Cavner at the place of business of Salesway Company was never forwarded to him because of the bankruptcy of said company.

It is undisputed no service of any nature was ever made on Jerald Ranne, the operator of the automobile which struck the plaintiff's greenhouse. The judgment entered against him was set aside and no appeal has been taken from that action. Cavner is not a joint tort-feasor in the technical sense. His liability, if the allegations of plaintiff's amended petition are proved, is purely derivative, stemming from the sole negligence of Ranne and resting upon the employer-principal only because of the doctrine of respondeat superior. Cavner's liability, if any, is based not on his own misdeeds but those of Ranne, his alleged employee. Dickey v. Estate of Meier, 188 Neb. 420, 197 N. W. 2d 385 (1972).

For the reasons stated, Cavner should have his day in court. The judgment is affirmed.

AFFIRMED.

BLANCHE E. WEBER, APPELLEE AND CROSS-APPELLANT, V. LEROY WARING WEBER, APPELLANT AND CROSS-APPELLEE.

265 N. W. 2d 436

Filed April 19, 1978. No. 41416.

1. **Divorce: States.** The area of domestic relations is virtually the exclusive province of the states, which have the right to prescribe the conditions upon which the marriage relation between their own citizens shall be created and dissolved, and which have an interest in the continuation and dissolution of the marital relation.
2. **Divorce: Legislature.** Public policy concerning divorce and its incidents is a matter for the Legislature, not the courts, to decide.
3. **Divorce: Statutes: Domicile.** Under section 42-341, R. R. S. 1943, a divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state if both parties to the marriage were domiciled in this state at the time the proceeding for divorce was commenced.
4. **Divorce: Comity.** Recognition of foreign divorce decrees under the principles of comity is neither a matter of absolute obligation

nor mere courtesy. As a general rule, a foreign judgment will not be given effect under the principles of comity if opposed to the settled public policy of this state.

5. **Divorce: Comity: Estoppel.** A person may be estopped from attacking the validity of a foreign divorce decree if, under the circumstances, it would be inequitable for him or her to do so.
6. **Estoppel.** The application of the principles of equitable estoppel cannot be subjected to fixed and settled rules of universal application, but rests largely on the facts and circumstances of each particular case.
7. **Divorce: Statutes: Property.** Under section 42-366, R. R. S. 1943, a property settlement agreement entered into by the parties to a marriage shall not be binding upon the trial court if, considering the economic circumstances of the parties and any other relevant evidence, the agreement is unconscionable. An agreement is unconscionable when it is manifestly unfair or inequitable.
8. **Divorce: Property.** This court is not inclined to disturb the division of property made by the trial court in a divorce action unless it is patently unfair on the record, or unless good cause is shown.
9. **Divorce: Attorney's Fees.** An award of attorney's fees in a divorce action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

Appeal from the District Court for Sarpy County: ORVILLE L. COADY, Judge. Affirmed as modified.

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

Dixon G. Adams, for appellee.

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

BRODKEY, J.

Blanche Weber, petitioner and appellee herein, filed this divorce action in the District Court for Sarpy County on September 19, 1975, seeking to dissolve her marriage to LeRoy "Jim" Weber, respondent and appellant herein, on the ground that the marriage was irretrievably broken. Petitioner

prayed, in part, for an award of alimony and an equitable distribution of property acquired during the marriage. The respondent appeared specially, objecting to the jurisdiction of the court on the grounds that the parties had been divorced in the Dominican Republic on January 13, 1975, and that they had executed a valid property settlement in conjunction with the foreign divorce.

The District Court concluded that it should not recognize the Dominican Republic divorce decree, and that the property settlement executed by the parties in conjunction with that decree was not binding on the petitioner because it was unconscionable. The trial court dissolved the marriage of the parties, and awarded the petitioner the family residence, an automobile, personal property in her possession, and the sum of $160,000 in lieu of a property settlement. The money judgment, with eight percent interest thereon, was ordered to be paid at the rate of $8,000 per year, although the respondent was granted the right to accelerate payments. The petitioner also received an award of $2,450 for attorney's fees.

The respondent has appealed to this court, contending that the District Court erred in (1) failing to recognize the foreign divorce decree; (2) finding that the property settlement executed by the parties was unconscionable; (3) failing to hold sections 42-341 and 42-366, R. R. S. 1943, unconstitutional; and (4) awarding the petitioner a disproportionate share of the property. The petitioner has cross-appealed, contending that the award of attorney's fees was inadequate. We affirm the judgment of the District Court, but increase the amount of attorney's fees awarded plaintiff.

The parties were married in 1950, when both were students, and neither brought any significant amount of money or property to the marriage. Between 1951 and 1958, the wife worked as a nurse, and the husband was in the Air Force and attended law

school. During this period of time, both contributed income to the marriage, and the husband's contributions were equal to, or exceeded, the contributions of the wife. The wife worked as a nurse until 1960, by which time the husband had established a law practice. The wife then retired from nursing to care for their two children and home. She resumed her career in nursing in 1971, and now earns an annual gross income of approximately $11,000.

The husband has had a successful law practice since 1960, and during the course of the marriage handled the family finances. He made sound investments in real property and stocks, and by 1975 had built up a sizable marital estate. The total value of the personal and real property, the cash value of insurance policies, and stocks acquired by the parties during the marriage was disputed at trial. Evidence presented by the husband indicated that the value of the marital estate was between $345,000 and $390,000, while the wife's evidence indicated that the value was approximately $500,000. The trial court found that the value was in excess of $449,000.

Marital difficulties arose as early as 1970. In January 1975, the parties agreed that they should be divorced, and the husband suggested that a foreign divorce be obtained to avoid the "notoriety" of local divorce proceedings. The husband secured a "power of attorney" form from a Miami attorney for use in divorce proceedings in the Dominican Republic and the wife signed it, although she never at any time before or after those proceedings met the attorney or spoke with him. The husband also drafted a property settlement agreement, dated January 7, 1975. Under this agreement, the wife was to receive various household furnishings, a 1969 automobile, and gross alimony in the amount of $12,100, payable at the rate $100 per month. She was also to receive a life estate in the family residence. The husband agreed to pay child support in the amount

of $75 per month for each of two children, the custody of whom was to be awarded to the wife. All other property acquired during the course of the marriage was to be the property of the husband. The wife signed the agreement, without consultation with or advice of counsel.

The husband then traveled to the Dominican Republic for 2 days and secured a divorce in that country. In the Dominican Republic decree it is stated that the parties expressly submitted to the jurisdiction of the court, and that the wife appeared before the court by her attorney. The decree also recites that both the husband and wife were domiciliaries of Nebraska. The basis of the foreign decree as set forth therein, was "incompatibility of temperaments." It is important to note the decree further expressly provided that the property settlement agreement executed by the parties was not affected nor modified by the judgment, and would survive in the form established by the laws of the place where the document was signed.

The husband then moved out of the family residence, and made alimony and support payments as provided in the property settlement agreement. He also had the wife sign quitclaim deeds to the real property granted to him under the agreement. At no time during this time period did the wife obtain the advice of an attorney. However, in September 1975 she did consult counsel, and this action was filed immediately thereafter.

We first consider respondent's contention that the trial court erred in failing to recognize the Dominican Republic divorce decree. Section 42-341, R. R. S. 1943, provides: "A divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state, if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced." It is clear that the foreign divorce in this case falls

within the provisions of section 42-341, R. R. S. 1943, as it is undisputed that the parties were Nebraska domiciliaries at the time the Dominican Republic proceeding was commenced.

Respondent contends, however, that section 42-341, R. R. S. 1943, is unconstitutional because it violates his right to due process and equal protection of the laws. In summary, he argues that the statutory provision is overbroad, arbitrary, and capricious, and denies him fundamental freedom of choice in matters relating to marriage and family life. Respondent relies on cases such as Cleveland Board of Education v. LaFleur, 414 U. S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974); Eisenstadt v. Baird, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); and Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). These cases, however, do not deal with, or discuss, the constitutional validity of a statutory provision like section 42-341, R. R. S. 1943, nor do they, or any other cases, support respondent's contention that he has a fundamental right to have a foreign divorce decree recognized by the courts of this state when both he and his spouse are Nebraska domiciliaries.

The area of domestic relations is one that has long been regarded as a virtually exclusive province of the states, which have the right to prescribe the conditions upon which the marriage relation between their own citizens shall be created and dissolved. See Sosna v. Iowa, 419 U. S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975). The state is impliedly a party to the marriage contract, and has an interest in the continuance and dissolution of the marital relation. Binger v. Binger, 158 Neb. 444, 63 N. W. 2d 784 (1954); Dudgeon v. Dudgeon, 142 Neb. 82, 5 N. W. 2d 133 (1942); Lippincott v. Lippincott, 141 Neb. 186, 3 N. W. 2d 207 (1942). Public policy concerning divorce and its incidents is a matter for the Legislature, not the courts, to decide. Detter v. Erpelding,

176 Neb. 600, 126 N. W. 2d 827 (1964). We believe it apparent that the Legislature may properly deny recognition of foreign divorce decrees when the parties are domiciliaries of this state in order to promote its policy of preventing fraud, deceit, and artifice in the procuring of divorces, and of protecting the interests of Nebraska domiciliaries from being compromised in quick foreign divorce proceedings. See, Yost v. Yost, 161 Neb. 164, 72 N. W. 2d 689 (1955); Zenker v. Zenker, 161 Neb. 200, 72 N. W. 2d 809 (1955). Section 42-341, R. R. S. 1943, bears a rational relation to valid state purposes, and respondent has cited no case which holds that a statutory provision like section 42-341, R. R. S. 1943, is unconstitutional on grounds that it violates due process of law or equal protection of the laws. His contention is clearly without merit.

Respondent next contends that despite section 42-341, R. R. S. 1943, we should recognize the Dominican Republic divorce decree as a matter of comity. Comity is neither a matter of absolute obligation nor mere courtesy. As a general rule, a foreign judgment will not be given effect under the principles of comity if opposed to the settled public policy of this state. See, Green Finance Co. v. Becker, 151 Neb. 479, 37 N. W. 2d 794 (1949); Kindler v. Kindler, 169 Neb. 153, 98 N. W. 2d 881 (1959).

With the exception of New York, the rule adopted by other states is that "bilateral" divorce decrees, rendered upon the physical presence of the petitioning spouse in the divorcing nation, and the voluntary appearance of the respondent spouse through an attorney, are not entitled to domestic recognition under the principles of comity. See Annotation, Domestic Recognition of Divorce Decree Obtained in Foreign Country and Attacked for Lack of Domicil or Jurisdiction of the Parties, 13 A. L. R. 3d, § 3 (d), at p. 1433. Regardless of the validity of the decree in the nation awarding it, courts in this country have gen-

erally not recognized a foreign judgment of divorce unless, by the standards of the jurisdiction in which recognition is sought, at least one of the spouses was a good-faith domiciliary in the foreign nation at the time the decree was rendered. Annotation, 13 A. L. R. 3d, § 3 (a), at p. 1425.

In enacting section 42-341, R. R. S. 1943, the Legislature of this state has made clear its policy of refusing to recognize quick foreign divorces by domiciliaries of this state. Yost v. Yost, *supra*. In view of this legislative declaration of public policy, we, as well as other courts, decline to extend comity to a divorce obtained in a foreign country when the parties are Nebraska domiciliaries. See In re Estate of Steffke, 65 Wis. 2d 199, 222 N. W. 2d 628 (1974).

Respondent next contends that the petitioner should be estopped from attacking the Dominican Republic decree because she voluntarily submitted to the jurisdiction of the foreign court, and accepted the benefits of the foreign decree. In a proper case, a person may be precluded from attacking the validity of a foreign divorce decree if, under the circumstances, it would be inequitable for him or her to do so. See, Zenker v. Zenker, *supra*; Restatement, Conflict of Laws 2d, § 74, at p. 224. Such inequity may exist when action has been taken in reliance on the divorce, or when the attack on the divorce is inconsistent with the earlier conduct of the attacking party. Restatement, Conflict of Laws 2d, § 74, Comment b, at p. 225. In cases involving foreign divorce decrees, as in other situations, however, the application of the principles of equitable estoppel cannot be subjected to fixed and settled rules of universal application, but rests largely on the facts and circumstances of each particular case. See Luther v. Sohl, 186 Neb. 119, 181 N. W. 2d 268 (1970).

As respondent notes, it is true that the petitioner in this case was aware that the foreign divorce decree was being obtained, and she took part in the Domini-

can Republic proceedings to the extent of granting a power of attorney to local counsel. An important factor in this case, however, is that the respondent, an attorney, was the dominant figure in obtaining the foreign decree, and he persuaded the petitioner to act when he knew she was without the aid of counsel, and was not knowledgeable with respect to applicable law and her rights thereunder. The record also reveals that the petitioner was not fully aware of the amount of property acquired by the parties since the marriage, as the respondent controlled the family finances to the exclusion of the petitioner. Finally, the record does not reflect that either party, in reliance on the foreign divorce, altered his or her position in such a manner that it would now be inequitable to permit the petitioner to challenge the decree. Under the circumstances of this particular case, we believe, the trial court was correct in its finding that the petitioner should not be estopped from attacking the Dominican Republic decree. See Warrender v. Warrender, 79 N. J. Super. 114, 190 A. 2d 684 (1963), affirmed, 42 N. J. 287, 200 A. 2d 123 (1964), a case with facts analogous to those in the present case, where the court refused to apply the principles of estoppel.

The next issue presented is whether the trial court erred in concluding that the property settlement agreement executed by the parties was unconscionable and therefore not binding on the petitioner. Section 42-366, R. R. S. 1943, provides that parties to a marriage may enter into a written property settlement agreement to promote the amicable settlement of disputes attendant upon their separation or the dissolution of their marriage. Subsection (2) of section 42-366, R. R. S. 1943, provides: "In a proceeding for dissolution of marriage or for legal separation, the terms of the agreement, * * * shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and

any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable." Under subsection (3) of section 42-366, R. R. S. 1943, if the court finds that the agreement is unconscionable, it may make orders for the disposition of property, support and maintenance.

Respondent contends that subsection (2) of section 42-366, R. R. S. 1943, is unconstitutional because the term "unconscionable" is so "ethereal that it defies definition," and because the statute provides no standards by which such an agreement may be judged. Respondent also argues that the statutory provision violates the rights of the parties to a contract.

Neither contention has merit. The term "unconscionable" as used in statutes like section 42-366, R. R. S. 1943, has been interpreted as meaning "manifestly unfair or inequitable." See Wilhoit v. Wilhoit, 506 S. W. 2d 511 (Ky., 1974). As we stated in Prochazka v. Prochazka, 198 Neb. 525, 253 N. W. 2d 407 (1977), in discussing the applicability of section 42-366, R. R. S. 1943, to a property settlement agreement, the question is whether the evidence shows "any circumstance, economic or otherwise, which operates to render the effect of the agreement unjust to either party or obviously excessive in respect to benefits or burdens on either side." The term unconscionable is not vague, nor is the Legislature required to set forth specific standards of application since the question of whether an agreement is manifestly unfair or inequitable depends on the particular circumstances of each case.

The respondent cites no authorities in support of his argument that section 42-366, R. R. S. 1943, violates the rights of the parties to enter into a contract and to rely upon it. The statutory provision merely establishes that an unconscionable agreement is not binding on the trial court; it does not

prohibit parties from entering into a contract which is not manifestly unfair or inequitable. As already noted above, the state has an interest in the dissolution of the marital relation, and therefore the Legislature may properly require that property settlements be "conscionable."

There can be little doubt that the property settlement agreement in this case was unconscionable. Under the agreement, the petitioner received only a life estate in the family residence, a 1969 automobile, and gross alimony in the amount of $12,100. As will be discussed hereinafter, the marital estate had a value of approximately $400,000 to $450,000. The petitioner not only made contributions to the marriage as a homemaker, but contributed her entire income during 12 years of the marriage. Also relevant is the fact that the respondent drafted the agreement, and was acting from a superior position of knowledge with respect to the law and the value of the marital estate, while the petitioner had neither the benefit of counsel nor knowledge of her legal rights and the value of property acquired during the marriage. Under the particular circumstances of this case, the agreement was manifestly unfair and inequitable.

Respondent's final contention is that the District Court awarded a disproportionate share of the marital estate to the petitioner. His primary argument is that the marital estate was acquired almost entirely through his efforts and as a result of his contributions, and that therefore the petitioner is not entitled to share in any significant portion of it. We do not find this argument persuasive.

Section 42-365, R. S. Supp., 1976, provides that in awarding alimony or dividing property the trial court should consider 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." In determining what is appropriate in a particular case, the court may consider alimony and property rights together. Gottschalk v. Gottschalk, 197 Neb. 437, 249 N. W. 2d 502 (1977). This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record, or unless good cause is shown. See, Abbott v. Abbott, 196 Neb. 97, 241 N. W. 2d 527 (1976); Schmer v. Schmer, 197 Neb. 800, 251 N. W. 2d 167 (1977); Mathias v. Mathias, 194 Neb. 598, 234 N. W. 2d 212 (1975).

The marriage in the present case was of a duration of about 25 years. Neither party brought any significant property to the marriage, and neither inherited nor was given property during the course of the marriage. During thirteen years of the marriage the petitioner was employed and contributed her income, and in the other years she served as a homemaker and cared for the children, interrupting her career to do so. Although it is true that the respondent was the party who made the investments which led to the accumulation of the marital estate, and that he worked diligently, it is apparent that the petitioner's contributions assisted him in this endeavor.

Although the evidence with respect to the value of the marital estate was conflicting, we do not believe that the trial court erred in concluding that the value was approximately $449,000. We have carefully reviewed the exhibits and testimony presented at trial, and find that they support the findings of the trial court. The petitioner was awarded $160,000 and the family residence, which had a value of approximately $40,000. Therefore her total award was $200,000, or approximately 45 percent of the marital

estate. Petitioner received no alimony. This award was well within the limits previously approved by this court. See Mathias v. Mathias, *supra*.

We do not believe, under the circumstances of this case, the fact that respondent made the investments and worked industriously to accumulate a substantial marital estate, warrants a reduction of the award. The contributions of the petitioner were significant, and are not minimized simply because her efforts were not directly involved with the accumulation of property. She did contribute her income to the marriage for many years, and cooperated to live very frugally so that funds could be invested. In a marriage relationship each spouse should ordinarily be entitled to share in the property the parties accumulate during the course of the marriage when both make contributions, monetary or otherwise. We conclude that the division of property in this case was reasonable.

The final issue in this case is whether the trial court erred by failing to award fair and reasonable attorney's fees to the petitioner. The award granted by the District Court was $2,450. The award of attorney's fees involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. See, Barnes v. Barnes, 192 Neb. 295, 220 N. W. 2d 22 (1974); Fotinos v. Fotinos, 184 Neb. 486, 168 N. W. 2d 698 (1969); Junker v. Junker, 188 Neb. 555, 198 N. W. 2d 189 (1972); Holmes v. Holmes, 152 Neb. 556, 41 N. W. 2d 919 (1950).

The present case is obviously not an ordinary or typical divorce action in light of the issues raised by the foreign decree, the property settlement, and the

sizable marital estate involved. The record and petitioner's brief on appeal indicate that her counsel has devoted considerable time to the preparation and presentation of her case, and has demonstrated commendable skill in so doing. Under the circumstances of this case we believe that an award of $4,000 is appropriate for legal services rendered in connection with the proceedings in the District Court. We also make an additional award of $2,500 for services rendered by petitioner's attorney on appeal. Therefore we modify the award of attorney's fees made by the District Court to $4,000, and also award an additional $2,500 for services rendered on appeal. This total award of $6,500 is in line with awards in other cases. See, Shomaker v. Shomaker, 166 Neb. 164, 88 N. W. 2d 221 (1958); Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368 (1957).

As modified, the judgment of the District Court is affirmed.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF BENJAMIN F. ROBERTS, ALSO KNOWN AS BENJAMIN F. ROBERTS, JR. INA P. ROBERTS, APPELLANT, V. SHRINERS HOSPITALS FOR CRIPPLED CHILDREN ET AL., APPELLEES.

264 N. W. 2d 865

Filed April 19, 1978. No. 41436.

1. **Contracts: Property: Estates.** Presumably a wife joins in a land contract solely to release her inchoate right of inheritance, but the presumption is rebuttable, and is to be accorded effect in the absence of a showing to the contrary.
2. _____: _____: _____. Evidence sufficient to rebut a presumption that a wife has joined with her husband in a land contract solely to release her inchoate right of inheritance must be special language which is inserted in the contract and tends to establish an agreement that the wife is to share in the ownership of payments to be made or evidence dehors the contract tending to prove such an agreement.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

J. L. Zimmerman of Atkins, Ferguson, Hahn, Zimmerman & Hansen, for appellant.

Wright & Simmons and George A. Summer, for appellees.

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

WHITE, C. J.

This action revolves around two real estate contracts and the proceeds thereof. Following the death of her husband, appellant Ina P. Roberts was named executrix of his estate. At first, appellant listed the full value of these contracts and a check in payment thereon as assets of her husband's estate. Appellant subsequently altered her position and filed an amended inventory which listed only one-half of the value of these contracts and the check as assets of her husband's estate. Appellant filed a petition with the county court of Scotts Bluff County for approval of her final accounting. Objections to this final accounting were filed by several of the legatees of her husband's will. The county court held that the real estate contracts were assets of the estate of Benjamin F. Roberts. Appellant, in her capacity as executrix and in her individual capacity, appealed from the decree of the county court to the District Court. The District Court held that the real estate contracts and the proceeds thereof were assets of the estate of Benjamin F. Roberts and that appellant had no interest therein, except as provided under her husband's will. Appellant has appealed from the determination of the District Court. We affirm the judgment of the District Court.

The facts are not in dispute. Benjamin F. Roberts was the sole record title holder of certain real estate, which was the subject of the two contracts,

from the date of his marriage to appellant until the date of his death. Except for the two real estate contracts in question, he never signed any instrument which would constitute a conveyance of this real estate.

On January 26, 1973, the first real estate contract was entered into. It provided for a purchase price of $74,000, with $21,000 payable before closing and the balance of $53,000 to be paid in 11 installments over a 10-year period. Purchasers were James and Linda Bourret and Tom and Bonita Broderick. The introductory paragraph named Benjamin F. Roberts, Jr., and Ina P. Roberts, husband and wife, and designated them collectively thereafter as "ROBERTS." The contract stated that, "ROBERTS have this day sold * * * and [the purchasers] have this day purchased from ROBERTS * * *." The obligations and rights throughout the contract run to and from "ROBERTS." Both appellant and her husband signed the contract as "Sellers."

The second contract was entered into on February 7, 1973, the purchasers being John and Wanda Adams. This contract called for a total purchase price of $160,000, with $46,400 due before closing and the balance of $113,600 payable in 11 installments over a 10-year period. The second contract was essentially the same as the first, with both Mr. and Mrs. Roberts named and collectively designated as "ROBERTS"; obligations and rights running to and from "ROBERTS"; and with both appellant and her husband signing as "Sellers."

The same realtor handled both transactions which were both closed on March 12, 1973. On that date, a check was issued by the realtor to "Benjamin F. Roberts and Ina P. Roberts" representing the amount of the closing balance due the sellers, $55,152.25. Mr. Roberts died on March 16, 1973, without having deposited or cashed the check.

The sole question on appeal is whether appellant

has a one-half interest in the real estate contracts and the proceeds thereof as she contends. Appellant's argument, boiled down, is that by her being named in the contracts, she and her husband being referred to collectively as "ROBERTS" in the contracts, the buyers' obligations under the contracts running to "ROBERTS," and her signing with her husband as a seller, therefore, a one-half interest was created in her in the contract and the proceeds thereof. She cites the well-established rule that where a conveyance of property is to two or more persons, and the instrument is silent as to the interest which each is to take, the presumption is that their interests are equal. See Hoover v. Haller, 146 Neb. 697, 21 N. W. 2d 450 (1946).

Appellant's argument is without merit. The real estate contract did not convey or otherwise create any interest in her. She merely joined with her husband who was the sole record title holder of this real estate in the conveyance.

Hendricks v. Wolf, 279 Mich. 598, 273 N. W. 282 (1937), involved a similar factual situation. Plaintiff's husband owned a number of lots in a subdivision. A portion of these lots were sold on land contracts. In all the land contracts plaintiff and her husband were named as vendors in the following manner: "Augustin Hendricks and Gertrude M. Hendricks, his wife, and also in her own right." Following the death of her husband, plaintiff filed suit against the administrator of his estate, contending that she had an interest in the contracts. In affirming a decree for the defendant, the court stated: "Plaintiff further argues that although section 13071 has no application to contracts executed prior to September 5, 1927, nevertheless she is entitled to one-half interest in the contracts theretofore executed. In support thereof she submits that because she joined in the execution of the contracts, an inten-

tion to make a gift to her of a one-half interest therein was established. * * *

"Prior to the execution of any of the contracts, the legal title was held in the name of plaintiff's deceased husband. In the absence of a showing to the contrary, it must be presumed that plaintiff joined in the execution of the contracts for the purpose of barring her inchoate dower rights."

Estate of Fischer, 22 Wis. 2d 637, 126 N. W. 2d 596 (1964), involved an action by a widow to amend the inventory filed in the estate of her deceased husband to strike therefrom a land contract. The court held that the contract was properly included as an asset of the husband's estate. The land involved was in the name of the husband. Both the husband and the wife were named in the contract as vendors and payments thereunder were payable to vendors. The court adopted the presumption of Hendricks v. Wolf, *supra*, and stated: "As enunciated by the Michigan court, this presumption, that the wife joined the land contract solely to release her inchoate right of dower, is clearly a rebuttable one * * *. Evidence sufficient to rebut the presumption would necessarily have to be either special language inserted in the contract tending to establish an agreement between the husband and wife vendors that the wife was to share in the ownership of the payments to be made by the vendee thereunder, or evidence that the contract tended to prove such an agreement." See, also, Estate of Martin, 22 Wis. 2d 649, 126 N. W. 2d 549 (1964).

Pauley v. Knouse, 109 Neb. 716, 192 N. W. 195 (1923), involved an action for breach of warranty on a deed. The question was whether the wife, who also signed the deed, was jointly liable with the husband. The court held that she was not, stating: "The title to the premises conveyed in this instance was exclusively in the defendant Earl Knouse. The defendant Bertha M. Knouse was his wife, and, it not

appearing that she had a greater interest, she presumably joined her husband in the conveyance to plaintiff for the purpose only of relinquishing such contingent interest, if any, she may have had in the premises as such wife." See, also, Pochin v. Conley, 74 Neb. 429, 104 N. W. 878 (1905).

We start then with the presumption that appellant joined in these real estate contracts with her husband, who was the sole record title holder of the subject real estate, during the course of their marriage, in order to bar any interest she may have had in the subject real estate. Was this presumption rebutted? We believe not.

We find no special language in the contracts indicating that appellant was to own the proceeds thereof jointly with her husband. While appellant's evidence shows a general pattern of sharing, as is not unnatural, between appellant and her husband, we find no evidence of any specific agreement that appellant was to share in the proceeds of these contracts.

The evidence indicates that appellant's husband attempted to deposit the realtor's check in a joint bank account maintained with appellant. He died, however, before he could accomplish this. Viewed most favorably for appellant, this merely shows a present intention on his part to make a future gift. Had he succeeded in depositing the realtor's check, and any other checks from those contracts, into his joint account with appellant, then she would, upon such deposit, have acquired an interest in those proceeds actually deposited. Death, however, intervened and frustrated whatever plans her husband may have had in this regard.

Other contentions raised by the appellant have been examined and are found to be without merit. The District Court correctly concluded that the full value of the two land contracts and the proceeds thereof should be included as assets of the estate of Benjamin F. Roberts, Jr., deceased.

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

AFFIRMED.

IN RE ESTATE OF WILLIAM KITTENBRINK, DECEASED. HUGH R. RALSTON, EXECUTOR OF THE ESTATE OF WILLIAM KITTENBRINK, AND HUGH R. RALSTON, AN INDIVIDUAL, APPELLANT, V. COUNTY OF DAWSON, NEBRASKA, ET AL., APPELLEES.

264 N. W. 2d 868

Filed April 19, 1978. No. 41457.

1. **Taxation: Legislature.** The Legislature has a broad discretion in making classifications for the purpose of excise taxes.
2. **Taxation: Constitutional Law.** A tax classification, although discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it.
3. **Taxation: Legislature.** The matter of the exemptions in the inheritance tax law, to whom they apply and the amount thereof, is a legislative matter and not a judicial prerogative.
4. **Taxation: Constitutional Law.** Previous inheritance tax law which distinguished between nephews related by blood and nephews related by marriage is constitutional.

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

Cook, Lubberstedt & Kopf, for appellant.

Willard C. Weinhold, for appellee County of Dawson.

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

BOSLAUGH, J.

William Kittenbrink died testate on September 23, 1974. The principal beneficiaries of his estate were the Methodist Church of Gothenburg, Nebraska; the Gothenburg Memorial Hospital; and Hugh R. Ralston, a nephew of his deceased wife.

The county court of Dawson County, Nebraska, found and determined that the value of the property which passed to Ralston from the decedent was $1,729,062.62 and that the total amount of inheritance tax due from Ralston was $308,591.27. From this order Ralston appealed to the District Court where the order was affirmed. Ralston has now appealed to this court.

Ralston contends that inheritance tax statutes which classify beneficiaries according to kinship are unconstitutional and that in any event he should be treated the same as a blood nephew of the testator even though there was no blood relationship between them.

At the time of the death of the testator, the inheritance tax statute, sections 77-2005 and 77-2006, R. R. S. 1943, provided as follows: "In the case of an uncle, aunt, niece, or nephew related to the deceased by blood or legal adoption, or other lineal descendant of the same, the rate of tax shall be six per cent of the clear market value of the property received by each person in excess of two thousand dollars and not exceeding sixty thousand dollars; and on all the excess over sixty thousand dollars, the rate of tax shall be nine per cent." § 77-2005, R. R. S. 1943. "In all other cases the rate of tax on the clear market value of the beneficial interests shall be as follows: (1) For any amount not exceeding five thousand dollars, six per cent; (2) on all the excess of beneficial interests over five thousand dollars and not exceeding ten thousand dollars, nine per cent; (3) on all the excess of beneficial interests over ten thousand dollars, and not exceeding twenty thousand dollars, twelve per cent; (4) on all the excess of beneficial interests over twenty thousand dollars and not exceeding fifty thousand dollars, fifteen per cent; and (5) on all the excess of beneficial interests over fifty thousand dollars, eighteen per cent; Provided, the rate of tax shall be applied to each in-

heritance only to the amount of the beneficial interest received in excess of five hundred dollars, and if the inheritance is five hundred dollars or less it shall not be subject to any tax." § 77-2006, R. R. S. 1943.

If the appellant were taxed as a nephew related to the deceased by blood, under section 77-2005, R. R. S. 1943, the inheritance tax due would be $153,695.64, approximately 50 percent of the amount due under section 77-2006, R. R. S. 1943.

In 1976 the Legislature amended the inheritance tax law, effective January 1, 1977, so that it now provides that "relatives of the decedent shall include relatives of a former spouse to whom the decedent was married at the time of the death of the former spouse." § 77-2005.01 (1), R. R. S. 1943. The effect of this amendment so far as a nephew is concerned is to eliminate the distinction between a nephew related by blood and a nephew by marriage.

The Chairman of the Judiciary Committee of the Legislature at the time the statute was amended testified at trial that a legislative study had disclosed "there was just no rational basis in fact for making a distinction as to matter of blood or non-blood relatives in this kind of situation. We could just find no reason whatsoever, no rationale, no reason was ever brought forth, and all that there was was a complaint about the fact there was a difference." The appellant in effect argues that this testimony was binding on the court and established that the classification which existed prior to 1976 did not rest upon real differences in situation and circumstances and was illegal and unconstitutional.

This testimony in regard to the legislative findings which led to the 1976 amendments to the inheritance tax law was an explanation by the witness as to why the statute was amended. To some extent it was in the nature of an opinion or judgment as distinguished from a conclusion of fact. Generally, such testimony is of limited use in statutory construction.

See, 2A Sutherland Statutory Construction (4th Ed.), § 48.16, p. 222; 82 C. J. S., Statutes, § 361, p. 792.

The question is not what the Legislature found in 1976 but what the Legislature could find at the time the distinction was made between nephews related to the deceased by blood or adoption and nephews by marriage. Essentially, this is a question of law.

The rule is well established that the Legislature has a broad discretion in making classifications for the purpose of excise taxes. In Anderson v. Tiemann, 182 Neb. 393, 155 N. W. 2d 322, we said: "The power of a state to make reasonable and natural classifications for purposes of taxation is clear and unquestioned. 'That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy. * * * Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it.' Allied Stores of Ohio, Inc. v. Bowers, 358 U. S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480." See, also, 42 Am. Jur. 2d, Inheritance, Estate, and Gift Taxes, § 16, p. 233. In Todd v. County of Box Butte, 169 Neb. 311, 99 N. W. 2d 245, this court noted that the matter of exemptions in the inheritance tax law, to whom they apply and the amount thereof, is a legislative matter and not a judicial prerogative. In the Todd case a section applicable to the "husband of a daughter" was held not applicable to the husband of a deceased daughter.

It is generally held that an inheritance tax law may create a distinction in favor of kindred in the direct line as against collateral kindred or strangers in blood with respect to exemptions and the rate of taxation. See 42 Am. Jur. 2d, Inheritance, Estate, and Gift Taxes, § 19, p. 238. In First National Bank of Denver v. People, 183 Colo. 320, 516 P. 2d 639, a

classification as between a grandchild and a step-grandchild for the purposes of inheritance tax was upheld on the ground that the legislative scheme comported with the natural law of kinship. In Beals v. Commissioner of Corp. & Taxation (Mass.), 352 N. E. 2d 692, a classification as between adopted children and natural children of lineal descendants was held valid even though the distinction had been abolished in the probate law and prospectively in the inheritance tax law. In the Beals case the court said: "Although the Legislature has abolished such a distinction prospectively for tax purposes and even more generally for the purpose of construing wills and trust instruments (as we have assumed for the purposes of this case), there was no constitutional requirement that the distinction be eliminated in its entirety. The rational basis which sustained the earlier, general distinction may sustain, as well, the vestigial distinction in the inheritance tax law." See, also, In re Estate of Hagar, 98 Vt. 235, 126 A. 507.

The appellant cites and relies upon Williams v. State, 81 N. H. 341, 125 A. 661. In the Williams case the court recognized that similar legislation had been upheld in many other jurisdictions but felt the decision was controlled by a constitutional interpretation peculiar to New Hampshire.

The appellant's other contention is that the statute is ambiguous and the court should adopt a construction that would avoid unconstitutionality. We find no ambiguity in the language of section 77-2005, R. R. S. 1943, as it existed at the time of the death of the testator, and for the reasons stated above, the statute was not unconstitutional.

The judgment of the District Court is affirmed.

AFFIRMED.

PROFESSIONAL COLLECTION SERVICE, APPELLEE, V. GARY COBLE, APPELLANT, IMPLEADED WITH JANET COBLE, APPELLEE.

264 N. W. 2d 686

Filed April 19, 1978. No. 41459.

Pleadings: Waiver. An objection to the name in which a suit is brought must be made before trial or it is waived.

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

Thomas O. David, for appellant.

Jess C. Nielsen of Crosby & Nielsen, for appellee Professional Collection Service.

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

PER CURIAM.

This was an action in the county court of Lincoln County, Nebraska, upon an account by Professional Collection Service against Gary Coble and Janet Coble. There was no service upon the defendant Janet Coble and she made no appearance in the county court. The plaintiff recovered judgment in the county court against "defendant" in the amount of $939.76 plus attorney fees in the amount of $98.98 and interest and costs. The defendant Gary Coble then appealed to the District Court where, nearly 2 years later, the appeal was dismissed for lack of prosecution. A motion for new trial filed by both defendants was sustained. The plaintiff then recovered judgment against both defendants in the amount of $425.67 plus attorney fees in the amount of $44.48 and interest and costs. The defendant Gary Coble has appealed. There is no cross-appeal.

The assignments of error relate to the capacity of the plaintiff to sue and the sufficiency of the evidence to sustain the judgment.

The account was for merchandise sold by Miller &

Paine, a corporation, of Lincoln, Nebraska, to the defendant Janet Coble, the wife of the defendant Gary Coble, between August 13 and October 24, 1969. The answer of Gary Coble alleged that the defendants were divorced on or about May 6, 1974.

The account was assigned by Miller & Paine to Professional Collection Service on September 25, 1971. The evidence shows that from October 8, 1973, to May 10, 1974, Gary Coble made 8 payments amounting to $189.66 on the account. This action was commenced January 31, 1975.

The petition alleged that the plaintiff was a Nebraska corporation, the Credit Bureau of North Platte, Inc., which operated a collection of accounts division under the name of Professional Collection Service, a duly registered trade name. The defendant made no objection prior to trial to the way in which the action had been brought.

The plaintiff in this case was the Credit Bureau of North Platte, Inc., and the plaintiff should have been correctly identified in the caption to the petition. See 61 Am. Jur. 2d, Pleading, § 24, p. 473. There was no prejudice to the defendant, however, because the fact was alleged in the petition. The defendant's failure to timely object waived any error based on the defect in the caption. See Patrick v. Norfolk Lumber Co., 81 Neb. 267, 115 N. W. 780.

With respect to the sufficiency of the evidence, the plaintiff proved the account, the payments on the account by the defendant Gary Coble, and the assignment of the account to the plaintiff. The defendant offered no evidence. The evidence was sufficient for the trier of fact to conclude that the defendant was indebted to the plaintiff in the amount of the judgment.

The judgment of the District Court is affirmed.

AFFIRMED.

BOSLAUGH, J., not participating.

BEAVER LAKE ASSOCIATON, A NEBRASKA NONPROFIT CORPORATION, ET AL., APPELLEES, V. BEAVER LAKE CORPORATION, A NEBRASKA CORPORATION, ET AL., APPELLANTS, IMPLEADED WITH ALBERT SCHMUECKER ET AL., APPELLEES.

264 N. W. 2d 871

Filed April 19, 1978. No. 41476.

1. **Contracts.** Contracts against public policy are those which tend to be injurious to the public, or against the public good.
2. _____. Courts should be cautious in holding contracts void on ground of public policy and before they do so prejudice to the public interest should clearly appear.
3. **Corporations: Officers and Directors.** A bylaw which gives a developer control of the board of directors of a homeowners' association, even though valid initially, may be contrary to public policy and become void when used to defeat the quasi-municipal functions of a homeowners' association and in aid of conflicting private purposes of the developer. Each such case will necessarily have to be considered on its own facts.
4. **Corporations: Declaratory Judgments.** An action for declaratory judgment may be an appropriate remedy for determining the validity of a bylaw of a homeowners' association.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

Peter E. Marchetti of Nelson, Harding, Marchetti, Leonard & Tate, for appellants.

James F. Kasher of Zweiback, Brady, Kasher, Festerson & Pavel, and Herbert K. Elworth of Casey & Elworth for appellees Beaver Lake Association et al.

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

CLINTON, J.

This is an action for declaratory judgment seeking a determination that certain bylaws of the Beaver Lake Association pertaining to the right of the Beaver Lake Corporation to name a majority of the directors of the association are null and void; to enjoin the defendants from interfering with amend-

ment of the bylaws; to declare the rights of the parties with respect to the operation and control of the association: and to declare that certain of the parties are proper members of the board of directors of the association and that certain other parties to this action have no authority to act as directors. After trial the court granted the relief requested. The Beaver Lake Corporation (hereinafter Corporation) appealed from the judgment and argues the following assignments of error: (1) The trial court erred in declaring that the bylaws were void as against public policy. (2) Declaratory judgment is not an appropriate remedy in this case. (3) The Beaver Lake Association (hereinafter Association) was not properly authorized to bring the action. (4) The individual plaintiffs are not real parties in interest and there is a defect in the parties plaintiff. We affirm.

Certain background information identifying the parties and their relationship to the events which give rise to this action is necessary to an understanding of the issues. Corporation, as owner, became the developer of a residential and recreational area in Cass County, Nebraska, known as Beaver Lake. It caused the development to be platted into 2,000 lots, constructed a dam, built roads, installed a water and sewer utility system, and constructed a club house. It then engaged in the sale of lots. It caused Association to be incorporated and certain bylaws to be adopted. All purchasers of lots became members of Association by virtue of provisions in the purchase contracts and in the bylaws.

The purpose of Association was to "acquire, hold, use, operate, provide, and maintain utility and recreational facilities, areas, equipment and services" for the benefit of the members. The operation and maintenance of streets, utilities, lake, club house, and other common areas was financed by assessment against members pursuant to provisions of the bylaws.

After many of the lots were sold and a substantial number of homes built by purchasers, Corporation became insolvent. In lieu of foreclosure it conveyed to its mortgagee the unsold lots, the utilities system, and certain other common areas.

The original board of directors of Association consisted of three persons, all associated with Corporation. Later, pursuant to an amendment to the bylaws, the board of directors was increased to seven, consisting of three purchasers of lots elected by the members, and four persons named by Corporation. It is the provisions of the bylaws which enable Corporation to control the board of directors which is the subject of attack in this action.

The two individual plaintiffs are lot owners and members of Association and their standing as plaintiffs is challenged here. Three of the individual defendants are lot owners, members of Association, and members of the board of Association elected by the members. Four of the individual defendants are persons named to the board of Association by Corporation. The other four individual defendants are lot owners, members of Association, and persons elected to the board by the members as replacements for the four named by Corporation. It is the status of the latter eight "directors" which is at issue here.

Among other things the petition alleges as follows: That part of the overall plan of development of the Beaver Lake subdivision was the ultimate ownership and operation of the utilities and other common areas by Association after acquisition from Corporation. On about October 10, 1975, Corporation proposed to have Association take over the utilities and common areas; that negotiations for the takeover reached an impasse; and that the Corporation has now conveyed all its interest in the subdivision, including unsold lots, utilities, and common areas, and no longer has any interest in Beaver Lake.

It further alleges that the following is the substance of bylaws adopted by the original board of directors:

"i. Article III Section 2 provides that beginning in 1975, the Board of Directors shall consist of seven persons, three of whom shall be elected by the regular members and four of whom shall be appointed by Beaver Lake Corporation. Beaver Lake Corporation designees need not be members while directors elected by Regular Members must be members of the Association;

"ii. Article III Section 3 provides that any vacancy in a directorship previously filled by Beaver Lake Corporation shall be filled by a new appointment by Beaver Lake Corporation. Other vacancies may be filled by remaining directors.

"iii. Article XI Section 4 provides that a lien for membership charges may be cancelled by application of Beaver Lake Corporation if it becomes an owner of a lot for which membership charges are delinquent.

"iv. Article VII provides for amendments to the By-Laws and states that in 'no event may the By-Laws be amended or repealed, nor may any By-Laws be adopted either by the Board of Directors or by the Regular Members, if such changes would affect any of the rights of Beaver Lake Corporation, unless Beaver Lake Corporation shall give written consent thereto'."

The petition further alleges that Corporation has not performed its obligations under contract with Association and with the members; that because of the conveyance by Corporation in lieu of foreclosure because of an inability to resolve the issue arising from the alleged failure of the corporation to fulfill its contractual obligation to Association and the members, "a conflict of interest has arisen between the Plaintiff Association and those directors who

have been appointed to its Board of Directors by Defendant, Beaver Lake Corporation."

It further alleges that on May 16, 1976, the members of Association held a meeting for the purpose of electing and did elect four members of Association as directors to replace the four named by Corporation; that Association had been unable to function because of the failure and refusal of the members of the board named by Corporation to participate in board action and Association had on that account been unable to muster a quorum and to carry out its purposes; that a separate mortgage made by Corporation covering the club house was threatened with foreclosure; and that utilities services were in danger of being terminated.

A review of the bill of exceptions shows that the evidence supported the allegations of the petition. A more detailed statement of certain facets of the evidence will be made as the issues are discussed.

The record discloses that on October 10, 1975, Corporation offered to sell to Association the water system for the sum of $1,075,476 and to give credit against the purchase price for the mortgage on the club house and incomplete work on common areas, roads, and utilities in the amount of $111,660. Under this proposal, common areas would be conveyed to Association and Corporation would cause the four directors named by it to resign. The proposal was not accepted. In July 1976, Corporation made an amended offer which included sale of the water system for $750,000, conveyance of the common areas, payment to Corporation by Association of unpaid utilities charges, and an exchange of mutual releases of all obligations. In connection with the latter matter, the record shows that Association and its members asserted claims for breach of contract against Corporation for various items allegedly founded on contract which included an inadequate sewage system, incomplete work in the common

areas, repair of dam, damages on account of an undisclosed agreement to furnish utility services to an adjacent developer, and sale of lots without provision for payment of a sewer use fee of $900 as contained in contracts for purchase of lots sold earlier. Corporation asserted a claim against Association for water service. The parties were unable to come to any agreement.

During the period these negotiations were taking place the directors named by Corporation constituted a majority of the board. While they did not vote on matters involving the settlement, there existed on the board no clearly legal quorum. Ultimately the Corporation directors absented themselves from meetings. An impasse existed. A primary factor in the impasse was Corporation's insistence upon mutual releases as an absolute condition of the sale of the water service facilities to Association. The absence of a quorum of the directors cast a cloud upon routine corporate action of the board in maintenance of the common properties and payment of routine bills.

The status of the four directors named by Corporation and the four "directors at large" chosen by the members of Association to replace the former depends upon the resolution of the bylaw issue.

The position of Association and its member plaintiffs is that the previously mentioned bylaws are void because contrary to public policy. Corporation and the directors named by it point out that there is nothing in the Nebraska Nonprofit Corporation Act under which Association was organized, nor in any other statutes, nor in decisions of this court, which make agreements for the naming of directors in this fashion illegal. It is also pointed out that this provision existed when each of the members joined Association by purchase of a lot.

No statute in this state governs the creation and management of homeowner associations. There

are, however, provisions for association of coowners pertaining to condominium ownership. §§ 76-802 (4), 76-814, and 76-815, R. R. S. 1943. None of the parties have been able to cite to us any other authority directly on point and we have discovered none.

The concept of public policy, except as embodied in Constitutions and statutes, is ill defined. At 17 C. J. S., Contracts, § 211, p. 1015, we find the following: "It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good. . . ." In Custer P. P. Dist. v. Loup River P. P. Dist., 162 Neb. 300, 75 N. W. 2d 619, we defined contracts against public policy as those which tend to be injurious to the public, or against the public good. In that case we held that a contract by a public utility which would have prevented it from carrying out some of its public obligations for a period of 26 years was void as against public policy.

Courts should be cautious in holding contracts void on ground of public policy and before they do so prejudice to the public interest should clearly appear. Smith v. Du Bose, 78 Ga. 413, 3 S. E. 309; Howard v. Adams, 16 Cal. 2d 253, 105 P. 2d 971.

We find, for reasons hereinafter set forth, that while the provision of the bylaws giving Corporation authority to appoint a majority of the board of directors of Association were not void ab initio as against public policy, they became against public policy and void when Corporation sought to apply them in its own private interests and against the public interest represented by the functions which Association performed. The reasons are these: (1) It is apparent that Association's purpose was the performance of quasi-municipal functions. It operated a sewage and water system, maintained streets, provided security, cared for the common areas, and collected assessments from its members to pay for those func-

tions. Its purpose and function are analogous to those of a condominium coowners' association, or a homeowners' association. § 76-801 et seq., R. R. S. 1943; Hyatt, Condominium and Home Owner Associations: Formation and Development, 24 Emory L. J. 977. (2) Corporation, on the other hand, performed only a private function in its own and its stockholders' pecuniary interest. When it conveyed the utilities, common areas, and the unsold lots in lieu of foreclosure, it no longer had any private interests in the property to protect. (3) It did have interests which conflicted with the interests of Association and its members and it did in fact exercise its control over the board of directors of Association for its own private purpose as against the quasi-municipal functions performed by Association. (4) An impasse existed which could be resolved only by terminating Corporation's control of the board of Association.

We hold that a provision in a bylaw which gives a developer control of the board of directors of a homeowners' association, even though valid initially, may be contrary to public policy and become void when used to defeat the quasi-municipal functions of a homeowners' association and in the aid of conflicting private purposes of the developer. Each such case will necessarily have to be considered on its own facts.

Corporation's contention that declaratory relief is not an appropriate remedy in this case and that Association and its members are relegated to a dissolution of the corporation under the provisions of section 21-1953 et seq., R. R. S. 1943, is not well taken for the reason that dissolution does not in this case afford an equally serviceable remedy. As we have pointed out, Association was, in its limited sphere, performing a quasi-municipal function. Interruption of that function by dissolution proceedings, distribution of assets, and reincorporation would not be

in the public interest and does not under the facts before us afford a method of speedily having the issue determined. The giving of such a speedy remedy is one of the purposes of declaratory relief. Stewart v. Herten, 125 Neb. 210, 249 N. W. 552.

Corporation also argues that an action for a declaratory judgment is not a proper remedy where it will not terminate the controversy. The controversy in this case is who is entitled to control Association. The declaratory judgment does resolve that issue and ends that controversy. The conflicting claims of the parties in other matters were not in issue for decision in this case under the pleadings and were not tried. Those are collateral issues and must be decided in another action.

Corporation's contentions (3) and (4) fall with the resolution of the issue on the validity of the bylaws.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID TOMMY GENE SUGGETT, APPELLANT.

264 N. W. 2d 876

Filed April 19, 1978. No. 41743.

1. **Criminal Law: Post Conviction.** A defendant who has appealed from a conviction cannot secure a second review of the identical propositions examined in that appeal by resorting to a post conviction procedure.
2. **Criminal Law: Post Conviction: Appeal and Error.** Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction, but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review.
3. **Criminal Law: Sentences.** A sentence of imprisonment ought not exceed the minimum period consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant.

Appeal from the District Court for Dawson County: HUGH STUART, Judge. Affirmed as modified.

Richard G. Kopf of Cook, Lubberstedt & Kopf, for appellant.

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

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

BRODKEY, J.

David Suggett, appellant herein, was convicted of murder in the second degree in 1972 and received an indeterminate sentence of imprisonment for not less than 20 nor more than 30 years. This court affirmed the conviction and sentence in State v. Suggett, 189 Neb. 714, 204 N. W. 2d 793 (1973). In June 1977, defendant filed this post conviction action pursuant to sections 29-3001 to 29-3004, R. R. S. 1943, seeking to set aside his conviction and sentence. Defendant alleged that the introduction in evidence of photographs at his trial denied him a fair and impartial jury and due process of law; and that the indeterminate sentence was not authorized by law, and constituted a denial of due process and equal protection of law, and cruel and unusual punishment.

Prior to a hearing on the matter, defendant applied for authority to retain a psychiatrist at public expense who would testify that the photographs in question "would have and did unduly influence the jury" at trial. The trial court denied the application, stating that an issue concerning admissibility of evidence was one of law to be decided by a judge.

After a hearing, the District Court overruled defendant's motion to vacate his conviction, but sustained the motion to vacate the sentence, and ordered a supplementary presentence report so that the defendant could be resentenced. After considering the report, the court sentenced the defendant to

confinement in the penal complex for a period of 30 years, with credit given for all time the defendant has served since February 22, 1972, the date of his arrest. Defendant has appealed, contending that the District Court erred in (1) determining that the admission in evidence of the photographs did not deny the defendant an impartial jury trial or due process of law; (2) denying his application to retain the psychiatrist as a consultant; and (3) failing to consider relevant sentencing criteria when resentencing the defendant, and delegating its sentencing authority to the parole board. We affirm, as modified, the judgment of the District Court.

Defendant's conviction arose out of a fight in a bar, during the course of which Benjamin Martinez struck the defendant, who retaliated by stabbing Martinez in the chest three times, inflicting fatal wounds. See State v. Suggett, *supra*. Defendant contends that five photographs admitted in evidence at trial inflamed the jury with prejudice against him. Two of these photographs were of the deceased lying on a table with his chest exposed. The other three were autopsy photographs depicting wounds in internal organs of the deceased. The photographs of the deceased were admitted in evidence in conjunction with the testimony of a physician and pathologist, who testified concerning the mechanism of death. Defendant objected to admission of the photographs at trial. In his original appeal to this court, the defendant contended that admission of one of the photographs, exhibit 5 at trial, was error, but did not assign as error admission of the other four photographs. This court found no error with respect to the admission in evidence of exhibit 5 in the original appeal.

The admission in evidence of exhibit 5 is clearly not a ground for post conviction relief. "A defendant who has appealed a conviction cannot secure a second review of the identical proposition examined

in that appeal by resorting to a post conviction procedure." State v. Bartlett, 199 Neb. 471, 259 N. W. 2d 917 (1977). The admission of exhibit 5 in evidence was upheld by this court in defendant's original appeal, and defendant cannot secure a second review of that issue in a post conviction proceeding.

With respect to the admission of the other four photographs, it must be noted that a post conviction proceeding cannot be used as a substitute for an appeal. "Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review." State v. Lincoln, 186 Neb. 783, 186 N. W. 2d 490 (1971). See, also, State v. Oziah, 198 Neb. 423, 253 N. W. 2d 48 (1977).

In the present case the defendant and his counsel were clearly aware of the issue concerning the admissibility in evidence of the four photographs, as evidenced by the fact that there was an objection to admission of the photographs at trial. The defendant chose to challenge the admissibility of exhibit 5 in his original appeal, but did not challenge the admissibility of the other four photographs. On these facts, we conclude that post conviction relief is not available on the contention that the admission in evidence of the photographs constituted reversible error. State v. Lincoln, *supra*. In any event, the four photographs in this case, when compared to photographs in other cases involving similar issues, were not such that their admission in evidence can be said to be an error of constitutional dimension warranting relief in a post conviction proceeding. See State v. Partee, 199 Neb. 305, 258 N. W. 2d 634 (1977), in which we discussed the admission in evidence of photographs of the deceased in a homicide case.

In view of the conclusions reached above, it is apparent that the trial court did not err in denying defendant's application to retain at State expense the psychiatrist for the purpose of securing testimony that the photographs in question had a prejudicial impact on the jury. We also note, as did the trial court, that the admission in evidence of photographs of the deceased in a homicide case is a question of law for the trial court, which must weigh the probative value of such evidence against its possible prejudicial effect. See State v. Partee, *supra*. The right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court. See Annotation, Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert, 34 A. L. R. 3d, § 4, at p. 1269. It cannot be said that the trial court abused its discretion in that respect.

Defendant's final contention is that the trial court erred in sentencing him to a term of imprisonment of 30 years because the court did not adequately consider all relevant sentencing criteria, and unlawfully delegated its sentencing authority to the parole board. Defendant's primary complaint is that the trial court did not adequately consider his good prison record in resentencing him.

This case is an unusual one in that the defendant was resentenced after a post conviction hearing because his first sentence was held invalid. Defendant's original indeterminate sentence of imprisonment for 20 to 30 years was not valid under the rule announced in State v. Laravie, 192 Neb. 625, 223 N. W. 2d 435 (1974), decided subsequent to State v. Suggett, *supra*. In Laravie we held that upon conviction for second degree murder, the trial court is not authorized to pronounce an indeterminate sentence, but must impose a sentence of a definite term of years. Under Laravie, it is apparent that the defendant was entitled to have his original sentence vacated. His

claim on appeal is essentially that the trial court abused its discretion in imposing the new sentence, and that the new sentence is excessive. This court has the authority to reduce a sentence rendered by the District Court when "in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence." § 29-2308, R. R. S. 1943.

In resentencing the defendant, the trial court stated it did not believe that a sentence harsher than the original one should be imposed, and that the defendant's good prison record should be considered. The court also stated, however, that the consideration of defendant's prison record "is more properly done by the parole board than by me, and I think it will be done by them in more effective manner than by me." The court did not believe probation would be an appropriate sentence because probation would depreciate the seriousness of the crime. The court then imposed a sentence of 30 years, the same as the maximum term of defendant's original sentence. The effect of the new sentence, however, is that the defendant has a minimum term of 10 years for the purpose of determining eligibility for parole. See, State v. Blankenship, 195 Neb. 329, 237 N. W. 2d 868 (1976); State v. Thompson, 189 Neb. 115, 201 N. W. 2d 204 (1972).

A sentence of imprisonment ought not exceed the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant. State v. Sturm, 189 Neb. 299, 202 N. W. 2d 381 (1972). We agree with the trial court that a sentence of imprisonment is required in this case in view of the serious nature of the crime. There are factors present in this case, however, which lead us to conclude that a sentence of 30 years is not warranted by the evidence. The defendant has no significant criminal record other than the

conviction involved in this case. The crime he committed, although a serious one, was unplanned, and provoked by the victim. Defendant has exhibited a willingness to work at honest labor, is not addicted to alcohol or narcotic drugs, and has cooperated with authorities. Such factors are relevant in determining the severity of a sentence to be imposed. See State v. Etchison, 188 Neb. 134, 195 N. W. 2d 498 (1972).

Significantly, two of the defendant's supervisors at the penal complex stated that his conduct has been exemplary since he was incarcerated more than 5 years ago. As stated by one of the supervisors: "Over all Mr. Suggett is a model worker and inmate. He gets along fine with all the other inmates and supervisor's. He is in no way a trouble maker, but carries his own respect. He has a good appearance and habits, along with a job that carries a great responsibility." Both supervisors indicated that the defendant was rehabilitated and fit for release.

As indicated above, it is important to consider the rehabilitative needs of the defendant in sentencing. See, State v. Sturm, *supra*; State v. Etchison, *supra*. The defendant's prison record provides evidence, not available at the time of his original sentencing, that an extended period of incarceration is not required to rehabilitate the defendant. "The primary function of the criminal law is to protect individuals and society from the depredations of the criminally bent." State v. Etchison, *supra*. The defendant's lack of a significant criminal record prior to this crime, the circumstances of the crime, and his prison record indicate that the defendant is not "criminally bent," and that a term of 30 years is not required to adequately protect the public.

We conclude that a term of imprisonment of 15 years is proper in this case. Although probation is not appropriate in view of the serious nature of the crime, such a sentence is consistent with protection

of the public, gravity of the offense, and rehabilitative needs of the defendant. State v. Sturm, *supra*. For the reasons set forth above, we affirm the judgment of the District Court, but modify the sentence to a term of 15 years. As ordered by the District Court, the defendant shall receive credit for all time he has served since February 22, 1972.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., dissenting in part.

I dissent from that part of the opinion which holds that the District Court had the power to vacate the original sentence on a motion for post conviction relief under sections 29-3001 to 29-3004, R. R. S. 1943. The sentence to imprisonment for 20 to 30 years for second degree murder afforded no basis for post conviction relief.

In State v. Laravie, 192 Neb. 625, 223 N. W. 2d 435, a direct appeal, we held that an indeterminate sentence was not authorized in a second degree murder case. In Draper v. Sigler, 177 Neb. 726, 131 N. W. 2d 131, we held that if an indeterminate sentence is imposed for a crime for which such a sentence is not authorized, the sentence is erroneous but not void and is effective as a sentence for the maximum term imposed.

It seems to me that under the rule of the Laravie case and the Draper case the sentence in this case became a flat 30-year sentence. Under section 83-1,105 (2), R. R. S. 1943, it was the legal equivalent of a sentence of 10 to 30 years imprisonment.

There was nothing about the sentence in this case which rendered the judgment void or voidable under the *Constitution of Nebraska* or the *Constitution of the United States*.

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

JOHN J. HANLEY ET AL., APPELLANTS AND CROSS-APPELLEES, V. NELLIE HOUSE MONTGOMERY CRAVEN ET AL., APPELLEES AND CROSS-APPELLEES, OLIVE SHOULTS ROSENBERGER ET AL., APPELLEES AND CROSS-APPELLANTS, IMPLEADED WITH ARTHUR F. MULLEN ET AL., APPELLANTS AND CROSS-APPELLEES.

263 N. W. 2d 90

Filed April 26, 1978. No. 41249.

SUPPLEMENTAL OPINION

Appeal from the District Court for Thurston County: WALTER G. HUBER, Judge. On motion for rehearing. See *ante* p. 81, 263 N. W. 2d 79, for original opinion. Motion for rehearing overruled.

Edmund D. McEachen and Michael G. Lessman of Baird, Holm, McEachen, Pedersen, Hamman & Haggart, Bernard T. Pipher, Thomas C. Emery, and Kenneth H. Beckenhauer of Beckenhauer and Beckenhauer, for appellants and cross-appellees.

Warren S. Zweiback of Zweiback, Brady, Kasher, Festerson & Pavel, and Daniel J. Duffy of Cassem, Tierney, Adams & Gotch, for appellees and cross-appellees.

Warren S. Zweiback of Zweiback, Brady, Kasher, Festerson & Pavel, for appellees and cross-appellants.

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

SPENCER, J.

The motion of Robert and James House for rehearing is overruled. We did not pass upon the validity of the stipulation in our opinion. That is a matter first for the consideration of the trial court. To make this clear, we amend the final sentence of our opinion as follows:

We remand the cause to the District Court with di-

rections to enter judgment in accordance with this opinion to determine the heirs of the blood of John R. House as of December 29, 1974; to determine the validity and effect of the trial stipulation entered into by grandnieces and grandnephews of John R. House with respect to their respective shares, if any, in the testator's property; and to enter a decree of partition.

ROY C. DUFFEY ET AL., APPELLANTS, V. SCHOOL DISTRICT NUMBER ONE OF WASHINGTON COUNTY, NEBRASKA, APPELLEE.

265 N. W. 2d 212

Filed April 26, 1978. No. 41445.

Eminent Domain: Estoppel. An owner of land taken by virtue of eminent domain proceedings, who has been paid and has accepted the award of damages, cannot afterwards contest the validity of the taking by collateral action.

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

Gregory P. Drew, for appellants.

John R. O'Hanlon, for appellee.

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

HENDRIX, District Judge.

This is an action by the plaintiffs, Roy C. Duffey and Judy R. Duffey, against the defendant, School District Number One of Washington County, Nebraska. Plaintiffs seek a declaratory judgment that an eminent domain proceeding was ineffective, and further seek an injunction forbidding defendant from exercising the rights of ownership over the property involved in the proceeding. The District Court entered judgment for the defendant, and the plaintiffs have appealed.

The essential facts are not in dispute. The defendant's Board of Education (hereinafter referred to as the school board) discussed the acquisition of plaintiff's real estate for use as the site for a proposed new school. It then determined that it would proceed with the acquisition. At its regularly scheduled meeting of July 8, 1974, the school board passed a resolution providing that if certain parcels of real estate, including the parcel involved herein, could not be acquired at an acceptable price prior to July 22, 1974, eminent domain proceedings should be instituted to acquire the parcels.

Published notice of meetings to discuss the property were only given by news articles in local area newspapers. The school board, being unable to negotiate a purchase of certain parcels, including the parcel of the plaintiffs, filed a condemnation petition in the county court of Washington County on January 14, 1975. The plaintiffs were personally served with the notice to condemnees and an order continuing the meeting of the board of appraisers until March 19, 1975. The board of appraisers met according to the order, inspected the property, and received evidence relative to the amount of damages sustained. The plaintiff, Roy C. Duffey, was present at the meeting and at the appraisal. The board of appraisers made its awards on April 14, 1975, including an award of $45,330.30 for the plaintiffs. Plaintiffs' award was paid into the county court by the school board. The county court, after the statutory time for appeal had expired, remitted the award to the plaintiffs, who accepted it without appeal or protest. On September 13, 1976, the present action was filed, and on January 27, 1977, the award was tendered back to the District Court by the plaintiffs.

The defendant did not fully comply with section 79-4,114, R. R. S. 1943, which contains the general grant of eminent domain power to the school district and then provides, in part: "A public hearing shall be

held on the question of such taking. Notice of such public hearing shall be given once each week for three successive weeks prior thereto in a legal newspaper published in or of general circulation in the county. Such notice shall include the purpose and location of the hearing." However, the county court of Washington County was the proper forum, the property was correctly designated, and the plaintiffs were personally served. The omission causes a defect in the proceedings.

The plaintiffs received and accepted the award. They did not tender back the proceeds for nearly 2 years after the award was made. They cannot by collateral attack set aside the taking. The general rule of law is repeated in the case of Swan Boulevard Development Corp. v. Cybulski, 14 Wis. 2d 169, 109 N. W. 2d 671 (1961), which refers to 6 Nichols, Eminent Domain (3d Ed.), § 28-321 (2), p. 419, and Beer v. Ozaukee County Highway Comm., 9 Wis. 2d 346, 101 N. W. 2d 89 (1960), and states, ". . . an owner of land taken by virtue of eminent-domain proceedings, who has accepted and been paid the award of damages, cannot afterward contest the validity of the taking, either directly or collaterally, or seek to recover or retain possession of his land, no matter how fundamental the defect in the proceedings may be." The rationale for the holding is that of estoppel, for having accepted the proceeds of the condemnation, the plaintiffs are now estopped from denying the facts upon which the condemnation proceeded. See, 27 Am. Jur. 2d, Eminent Domain, § 494, p. 444; Lane v. Burt County Rural P. P. Dist., 163 Neb. 1, 77 N. W. 2d 773 (1956).

The finality of an award of damages in eminent domain proceedings, in the absence of an appeal or upon acceptance of the award, has been established by this court. In Snyder v. Platte Valley P. P. & Irr. Dist., 140 Neb. 897, 2 N. W. 2d 327 (1942), this court held that a final award in condemnation proceedings

was conclusive upon the parties within the issues joined although not formally litigated. In Gruntorad v. Hughes Bros., Inc., 161 Neb. 358, 73 N. W. 2d 700 (1955), this court held that a landowner who fails to appeal from the award of appraisers in a condemnation proceeding is conclusively bound by it. In McCook Livestock Exchange Co. v. State Department of Roads, 173 Neb. 766, 115 N. W. 2d 147 (1962), this court held that a condemnee receiving the benefits of an award of appraisers by mistake, and failing to pay or tender back the amount with reasonable promptness, is precluded from an appeal.

We therefore find that the plaintiffs herein are precluded from bringing this action by virtue of their receipt and acceptance of the proceeds. The judgment of the District Court is, therefore, affirmed.

AFFIRMED.

FLAVIAN VEIK, APPELLEE, V. THE TILDEN BANK, APELLANT.

265 N. W. 2d 214

Filed April 26, 1978. No. 41456.

1. **Contracts: Uniform Commercial Code.** A writing is sufficient to avoid the bar of section 2-201, U. C. C., if it evidences a contract for the sale of goods, is authenticated in any manner by the party to be charged and identifies such party, and specifies the quantity of goods involved, notwithstanding other terms of the contract need be shown by parol evidence.
2. **Trial: Evidence: Courts.** Where evidence upon an issue is undisputed, the question is one for decision by the court as a matter of law.
3. **Trial: Witnesses: Courts.** A trial judge may, in his discretion, question witnesses during trial. A party may object thereto at the time or at the next available opportunity when the jury is not present. § 27-614, R. R. S. 1943.
4. **Trial: Evidence.** A trial court, in its sound discretion, may permit a party to withdraw his rest and offer additional evidence. Such action will stand unless there has been an abuse of discretion.

5. **Motions, Rules, and Orders: Continuances.** A motion for continuance of trial is addressed to the sound discretion of the court and will stand unless there has been an abuse of discretion.

Appeal from the District Court for Madison County: EUGENE C. MCFADDEN, Judge. Affirmed.

Brogan & Stafford, for appellant.

James G. Egley of Moyer, Moyer & Egley, for appellee.

Heard before SPENCER, BOSLAUGH, and WHITE, JJ., RIST and KELLY, District Judges.

RIST, District Judge.

This is an action for breach of contract wherein plaintiff, Veik, alleged a contract for the purchase by plaintiff of a repossessed truck tractor from defendant, Bank, for the sum of $6,800 and that the defendant refused to complete the sale according to the contract. Defendant denied there was a contract and alleges in the alternative that plaintiff failed to tender the consideration for the truck tractor by a date certain, thereby failing to meet his obligation under the agreement and understanding of the parties. The case was tried to a jury resulting in a verdict of $4,200 for the plaintiff for which judgment was entered. Defendant perfected its appeal to this court.

The evidence reflects that plaintiff made an offer of $6,800 to the defendant for the truck tractor and requested defendant to extend him credit for the purchase. Plaintiff, on May 16, 1975, received a letter dated May 15, 1975, from Keith Redinbaugh, executive vice president of defendant, in which the defendant refused plaintiff's offer saying: "Your offer was presented to the Board of Directors of the Tilden Bank and not accepted, under your terms. They will accept $6800.00 cash but do not wish to extend credit at this time for the purchase of the tractor. Thank you for expressing your interest and a Cash

offer will be considered." The letter contained an earlier reference to "the diesel truck tractor." The record reflects an earlier telephone conversation between plaintiff and Redinbaugh in which the particular truck tractor involved was more specifically identified.

Plaintiff testified that following receipt of the above letter he spoke to Redinbaugh by telephone on May 19, 1975, advising him he had obtained a loan elsewhere for the $6,800 but that it would be Wednesday or Thursday (May 21 or May 22) before he would receive the money. He further testified that Redinbaugh said this was acceptable and that he could have the title when he brought the check for the funds to the Bank and that he, Redinbaugh, would see him Wednesday or Thursday.

Redinbaugh testified that he wrote the letter to plaintiff referred to above, and that he had talked with plaintiff on the telephone on May 19, 1975. With respect to that conversation, he testified that plaintiff said he would get the money and that he, Redinbaugh, understood plaintiff would be at the Bank by May 20, 1975; and that he advised plaintiff to bring a cashier's check payable to defendant when he came.

Plaintiff further testified that on May 22, 1975, he went to defendant Bank with a bank money order payable to defendant in the amount of $6,800 and tendered it to an employee of the Bank who, after making a telephone call, advised plaintiff he would have to go to Norfolk, Nebraska, to see Mr. Doyle Busskohl, chairman of the board of directors of defendant, and returned the money order to plaintiff; that plaintiff on that date went to see Mr. Busskohl and tendered the check to him for the truck tractor; and that the latter refused the tender, saying that the defendant would not accept that amount for the truck tractor, it being worth more money.

Defendant assigns as error the court's failure to direct a verdict on the ground that the alleged con-

tract violates the statute of frauds. Section 2-201, U. C. C., provides in part that: "Except as otherwise provided * * * a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action * * * unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent * * *. A writing is not insufficient because it omits * * * a term agreed upon but * * * is not enforceable * * * beyond the quantity of goods shown in such writing."

We conclude the Redinbaugh letter of May 15, 1975, which was not disputed by either party, is a sufficient writing to come within the exception of the above statute. The comment to the above section of the code is approved, namely that: "The required writing need not contain all the material terms of the contract * * *. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. * * * Only three definite and invariable requirements as to the memorandum are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be 'signed', a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity." The letter clearly meets all these qualifications, therefore the fact that additional terms need be shown by parol evidence does not bring the contract within the bar of the statute.

Defendant contends that it was entitled to have the issue of whether the alleged contract violated the statute of frauds submitted to the jury. This contention is incorrect. Having held the undisputed evidence of the letter of May 15, 1975, was sufficient to remove the bar of the statute, we note the well-established rule that if evidence upon an issue is undisputed, the question is one for decision by the

court as a matter of law. Wylie v. Czapla, 168 Neb. 646, 97 N. W. 2d 255. The trial court was correct in not submitting this issue to the jury.

Defendant assigns as error the failure of the trial court to properly instruct the jury on the essential elements of the contract. We have examined the instructions in light of the evidence presented and find the trial court's instructions were correct as to the elements involved in this case. Defendant's proposed instructions would add nothing and in some cases were inappropriate. Specifically, we note defendant's requested instruction No. 6, relative to the necessity of a certificate of title to transfer ownership, is irrelevant to the issue of whether there was a contract between the parties. There is no title issue raised in the evidence. Defendant's requested instruction No. 5, relative to the statute of frauds, has been previously considered in this opinion.

Defendant argues that the court's instruction No. 10 was tantamount to directing a verdict against defendant, and that certain language inserted in handwriting in the instruction may not have been read to the jury. The instruction in its entirety was: "In arriving at your verdict you should not allow any interest, should you find for the plaintiff, since the Court will determine the amount of interest, if any, to which the parties may be entitled." The words "should you find for the plaintiff" were inserted in handwriting. We disagree that the instruction was adverse to the defendant. Additionally, we note in the bill of exceptions the court's statement that the insertion was read to the jury as a part of the instruction and this was not challenged by defendant. There was no error with respect to this instruction.

Defendant contends there was no offer of sale and that the Redinbaugh letter cannot be so considered. We find that this was a question for the jury and there was evidence sufficient to sustain a finding of an offer. Likewise the issues of whether there was

an acceptance and a timely tender of the purchase price by plaintiff were for the jury and there was sufficient evidence to sustain an affirmative determination of these issues.

Defendant assigns the following as errors during trial: (1) The court's questioning of the witness Redinbaugh, (2) errors in admission and in refusal of admission of exhibits, (3) permitting plaintiff to withdraw his rest and offer additional evidence, and (4) refusal to grant the defendant a continuance.

With respect to the court's questioning of the witness, such power is given the trial judge under section 27-614 (2), R. R. S. 1943, of the Nebraska Evidence Rules, and the party's right to object thereto is preserved in subsection (3) of the same section. An examination of the questioning does not indicate any impropriety, nor was it extensive. No objection thereto was made by defendant at the times provided by the rule. Defendant's characterization of the questioning as vengeful is an overstatement and not sustained by the record. There was no error in the questioning.

With respect to the admission of plaintiff's exhibit 4, being a copy of the bank money order plaintiff testified he tendered to defendant's officers, defendant's objection was limited to competency, relevancy, and materiality, and specifically waived objection because it was a copy. The trial court properly overruled this objection.

With respect to the refusal of the admission of defendant's exhibit 8, being a repair bill for the truck tractor, we note first the exhibit was never offered and, further, that the contents of the bill were in fact testified to as well as the purpose of the repairs. We doubt the relevancy of the evidence, but in any event there was no error.

With respect to the withdrawal of plaintiff's rest and the refusal of defendant's request for continuance, the same occurred during the instruction con-

ference and involved the reading of interrogatories to defendant and answers thereto concerning the telephone conversation between Redinbaugh and plaintiff as to the date by which the latter was to tender the payment for the truck, the Bank answering it was May 21, not May 22, 1975. It is clear the court has the discretion to permit a party to withdraw his rest. Johnson v. City of Lincoln, 174 Neb. 837, 120 N. W. 2d 297. In this case there was no abuse of that discretion. The additional evidence permitted was limited and defendant was given an opportunity to rebut or explain the same. Likewise the refusal to grant defendant a continuance after plaintiff's rest was withdrawn is not demonstrated to be prejudicial, defendant's objections being in general terms and stating no basis in fact as to how prejudice would arise if the continuance was not granted. The motion for continuance is addressed to the court's discretion and will stand unless an abuse of discretion is shown. Elm Creek State Bank v. Department of Banking, 191 Neb. 584, 216 N. W. 2d 883. No such abuse is shown.

Finally, defendant complains of the court's instruction No. 12 respecting expert witnesses, asserting it is in the plural when only one "expert" was involved, and in any event the witness did not qualify as an expert. A review of the evidence shows a sufficient foundation to permit an opinion as an expert to the value of the truck tractor. The jury was properly instructed as to how such testimony was to be considered. The use of the word "experts" is an error of no consequence and cannot be said to have misled the jury.

We have examined the record in its entirety, find no prejudicial error, and determine that the verdict is not excessive under the circumstances. The judgment of the trial court is affirmed.

AFFIRMED.

UNIVERSAL SURETY COMPANY, APPELLEE AND CROSS-APPELLANT, V. JED CONSTRUCTION CO., INC., APPELLANT AND CROSS-APPELLEE.

265 N. W. 2d 219

Filed April 26, 1978. No. 41492.

1. **Contracts: Reformation of Instruments.** Absent fraud or overreaching, mistake as a ground for reformation of a contract must be a mutual mistake.
2. **Contracts.** One who does not read a contract before signing it cannot relieve himself of its burdens.

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

Nelson, Harding, Yeutter, Leonard & Tate, Kenneth Cobb, and Robert P. Cox, for appellant.

James W. Hewett, for appellee.

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

WHITE, C. THOMAS, J.

This is an action by appellee and cross-appellant, Universal Surety Company, hereinafter referred to as Universal, to recover on a written agreement to indemnify against loss on a surety bond. The defense advanced by appellant, Jed Construction Co., Inc., hereinafter referred to as Jed, is that the agreement signed in blank was not completed in accordance with the terms of the actual agreement. The trial court entered judgment for Universal in the amount of $61,872.68 with an offsetting amount to Jed of $18,516.12. Jed appeals and Universal cross-appeals. We affirm in part and reverse in part.

In 1974, one William H. Bennett, an officer of Universal, was contacted by Gene Lilly, an insurance agent, who sought to secure a performance bond on behalf of Erik Hansen Construction Company, hereinafter referred to as Hansen. Universal, who pre-

viously had insured Hansen, declined to issue the bond because, in its opinion, Hansen had too much work in progress to justify the issuance of a bond only upon its signature and without another indemnitor. Lilly proposed Jed as the indemnitor. Jed had previously indicated to Lilly a willingness to indemnify Hansen should the need arise. Bennett agreed to write the bond for Hansen if Jed could be secured as an additional indemnitor.

Lilly then contacted the officers of Jed. After discussing the matter with them on the telephone, he took a Form 2 Indemnity Agreement to the office of Jed. Hansen had already advised Jed that if it were awarded the general contract, Jed would be awarded the masonry subcontract. The officers of Jed indicated their unwillingness to sign personal indemnification. However, the officers of Jed signed an agreement in blank, entitled "Form 2," after assurance Lilly would secure a personal indemnification from the owners of Erik Hansen Construction Company, Erik Hansen and his wife. On its face, "Form 2" provided that Jed was a "Silent Joint Venturer" with Hansen for purposes of indemnity. None of the officers of Jed read the agreement and they did not ask any questions about the provisions of the document. Two bonds were written; one was in the amount of $264,000 and the other was in the amount of $9,400.

During the course of the construction project, Hansen experienced difficulty in paying bills and Universal took over the work. Universal paid out the sum of $61,872.68 on behalf of Hansen, but did not pay to Jed the amount of $18,516.12 which was due Jed on its subcontract with Hansen. At the conclusion of the work, Universal made demand on Jed for payment. Jed refused and Universal filed suit.

The appellant assigns the following errors: (1) The failure of the trial court to find that the blanks in the instrument were not filled out in accordance

with the authority granted by Jed to Universal; (2) the failure to grant reformation of the contract to reflect the actual agreement of the parties; and (3) the failure to find that Jed was released from the agreement by reason of the unauthorized modifications in the oral agreement. Specifically, the appellant alleges three areas in which the written agreement did not reflect the agreement of the parties: (1) It failed to provide that no collection activities could be undertaken against Jed until the assets of Erik Hansen Construction Company and the Hansens personally were exhausted; (2) it failed to insert a provision forbidding a reduction in the retainage, i.e., the amount an owner retains of the total contract until performance is completed; and (3) it failed to insert a provision forbidding the surety to agree to additions to the building contract.

In each case, the printed form of the contract specifically contained language contrary to that which Jed claims was the true intent of the parties.

The cause was tried to the court without a jury. The court properly found there was no evidence on which the court could conclude that either of the defenses were proved.

Jed advances two theories, mutual mistake of fact and failure to complete the agreement according to its terms. Mistake as a ground for reformation of a contract must be a mutual mistake. See, Ready Sand & Gravel Co. v. Cornett, 184 Neb. 726, 171 N. W. 2d 775; Parry v. State Farm Mut. Auto. Ins. Co., 191 Neb. 628, 216 N. W. 2d 875.

It is conceded that the officers of Jed did not read the contract and that they did not even talk with an agent or officers of Universal. The evidence does not show that the claimed mistakes were ever discussed with Lilly prior to the signing in blank by Jed's officers. The officers of Jed testified that the agreement they signed contained provisions different from the actual agreement. There is no evi-

dence that Universal thought the terms of the contract were other than those contained in the actual agreement. Even if the officers of Jed were mistaken, it was a unilateral mistake rather than a mutual one. Furthermore, one who does not read a contract before signing it cannot relieve himself of its burdens. See, General Motors Acceptance Corp. v. Blanco, 181 Neb. 562, 149 N. W. 2d 516; Abbott v. Abbott, 188 Neb. 61, 195 N. W. 2d 204.

The second theory fails for the reasons discussed above. No evidence was offered tending to prove that the agreement was to be completed to include the provisions relating to exhaustion of the assets of the Hansens, retainage, or consent to extras. Again, the evidence could only establish that the Jed officers may have intended or thought that the agreement contained those provisions.

The decision of the trial court awarding $61,872.68 to Universal is correct and is affirmed. The trial court's decision granting Jed an $18,516.12 offset, by reason of its claim on the Erik Hansen Construction Company, is reversed. The agreement clearly states that any amount paid out by Universal on behalf of Hansen is recoverable by Universal from Jed.

AFFIRMED IN PART, AND IN PART REVERSED.

GARRY D. CONOVER, APPELLEE, V. DAIRYLAND INSURANCE COMPANY, A CORPORATION, APPELLANT.

265 N. W. 2d 222

Filed April 26, 1978. No. 41504.

Insurance: Motor Vehicles: Statutes. An automobile policy, to which sections 44-516 to 44-521, R. R. S. 1943, apply, issued for less than a 6-month period, is to be considered, for all purposes of said sections, as if written for a period of 6 months.

Appeal from the District Court for Adams County:

FREDRIC R. IRONS, Judge. Affirmed.

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

Stephen A. Scherr, for appellee.

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

CLINTON, J.

This is an action for declaratory judgment, having as its purpose the determination of whether or not a policy of automobile liability insurance, issued to the plaintiff Conover by the defendant Dairyland Insurance Company, was in force on October 30, 1974, when the "owned automobile" struck a pedestrian. There are no disputed issues of fact as the case was tried upon an agreed stipulation of the facts. The sole matter before this court is the proper construction of a portion of section 44-514 (3), R. R. S. 1943, L.B. 1396, Laws of Nebraska, Eight-second Legislature, Second Session, 1972.

The question is whether or not automobile liability insurance policies covering classes of vehicles and individuals and affording the coverage described in L.B. 1396 issued for a policy period of less than 6 months are, by virtue of the statutory provision in question, to be "considered as if written for a policy period or term of six months," and therefore are not subject to cancellation during the 6-month term except for the reasons and by the methods provided in L.B. 1396.

The part of section 44-514 (3), R. R. S. 1943, in question is the first proviso which is as follows: "Provided, that any policy with a policy period or term of less than six months shall be considered as if written for a policy period or term of six months." Subsection (3) defines the terms "renewal" and "to renew." Dairyland argues that because the proviso in question is a part of the section defining those

terms, it can only be meant to provide for a right to renew for the balance of the 6-month period where the policy period for which the policy is issued is less than 6 months. In support of its interpretation Dairyland relies upon Anthony v. National Grange Mut. Ins. Co., 113 N. H. 486, 309 A. 2d 919, where the Supreme Court of New Hampshire considered a somewhat similar provision. Dairyland acknowledges, however, that the Supreme Court of Louisiana, in Taylor v. MFA Mut. Ins. Co. (La.), 334 S. 2d 402, in construing a statute virtually identical to ours, arrives at a contrary interpretation. We follow the Louisiana interpretation and affirm the judgment.

The stipulated facts, insofar as pertinent, are these: On May 31, 1974, Dairyland issued to Conover an automobile liability insurance policy in which the policy period was specified as follows: Effective 05-31-74, expires 07-31-74 for which Conover paid the premium. On July 15, 1974, a renewal notice was mailed to and received by Conover. He paid a 2-month premium and an endorsement covering the policy period 07-31-74 to 9-30-74 was issued. On September 15, 1974, a renewal notice was again sent. It said, "select term desired." It then listed periods of 1 month, 2 months, 3 months, 6 months, and 1 year, and specified the premium for each period. This notice was not received by Conover because the local Post Office failed to forward his mail to his new address, despite the fact that Conover had left with the Post Office a valid and correct change of address form. He did not receive the renewal notice until after the accident. He then paid the premium.

L.B. 1396, Laws of 1972, among other things, specifies the reasons which permit the cancellation of a policy, § 44-515, R. R. S. 1943, and the method by which notice of cancellation must be given, § 44-516, R. R. S. 1943. See, also, Saunders v. Mittlieder, 195

Neb. 232, 237 N. W. 2d 838. It also limits the right to refuse to renew.

Dairyland concedes that if the term of the policy in question was 6 months, then, by virtue of the statutory provision earlier mentioned, a notice of cancellation was required. Dairyland argues that the purpose of the statutory provision is only to ensure that the holder has the right to renew during and for a 6-month period; that the statute expressly recognizes policy terms for shorter periods; and that in this case the term expired on September 30, 1974, and there was no coverage on the date of the accident on October 30, 1974, even though that was within the 6-month period.

The complete subsection in question, down to and including the first proviso, reads as follows: "(3) Renewal or to renew shall mean the issuance and delivery by an insurer of a policy replacing at the end of the policy period a policy previously issued and delivered by the same insurer, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term; Provided, that any policy with a policy period or term of less than six months shall be considered as if written for a policy period or term of six months."

The proviso is clear and unambiguous. It simply provides that if a policy is issued for a term of less than 6 months, the policy period is nonetheless 6 months. It is to be admitted that it is rather peculiarly placed in the statutes since subsection (3) introduces the subject of "renewal" and "to renew." It is to be observed, however, that the subject immediately preceding the proviso is "its policy period or term," and that this refers to a previously issued policy and not to a renewal. Under ordinary grammatical usage, the antecedent of the proviso, or that which it modifies, refers to the "policy period or term" on an already issued policy. No real ambiguity exists. The arrangement is simply clumsy. Fur-

thermore, the words of the proviso certainly are not apt to express the concept for which Dairyland contends, namely, a right of renewal during a 6-month period. If that is what the Legislature intended it ought to have used words which convey that idea.

The case of Taylor v. MFA Mut. Ins. Co., *supra,* completely, thoroughly, and soundly analyzes a statute virtually identical to ours, and we accept its analysis completely and recommend to the reader the full text of that opinion. It is not necessary to repeat it here.

We hold that an automobile policy, to which sections 44-516 to 44-521, R. R. S. 1943, apply, issued for less than a 6-month period, is to be considered, for all purposes of said sections, as if written for a period of 6 months.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E. SPURGEON, APPELLANT.

265 N. W. 2d 224

Filed April 26, 1978. No. 41702.

1. **Appeal and Error: Evidence.** A bill of exceptions is the only vehicle for bringing evidence before this court.
2. _____: _____. Evidence which does not appear in the record cannot be considered by this court on appeal.
3. **Criminal Law: Constitutional Law.** There is no colorable merit in the proposition that a criminal defendant is constitutionally vested with the right of assistance or representation by a lay person.
4. **Taxation.** It is generally held that if the form of a return calls for answers that the taxpayer is privileged from making he may raise the objection in the return but cannot on that account refuse to make any return at all.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Robert E. Spurgeon, pro se.

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

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

WHITE, C. J.

Defendant was charged with willful and unlawful failure to file a valid tax return. A jury trial was had and the defendant was found guilty. The defendant was fined $300 by the county court and sentenced to 30 days' imprisonment in the county jail. Defendant appealed to the District Court which affirmed the judgment and sentence of the county court. Defendant appeals to this court. We affirm the judgment and sentence of the District Court.

Defendant raises four contentions on appeal: (1) That the prosecuting attorney made certain remarks during the trial which were prejudicial and denied him a fair trial; (2) that his constitutional rights were violated when the trial court denied his motion for a 12-member jury; (3) that his constitutional rights were violated when the trial court denied him assistance of lay counsel; and (4) that his conviction is unlawful. We shall address each contention in order.

We have carefully examined the record regarding defendant's first contention and fail to find the remarks allegedly made by the prosecuting attorney of which defendant complains. In his brief, defendant indicates that these alleged remarks took place during final arguments. The final arguments are omitted from the bill of exceptions. We have repeatedly held that a bill of exceptions is the only vehicle for bringing evidence before this court. Hanson v. Hanson, 198 Neb. 675, 254 N. W. 2d 699 (1977). Evidence which does not appear in the record cannot be considered by this court on appeal. Schetzer v. Sullivan, 193 Neb. 841, 229 N. W. 2d 550 (1975). Since the allegedly prejudicial remarks of the prosecuting attorney do not appear in the bill of exceptions we are precluded from considering this assigned error.

The next contention by the defendant is that his rights were violated when his motion for trial by a 12-member jury was denied. Defendant was charged under section 77-27,115, R. R. S. 1943, which provides for a fine of not more than $300, or imprisonment of not more than 6 months, or both. In State v. Soester, 199 Neb. 477, 259 N. W. 2d 921 (1977), the defendant was convicted of failure to file a personal property tax return. On appeal the defendant contended that his conviction should be reversed because he was denied a trial before a 12-member jury in the county court. We held: "The offense charged was a petit offense and there was no constitutional right to a trial by a jury of 12 members. See State v. Young, 194 Neb. 544, 234 N. W. 2d 196. The defendant was tried before a 6-member jury as authorized by section 24-536, R. R. S. 1943."

Defendant was charged with a petit offense. See Codispoti v. Pennsylvania, 418 U. S. 506, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974). There was no violation of his constitutional rights by the trial court when it denied his request for trial by a 12-member jury. Defendant's contention is without merit.

Defendant next argues that his constitutional rights were violated when he was denied the assistance of lay counsel. Prior to the commencement of his trial, defendant sought to be represented by a Lowell Anderson, a person not licensed as an attorney in the State of Nebraska nor anywhere else. The District Court denied defendant's motion to be represented by Mr. Anderson. Following the denial of this motion, defendant requested that Mr. Anderson be permitted to sit next to him during the trial in the capacity of "clerical assistant." This request was also denied.

In United States v. Cooper, 493 F. 2d 473 (5th Cir., 1974), cert. den. 419 U. S. 859, 95 S. Ct. 108, 42 L. Ed. 2d 93 (1974), the court stated: "There is no colorable merit in the proposition that a criminal defend-

ant * * * is constitutionally vested with the right of assistance or representation by a lay person." See, also, United States v. Whitesel, 543 F. 2d 1176 (6th Cir., 1976), and cases cited therein. Defendant possessed no constitutional right to be represented by Mr. Anderson at his trial, and there is no error in this regard.

Defendant's last contention is, in effect, that his conviction is contrary to law. Section 77-27,115, R. R. S. 1943, provides for the punishment of "Any person required * * * to pay any income tax or * * * to make a return * * * who willfully fails to pay such tax or * * * make such return * * *." On his 1975 Nebraska income tax return, the State's exhibit 1, the defendant objected to all information called for except for his name, address, town, zip code, and Social Security number. Attached was a document in which the defendant explained the grounds for his objections. Defendant argues that his actions above constitute the filing of a return and he cannot thus be convicted of failure to file a return.

In United States v. Daly, 481 F. 2d 28 (8th Cir., 1973), the defendant was convicted of willfully failing to file an income tax return in violation of Title 26 U. S. C. A., section 7203. Defendant filed a tax return on which he supplied his name, address, occupation, and signature. Attached thereto was a document detailing his objections to the income tax law. On appeal the defendant contended that his filing of returns containing no information relating to income or expenses was sufficient to comply with the requirements of section 7203 that he "make a return." The court rejected this contention, citing United States v. Porth, 426 F. 2d 519 (10th Cir., 1970): "A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner." De-

fendant's argument is without merit.

Defendant also contends that his conviction is erroneous because his failure to provide any information, other than that indicated previously, was based upon a good faith claim of his privilege against self-incrimination under the Fifth Amendment to the United States Constitution. A similar contention was made by the defendant in State v. Soester, *supra*. We held: "It is generally held that if the form of a return calls for answers that the taxpayer is privileged from making he may raise the objection in the return but cannot on that account refuse to make any return at all. * * * There was no showing in this case as to how a disclosure of the personal property owned by the defendant on the taxing date would have incriminated him and it is not clear to us on what basis the defendant claimed the privilege. There must be some reasonable showing by the taxpayer as to how the disclosure could possibly incriminate him."

There is a total failure on defendant's part to show how disclosure on the return would or could possibly incriminate him. This contention is devoid of merit.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD ROBBINS, APPELLANT.

265 N. W. 2d 226

Filed April 26, 1978. No. 41793.

Criminal Law: Guilty Pleas. A guilty plea is not rendered involuntary simply because it is the product of legitimate plea bargaining.

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

Anthony S. Troia of Troia Law Offices, for appellant.

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

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

BRODKEY, J.

Donald Robbins, defendant and appellant herein, was charged with receiving stolen property, a revolver, in violation of section 28-508, R. R. S. 1943. Pursuant to a plea bargain, the information was amended to charge unlawful possession of a firearm by a felon under section 28-1011.15, R. R. S. 1943. In addition, a charge against the defendant of unlawful possession of heroin in a companion case was dismissed by the county attorney. The defendant then pled guilty to the amended charge, and was sentenced to a term of imprisonment for not less than 1 and ½ years nor more than 5 years. He has now appealed to this court from his conviction and sentence, contending that his plea of guilty was not voluntarily and intelligently made. We affirm the judgment of the District Court.

At the arraignment defendant appeared with counsel and was advised of the charge against him and of the possible penalties which could be imposed upon conviction. Defendant stated that he understood the nature of the charge and the possible penalties, and that he had had sufficient time to discuss the case with his attorney. The defendant was advised of the rights he would be waiving by pleading guilty, and he stated that he understood such rights. The plea bargain was disclosed to the court, and defendant stated that, other than the plea bargain, no promises, threats, or inducements had been made to secure his plea of guilty. A factual basis for a plea of guilty was established. The defendant then pled guilty and stated that his plea was a voluntary one.

Defendant argues on appeal that his guilty plea was not voluntary because he was forced to enter it

under pressure due to the fact that a plea bargain was offered to him, and because he would have had to go to trial on two felony charges if he did not accept the plea bargain. He does not contend that he did not understand the nature of the charge, the possible penalties, and the effect of the plea of guilty, but simply argues that his plea was involuntary because it was the product of a plea bargain.

Similar arguments were made and rejected by this court in State v. Fitzgerald, 190 Neb. 436, 208 N. W.2d 688 (1973); and State v. Reed, 187 Neb. 792, 194 N. W. 2d 179 (1972). In those cases the defendants pled nolo contendere and guilty, respectively, pursuant to plea bargains to avoid habitual criminal charges, and subsequently argued that their pleas had been coerced. In rejecting their argument, we stated that a threat or promise of illegal action may invalidate a plea, but that a threat to prosecute when the facts warrant prosecution is not coercive such that a subsequent plea is involuntary. Implicit in our holdings was a rationale that pleas are not rendered involuntary simply because they are the product of plea bargaining.

The effect of plea bargains on the validity of guilty pleas was also recently discussed by the Supreme Court of the United States in Bordenkircher v. Hayes, 46 U. S. L. W. 4089 (1978). The court stated that "acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process." The court noted that although confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the assertion of his trial rights, the imposition of difficult choices is an inevitable and permissible attribute of any legitimate system which tolerates and encourages the negotiation of pleas.

In the present case the bargaining results were

fully disclosed to the trial court, and the plea was entered deliberately after adequate consultation with counsel. The record clearly shows that the defendant voluntarily and intelligently entered his plea with a full understanding of all choices available to him. There is no indication of prosecutorial misconduct or threats of illegitimate action. Therefore defendant's assignment of error is without merit. State v. Fitzgerald, *supra;* State v. Reed, *supra.*

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

AFFIRMED.

BRIAN BRAESCH, A MINOR, BY DELBERT BRAESCH, HIS FATHER AND NEXT FRIEND, ET AL., APPELLEES, V. DANIEL DEPASQUALE ET AL., APPELLANTS.

265 N. W. 2d 842

Filed May 3, 1978. No. 41380.

1. **Appeal and Error.** The rule that appellate courts will ordinarily dismiss an appeal which has become moot because no actual controversy still exists between the parties is subject to an exception where the issues involved present matters of public interest.
2. **Due Process: Athletic Code of Conduct.** With regard to what process is due, where student athletes admit the misconduct with which they are charged, the function of procedural protections in insuring a fair and reliable determination of the issue of "guilt" is not essential.
3. **Schools and School Districts: Athletic Code of Conduct.** In order to overturn rules for the expulsion of participants from interscholastic athletics on the ground that such rules are unreasonable or arbitrary, or that they invade private rights, the evidence of such facts must be clear and satisfactory.
4. **Schools and School Districts: Athletic Code of Conduct: Waiver.** Where a board of education has provided effective, reasonable, and prompt procedures for notice, hearing, and review of an order of expulsion from participation in interscholastic athletics, and the athlete neglects or refuses to follow or comply with such procedures and exhaust such remedies, such neglect or refusal ordinarily constitutes a waiver of any right to subsequent injunctive relief.

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

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman & Thomsen, for appellants.

Clayton H. Shrout of Shrout, Christian, Krieger, Merwald & Mori, and Verne Moore, Jr., of Moore, Moore & Peters, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

MCCOWN, J.

The plaintiffs brought this proceeding in the District Court for Washington County, Nebraska, to enjoin the defendant school officials from enforcing any rules of conduct that would prevent full participation by the plaintiffs in the interscholastic basketball program of the Arlington Public Schools. The District Court granted a permanent injunction enjoining defendants from preventing plaintiffs from full participation in the interscholastic basketball teams of Arlington, Nebraska. The defendants have appealed.

The plaintiffs in this action were all minors under the age of 19 and represented by their respective parents. All five plaintiffs were senior members of either the boys or the girls interscholastic basketball teams of Arlington High School. Rules of conduct for boys and girls basketball teams were distributed at the beginning of the 1976-77 basketball season. Participants in the basketball program were required to sign them and obtain one parent's signature on a copy of the rules. The rule involved here was: "DRINKING, SMOKING OR DRUGS: Do not come out for basketball if you plan on using any of the above. Any use of them will result in the immediate expulsion from the squad." Each of the plaintiffs and one or more of their parents had signed the rule.

On Saturday evening, January 8, 1977, a party was held at the home of one of the plaintiffs. The other plaintiffs, along with other seniors who were not members of the interscholastic basketball teams, attended the party. A few days later, Robert Krempke, the coach of the boys basketball team, overheard conversations at school about the party and learned that a senior boy not on the basketball team had been arrested on the evening of the party on a charge of minor in possession. On January 12, 1977, the coach approached the plaintiff who had been the host for the party and questioned him about the party. The plaintiff host admitted that there had been beer at the party and that he and other members of the basketball team were "involved." After consulting with the school principal, the basketball coach talked with each of the plaintiff members of the boys basketball team. Each admitted being at the party and drinking. The coach told them to leave basketball practice, and told them that he would arrange a meeting with them and their parents, and the principal, the following morning. The following morning, January 13, 1977, Daniel DePasquale, the principal of the high school, and Mr. Krempke, the coach, met with two of the boys involved, and on the next morning with the third. Each boy was accompanied by a parent or adult member of his family. At these brief meetings the coach told the persons present that the rules required expulsion from the basketball team, and the principal supported the coach. The principal testified that at the conclusion of these meetings he considered the boys suspended from the team and told them the decision would be confirmed by mail.

On January 13, 1977, Eloise Hiemke, the girls basketball coach learned about the drinking party from one of the girls involved and from an assistant coach. On the morning of January 14, 1977, the girls coach met with the two girls involved, asked each of

them if they had been at the party, and if they had had any alcoholic beverages to drink. Each of the girls admitted she had. The principal and the girls basketball coach met with the girls and their parents on the afternoon of January 14, 1977. The principal and the girls coach advised the girls and their parents that they felt the girls should be expelled from the team, and that an official letter would be mailed to them advising them of the decision and telling them what could be done to appeal the decision. The principal opinion expressed by the parents at the various meetings was that the penalty was too severe.

By letter dated January 18, 1977, the principal notified all the plaintiffs and their parents that each of the plaintiffs had been suspended from the basketball team until January 31, 1977, and then expelled from the team for the remainder of the season. The letter also informed them that they had 5 days in which to give written notice of their desire to appeal to the board of education, and that at the hearing they would each have the right to present their side of the issue, present any documents or statements, and cross-examine witnesses and be represented by counsel. By letters dated January 20, 1977, each of the plaintiffs requested a hearing.

On January 21, 1977, the plaintiffs filed this action in the District Court for Washington County, and obtained a temporary order restraining the defendant school officials from enforcing any rules that would prevent full participation by the plaintiffs in the interscholastic basketball program. Hearing on a temporary injunction was set for January 28, 1977.

On January 24, 1977, the plaintiffs were advised by the principal that they were entitled to a hearing before a hearing examiner. The hearing examiner advised the plaintiffs that hearing would be held at 4:30 p.m., on January 26, 1977, at the school. The

plaintiffs declined to participate in the appeals procedures established by the school board.

On January 28, 1977, following a hearing, the District Court granted a temporary injunction enjoining the defendants from preventing the plaintiffs from full participation on the interscholastic basketball teams. Trial on the permanent injunction was later set for and held on February 18, 1977. Following the hearing, the court specifically found that the right to participate in interscholastic basketball activities was "a constitutional right protected by the due process clause of the state and federal constitutions" and that plaintiffs had been deprived of that right without due process. The District Court entered a permanent injunction enjoining defendants from preventing plaintiffs' full participation in the interscholastic basketball teams of Arlington High School. The defendants have appealed.

The plaintiffs filed a motion to dismiss the appeal in this court on the ground that the matter is moot. All the plaintiffs have now been graduated from high school. It is contended that the judgment in this court will, therefore, have no practical effect as to them, and there is no ground for appellate review. The defendants contend that although the issues may be moot as to the particular plaintiffs here, the case nevertheless involves matters of public interest which affect all schools in the state that maintain programs of interscholastic athletics.

Some cases hold that in a case which has become moot, an appeal will not be retained merely for determining the question of costs. As a general rule, appellate courts do not sit to give opinions on moot questions on abstract propositions, and an appeal will ordinarily be dismissed where no actual controversy exists between parties at the time of the hearing. In State ex rel. Coulter v. McFarland, 166 Neb. 242, 88 N. W. 2d 892, this court recognized that general rule but said: "This general rule, however, is

subject to some exceptions, as where the question involved is a matter of public interest; * * *." The court then held that the questions involved in that case presented matters of public interest because they affected all county courts of the state. The questions involved in the case now before us also present matters of public interest. In the context of disciplinary action in the field of interscholastic athletic competition, almost no case could reach this court for decision before it became moot if we refused to decide all cases where no actual controversy still exists between the parties at the time of appellate hearing and decision. The motion to dismiss is not well taken.

There is some disagreement between the parties as to whether participation in high school athletics is a constitutional right or is a privilege not protected by any constitutional principle. Since Graham v. Richardson, 403 U. S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534, the Supreme Court of the United States has abandoned much of the former dichotomy between rights and privileges in constitutional classifications. The Fourteenth Amendment's protection of property extends to benefits which, under state law or practice, a person has a claim or entitlement. Board of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548. The Supreme Court of the United States has also held that temporary suspension from public school infringes upon property or liberty interests protected by the due process clause of the Fourteenth Amendment. Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725.

The State of Nebraska, as a part of its program for public education, has provided athletic opportunities to all public school students. Participation in interscholastic athletics ordinarily has significantly less important constitutional dimensions than does participation in traditional academic education. A student's interest in participation in high school ath-

letics is nevertheless a significant one. Brenden v. Independent School Dist., 477 F. 2d 1292 (8th Cir., 1973). In the light of these constitutional principles, the question is whether the due process clause limits the power of the defendants to exclude the plaintiffs from participation in the interscholastic athletic program of Arlington High School.

Assuming that the application of the rule of conduct involved here implicates a property or liberty interest which is protected by the Fourteenth Amendment, the question becomes one of what process was due the plaintiffs under the circumstances of this case. Due process is not a technical fixed concept to be applied in all conditions, but must be flexible. It calls for such procedural protection as may be appropriate to meet the particular situation. In Goss v. Lopez, *supra*, the Supreme Court held that due process requires that a student facing temporary *academic* suspension for disciplinary reasons be given oral or written notice of the charges against him, and, if he denies them, an explanation of the evidence the authorities have and an opportunity to explain his side of the story. The Supreme Court required those rudimental precautions against unfair or mistaken findings and arbitrary exclusion from school. Certainly no greater requirements should be imposed for expulsion from interscholastic athletics.

There can be no doubt that each of the plaintiffs here had specific advance notice of the rule of conduct involved, and notice of the date, time, and place of the violation charged. Each of the plaintiffs admitted his or her violation of the rule. Courts that have considered the issue have generally concluded that when the acts which are the basis for disciplinary action are admitted, the requirements of due process are far less stringent, and that due process requirements with respect to the "guilt" finding process have been met by the admissions. See,

Betts v. Board of Educ. of the City of Chicago, 466 F. 2d 629 (7th Cir., 1972); Ector County Independent School Dist. v. Hopkins, 518 S. W. 2d 576 (Tex. Civ. App., 1974). In the latter case the court said: "With regard to what process is due, where students admit the misconduct with which they are charged, the function of procedural protections in insuring a fair and reliable determination of the issue of 'guilt' is not essential."

In the case before us the plaintiffs do not dispute that there was a specific rule of conduct for interscholastic basketball participants; that each of them and their parents had actual notice of the rule in advance; and that each of the plaintiffs violated the rule. The plaintiffs' position is simply that the rule was arbitrary and unreasonable or that the penalty was too great.

Rules prohibiting use of alcoholic liquor or drugs by participants in interscholastic athletics are clearly appropriate. In Richardson v. Braham, 125 Neb. 142, 249 N. W. 557, this court upheld the right of public schools to make reasonable rules for student conduct, and held that in order to overturn such rules on the ground that they were unreasonable or arbitrary, or that they invade private rights, the evidence of such facts must be clear and satisfactory. This court said: "The wisdom or expediency of a rule adopted by a school board and the motive prompting it are not open to judicial inquiry, where it is within the administrative power of that body." Rules governing the conduct of participants in interscholastic athletics duly and regularly adopted by school authorities ought to be valid and enforceable unless they are clearly arbitrary and unreasonable and serve no legitimate end of educational athletic policy.

The rule involved in this case, even though the penalty of expulsion for the season might be deemed severe by some persons, clearly serves a legitimate

rational interest and directly affects the discipline of student athletes. It cannot be said that the prescribed penalty was an arbitrary and unreasonable means to attain the legitimate end of deterrence of the use of alcoholic liquor by student athletes. See, Bunger v. Iowa High School Athletic Assn., 197 N. W. 2d 555 (Iowa); Annotation, 53 A. L. R. 3d 1110 at p. 1124.

Although due process may also contemplate an opportunity to be heard on the question of the penalty to be imposed where the penalty is discretionary rather than prescribed, that opportunity was also provided here. In addition to the informal procedures and meetings, which met all rudimentary requirements of due process, the plaintiffs here were also given the right to appear at a formal hearing with a right to present evidence, cross-examine witnesses, and be represented by counsel. A hearing examiner was appointed and a date set for hearing but the plaintiffs declined to participate in any of the appeals procedures established by the school board. Instead, they commenced this injunction action 1 day after they had requested the appeals procedures offered by defendants, and the temporary injunction was obtained in the District Court 2 days after the date set for the school hearing which plaintiffs had already refused. Under such circumstances courts should be reluctant to interfere prior to completion of prompt and reasonable procedures for obtaining a final order of the school board. A few days suspension from interscholastic athletic competition can hardly be said to constitute such irreparable harm as to justify judicial interference with orderly and prompt school board procedures.

While school boards are not subject to the Administrative Procedures Act, the rules broadly applying to judicial review of the action of administrative agencies are, or should be, equally applicable here. It is the general rule that administrative action

which is not final cannot be attacked in an injunction proceeding, the reason being that in the absence of a final order or decision, power has not been fully and finally exercised and there can usually be no irreparable harm. See 2 Am. Jur. 2d, Administrative Law, § 583, p. 411. On the evidence in this case, a few days delay could not constitute irreparable harm in a constitutional sense or otherwise.

It is clear in this case that the school board had the power to change or reduce the penalty if it were determined to be arbitrary and unreasonable. The plaintiffs refused to exhaust that remedy or to pursue it to the point of finality at which it might be ripe for judicial review. Where a board of education has provided effective, reasonable, and prompt procedures for notice, hearing, and review of an order of expulsion from participation in interscholastic athletics, and the athlete neglects or refuses to follow or comply with such procedures and exhaust such remedies, such neglect or refusal ordinarily constitutes a waiver of any right to subsequent injunctive relief.

The action of the District Court in granting the injunction here was erroneous and is therefore reversed.

REVERSED.

DAVID HATCH, APPELLEE, V. PETER F. HEIM, APPELLANT.

265 N. W. 2d 444

Filed May 3, 1978. No. 41410.

1. **Motor Vehicles: Damages: Evidence.** Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation. As a general rule, the evidence should be such as to enable the court or jury to determine the injury and the amount of damages with reasonable certainty or accuracy.
2. **Motor Vehicles: Damages.** When a damaged automobile can be repaired and restored substantially to its original condition, the reasonable cost of repair is the proper measure of damages. How-

ever, the reasonable cost of repair must not exceed the value of the vehicle immediately prior to the accident.

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

Michael G. Helms of Schmid, Ford, Mooney, Frederick & Caporale, for appellant.

McCormack, Cooney & Mooney, for appellee.

Heard before WHITE, C. J., BOSLAUGH, and WHITE, JJ., and WARREN and KORTUM, District Judges.

KORTUM, District Judge.

This is an action to recover damages arising from a collision of motor vehicles operated by the plaintiff and defendant. The jury returned a verdict for the plaintiff and the defendant has appealed.

The accident happened on September 22, 1976, at approximately 32nd and L Streets in Omaha, Nebraska. The plaintiff was proceeding westbound on L Street and was stopped behind traffic when his 1970 Ford van was struck in the rear by the defendant's 1960 International Scout.

On the day following trial in the District Court, while the jury was in recess, the defendant filed an amended answer admitting liability. The only issues thus raised by the pleadings and tried in the District Court related to the nature and extent of the plaintiff's damage, including injury to his person and to his vehicle.

The defendant first assigns as error that the trial court erred in admitting, over defendant's objections, a repair bill purporting to represent the repairs to plaintiff's vehicle.

The plaintiff's vehicle was a 1970 Ford van, purchased 2 months before the accident for $200. The van had between 84,000 and 93,000 miles on it at the time of the accident. At the time of the accident, the plaintiff's van was completely unpainted, had

some automotive putty applied to it, and was not equipped with any bumpers.

Photographs of the plaintiff's vehicle taken shortly after the accident, and subsequently admitted into evidence, showed dents to the right side, right rear corner, including a broken taillight assembly.

The repairman called by the plaintiff testified there was rust in the lower portion of the right rear panel in the same area that was damaged by the accident, as well as rust on the front and left side of the van. The plaintiff testified that he had begun to repair some areas of rust on his van prior to the accident and that the rust had no connection with the accident.

The repairs to plaintiff's vehicle included a complete painting of the van, repair of rust areas in the right rear and sanding of rust areas in the front and left side, repair of dents, replacement of the rear bumper, and installation of a taillight lens.

Exhibit 7 was the repair bill in the amount of $1,008.46. The repairman testified that he performed the work on exhibit 7 and that the charges were fair and reasonable for the work done: The exhibit contained the following description of work done, "repair rust & dents as needed. Install taillight lens and front bumper."

The trial court admitted exhibit 7 over defendant's objection. No other evidence was presented to show the fair and reasonable cost of repair to plaintiff's vehicle.

When a damaged vehicle can be repaired and restored to substantially its original condition, the cost of repair is the proper measure of damage. Carl R. Anderson & Co. v. Suhr, 181 Neb. 474, 149 N. W. 2d 101; Wylie v. Czapla, 168 Neb. 646, 97 N. W. 2d 255.

It seems quite clear that the repair made for replacement of the rear bumper, repairs of rust, and repainting of the entire vehicle were not made necessary by reason of the accident. No effort was made in exhibit 7, or in the testimony presented, to

either itemize the repair charges or to separate the charges in any manner. Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation. Carl R. Anderson & Co. v. Suhr, *supra*; Wylie v. Czapla, *supra*.

In this instance there was no evidence presented from which the jury could determine the fair and reasonable cost of those items of repair directly related to the accident. The reception of the repair bill, exhibit 7, over objection by the defendant, was clearly erroneous and requires a new trial on the issue of damages.

Defendant also assigns as error the refusal of the court to give defendant's requested instruction relating to the personal property damage. The requested instruction was as follows: "The fair and reasonable cost of making the repairs necessary to restore the vehicle to substantially its condition immediately before the injury.

"The reasonable cost of repair cannot exceed the value of the vehicle before the accident. Thus, the proper measure of damages for the damage to the vehicle is the lesser of:

"(a) the fair and reasonable cost of making the repairs necessary to restore the property to substantially its condition immediately before the accident; or

"(b) the fair and reasonable market value of the property immediately prior to the accident."

The trial court refused to give this instruction and instead gave the following instruction: "Evidence has been received that there has been damage to the Plaintiff's automobile as a result of the collision. It is for you, the Jury, to determine the amount and extent of such damage, if any.

"You are instructed that under the law of this State the Jury may determine the amount of damage under the theory of repair which is: The fair and reasonable cost of making the repairs necessary

to restore the automobile to substantially its condition immediately before the accident.

"The reasonable cost of repair cannot be excessive in comparison to the value of the vehicle at the time of the accident or immediately prior thereto. It is, however, for you, the Jury, to determine the value of the vehicle at the time of or immediately before the accident. The amount paid for an automobile is not the sole criteria to be used by you in making such determination.

"If you, the Jury, determine that the automobile could not be repaired for a reasonable amount, then you must determine the fair and reasonable market value of the property immediately prior to the accident and after the accident, and thus determine the loss to the Plaintiff, under this theory of recovery."

We think the more precise wording of the requested instruction is to be favored. Where personal property can be repaired so that, when repaired, it will be in as good condition as it was before the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the use of the article while being repaired with ordinary diligence, not exceeding the value of the article before the injury. Sky Harbor Air Service, Inc. v. Lang, 194 Neb. 428, 231 N. W. 2d 704; Helin v. Egger, 121 Neb. 727, 238 N. W. 364.

It is unnecessary to consider the remaining assignment of error. For the reasons given the judgment of the District Court is reversed and the cause is remanded for a new trial on the issue of damages.

REVERSED AND REMANDED.

ESTHER LANGENHEIM, APPELLANT, V. CITY OF SEWARD, FOR AND ON BEHALF OF THE SEWARD AIRPORT AUTHORITY, APPELLEE.

265 N. W. 2d 446

Filed May 3, 1978. No. 41447.

1. **Eminent Domain: Time: Damages.** In an eminent domain proceeding the date of valuation for property taken and for severance damages suffered is the date condemner files its petition in condemnation in the county court.
2. **Eminent Domain: Appeal and Error: Damages.** The rule requiring the submission on appeal to the District Court of the same issues tried in county court does not require separate verdicts or special findings as to the type of damages sustained.
3. **Trial.** The submission of special findings to a jury is discretionary with the trial court and there is no error unless there has been an abuse of discretion.
4. **Trial: Appeal and Error: Statutes.** Under the provisions of section 27-103, R. R. S. 1943, error may not be predicated upon a ruling admitting evidence unless the specific ground of objection has been stated, if such ground is not apparent from the context.
5. **Trial: Courts: Instructions.** Failure of the trial court to file instructions with the clerk of the court is not, in and of itself, prejudicial.
6. **Eminent Domain: Landlord and Tenant: Damages.** A joint award to landlord and tenant, standing alone, affords no basis of allocation of that award between the parties.
7. **Trial: Appeal and Error.** A party cannot complain of error when, by his own action, he has acquiesced therein.

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

Blevens, Blevens & Jacobs, for appellant.

Thomas E. Johnson and Kirk S. Blecha of Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellee.

Heard before SPENCER, BOSLAUGH, and WHITE, JJ., and RIST and KELLY, District Judges.

RIST, District Judge.

This is an action wherein the defendant, City of Seward, filed its petition in the county court of Seward County, Nebraska, on September 27, 1974, to con-

demn 98.80 acres of the southeast quarter, Section 5, Township 10 North, Range 3 East of the 6th P.M., Seward County, Nebraska, for airport purposes. Said southeast quarter section together with an 80-acre tract across the highway to the east thereof, were owned by the plaintiff, Esther Langenheim.

After the appointment of appraisers, proceedings were delayed until May 12, 1975, because of an injunction respecting the city's authority to proceed in this case. At that time the appraisers filed their return in the county court awarding the plaintiff, as owner, and Burhoop Brothers, a partnership, as lessees, the sum of $122,512 for the land taken in fee title and awarding to the same parties severance damages in the amount of $35,514 plus $50 for abstracting. No apportionment of any of said damages was made between the plaintiff landowner and the lessees.

Plaintiff perfected her appeal from said award to the District Court for Seward County. Burhoop Brothers did not appeal. Plaintiff, in her petition in the District Court, pleaded that she was the sole owner of the real estate condemned and the only person entitled to compensation for the taking, and that the tenants named in the award were not entitled to any portion of the compensation which might be awarded for such taking.

Subsequent to the filing of plaintiff's petition on appeal, the defendant City moved to file a third party petition against Burhoop Brothers, alleging in said petition that since plaintiff made exclusive claim to any damages to be awarded and because of the joint award made in the county court, the court should determine the portion, if any, of any award or judgment to which Burhoop Brothers were entitled. Leave to file the third party petition was granted, apparently without objection. Service was had upon said third party defendants and on April 22, 1977, following the trial of plaintiff's action to the jury, the

District Court entered a default judgment against said third party defendants determining that they were entitled to no portion of either the award of the appraisers or the verdict and judgment of the plaintiff.

Plaintiff's case was tried to a jury in March of 1977 and on the 10th day of said month a verdict was rendered in favor of plaintiff and against defendant in the amount of $147,000, for which amount judgment was entered.

Plaintiff's motions for new trial were overruled and her appeal was perfected to this court.

Plaintiff complains that the trial court erred in sustaining defendant's motion in limine which established the date on which damages were to be determined as September 27, 1974, the date the petition in condemnation was filed in county court. Plaintiff also claims that her motion in limine, to set said date as June 27, 1975, when the appraisers' award was paid into court, should have been sustained.

Plaintiff's position is based upon her reading of this court's decision in Petersen v. School Dist. of Bellevue, 188 Neb. 354, 196 N. W. 2d 510. Plaintiff asserts that case has overruled a long line of decisions of this court holding the valuation date to be the date of the filing of the petition in condemnation, and that Petersen now establishes the correct valuation date to be the date of payment of the appraisers' award into court.

We disagree with plaintiff's contention. First, the Petersen case deals solely with the question of when interest begins to run on a condemnation award, there being no issue raised therein as to the proper valuation date. Second, this court specifically considered this issue in Platte Valley P. P. & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200. At the time of that decision the provisions of Chapter 76, article 7, R. R. S. 1943, material to the case before us, were the same as now. In Platte Valley the trial

judge had instructed the date of valuation to be the date the award was paid into court and not when the petition in condemnation was filed. This court, in specifically holding that to be erroneous, said: "It has long been a general rule in this jurisdiction, unchanged by Chapter 76, article 7, R. S. Supp., 1953, that the market value of lands taken by eminent domain proceedings, together with damages, if any, to other remaining lands by severance, are computable as of the time of the taking, which is deemed to occur when the petition for condemnation is filed."

Finally, while apparently dicta, it is nonetheless instructive to note that this court in Harmony Lanes v. State, 193 Neb. 826, 229 N. W. 2d 203, a decision subsequent to Petersen, held the date of taking was when the action commenced in county court.

We reaffirm that the date for purposes of determining valuation and damages in eminent domain proceedings is the date condemner files his petition in condemnation in the county court.

Plaintiff next contends that the trial court erred in refusing to submit special findings to the jury which would have resulted in separate findings of (1) the value of the land taken in fee, (2) the amount of severance, if any, to the quarter section from which the tract in fee was taken, and (3) the amount of severance damages, if any, to plaintiff's 80 acres immediately east of the quarter section. The trial court had instead submitted a single verdict form for all damages to which plaintiff was entitled.

Plaintiff's contention rests upon two arguments. First, that since the appraisers' award in the county court had separated the value of the fee from the severance damages, the District Court had to treat these as the issues tried below and submit them to the jury in the same manner. Second, a failure to separate damages for fee taking from severance damages, subjects plaintiff to an increase in federal income tax burdens.

With respect to these arguments, it is first noted that the trial court correctly instructed the jury on the determination of damages for both the fee taking and for severance.

We disagree with plaintiff that the submission of the same issues raised in the county court required the District Court to submit the precise form of the damage award used in the county court. The issue was damages, both for the taking and for the severance, and these issues were tried and submitted to the jury in the District Court. The fact that they were awarded together in one verdict goes to the technical form of reporting the result, not to the issues considered. We agree with defendant that the identity of the cause of action was preserved and the same issues presented at trial, as at the commencement of the action in county court.

We also point out that the submission of special findings rests within the sound discretion of the trial court. Masonic Bldg. Corp. v. Carlsen, 128 Neb. 108, 258 N. W. 44. Unless the record shows an abuse of that discretion, the trial court's decision should stand. Hedrick v. Strauss, 42 Neb. 485, 60 N. W. 928.

We find no such abuse shown unless plaintiff's contention respecting possible income tax consequences would so qualify. As to this contention, no extended discussion of federal tax law is required except to say we are satisfied that plaintiff has adequate recourse under federal statutes to obtain a determination of the division between damages for taking and severance, as she may believe necessary and appropriate. More to the point, however, is the fact that such tax consequences, however important to plaintiff, are a purely collateral matter to this action and totally unrelated to the issues here involved. Courts are not required to accommodate litigants on matters beyond those material to the action being tried, and litigants have no right, constitutional or otherwise, to insist upon such accommodation. We find

no abuse of discretion by the trial judge in denying plaintiff's request for special findings.

Plaintiff next contends that the trial court erred in permitting defendants' witnesses, Achord and Loftis, to give opinions of value as expert witnesses without foundation showing they were licensed appraisers. This contention rests upon the fact that no affirmative showing of such licensing appears in the record and upon the provisions of section 81-8,286, R. S. Supp., 1976, which provides in substance that no person shall, after January 1, 1974, act as a real estate appraiser without a license issued by the State Real Estate Commission, and no person shall testify as an appraiser before any court unless so licensed.

A review of the bill of exceptions reflects that as to each of these witnesses, defendant laid such foundation as to training, experience, and knowledge of the land involved as would qualify the witness to express an expert opinion. No showing of licensing appears in the record. When the opinion of each witness was asked, plaintiff's only objection was "Objection, foundation," or "Objection, lack of foundation." No basis for such objections was ever stated or detailed.

Section 27-103, R. R. S. 1943, of the Nebraska Evidence Rules requires a timely objection to the admission of evidence stating the specific ground of the objection if a specific ground is not apparent from the context within which the question was asked. The reason for the requirement of specificity is to permit both court and counsel to better deal with the objection, either by way of counsel's correction of the claimed error, or as assistance to the court for a fair and more accurate ruling.

It is our conclusion that the defendant, having laid a sufficient foundation to show requisite expertise and knowledge of these witnesses and plaintiff, having failed to specify the failure of licensing in her ob-

jection to foundation, is now barred from effectively raising such omission as an error on appeal.

Plaintiff's contention that the court erred in failing to file the instructions with the clerk of the court is sufficiently answered by plaintiff's admission in her brief that it was not prejudicial to her. It affords no basis for reversal herein.

Plaintiff asserts that the trial court erred in refusing to allow appraisers' and attorney's fees to plaintiff under the provisions of section 76-720, R. R. S. 1943. The applicable provisions of this statute provide that the trial court, in its discretion, may allow such fees when the condemnee appeals and recovers a final judgment greater by 15 percent than the appraisers' award in the county court. As indicated earlier, plaintiff's verdict was $147,000 and the joint award of the appraisers was $158,076.

Plaintiff argues that the joint award last noted, which was to both plaintiff and Burhoop Brothers, must be treated as one-half to plaintiff and one-half to Burhoop Brothers and therefore the verdict qualifies her for the allowance of fees. Plaintiff cites no authority and we know of none which says that a joint award to landlord and tenant must be considered as an equal award to each. The respective legal interests of these parties in this real estate are materially different and there is no evidence in the record to afford any basis for determining what amount of the award the appraisers considered allocable to each. The burden was on plaintiff to prove the necessary basis for the allowance of fees and having failed to do so there was no abuse of discretion in the trial court in denying such allowance.

Finally, plaintiff claims that the trial court erred in entering a default judgment against Burhoop Brothers as third party defendants, holding they had no interest in the award or verdict, and further erred in overruling plaintiff's motion, after trial, to dismiss the appeal and reinstate the appraisers'

award. The above claims are intertwined and will be considered together.

Plaintiff presents a curious mixture of arguments, insisting on the one hand that the statutory basis for third party proceedings was not pleaded or shown and that the pleading for a default judgment against third party defendants was a nullity, but admitting, on the other hand, in her brief that "Plaintiff is not complaining about a default judgment against the tenants, but objects to the time and manner in which it was done."

Plaintiff's basic complaint is that if the default judgment against third party defendants had been entered before plaintiff's trial, then plaintiff would have had the right to dismiss her appeal and accept the appraisers' total award in county court, but since the default judgment came after trial, the trial court should have sustained plaintiff's motion to vacate the judgment on the verdict, and permitted plaintiff to withdraw her appeal and accept the appraisers' award.

Plaintiff is correct that the nature of the interest of Burhoop Brothers, if any, in this litigation was not within the provisions of section 25-331, R. R. S. 1943, since clearly such third party defendants would not be liable to the City of Seward for any portion of plaintiff's claim against such City. Be that as it may, plaintiff made no objection to the procedure followed or the issue presented in the third party petition until after her own case was tried and the default judgment entered on the third party petition. She had the right to raise such objections prior to her trial.

A party cannot complain of error when, by his own action, he has acquiesced therein. Ellsworth v. City of Fairbury, 41 Neb. 881, 60 N. W. 336. A party may not complain of error which he has invited. One who asks relief which is granted, cannot appeal from such decree because the effect is different

from that anticipated by the party. County of Kearney v. State Board of Equalization & Assessment, 183 Neb. 329, 160 N. W. 2d 179. If one is improperly made a party to an action, the error is waived if it was done with consent of the party now complaining. Chamberlain v. Brown, 25 Neb. 434, 41 N. W. 284.

We hold that plaintiff may not now challenge the court's actions with respect to the third party complaint, since she made no timely objection thereto and elected to first proceed with her own trial. Having made that election, she may not now, with the benefit of hindsight, seek to change the effect of it.

We have reviewed the record in this case with respect to plaintiff's general assignment of error that the trial court failed to grant a new trial. We find no error with respect to this assignment.

The judgment of the District Court is affirmed.

AFFIRMED.

TEDCO DEVELOPMENT CORP., APPELLEE AND CROSS-APPELLANT, V. OVERLAND HILLS, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES.

265 N. W. 2d 56

Filed May 3, 1978. No. 41546.

1. **Evidence: Witnesses: Appeal and Error.** When evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. **Equity: Contracts: Specific Performance.** The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust and may be denied where the party seeking it has failed to perform.
3. _____: _____: _____. The burden is primarily on the party seeking specific performance to show his right in equity and good conscience to the relief sought.

4. **Contracts: Specific Performance: Evidence.** The evidence which entitles a party to specific performance must be clear, satisfactory, and unequivocal.
5. _____: _____: _____. A party who seeks specific performance must show not only that he has a valid, legally enforceable contract, but also that he has substantially complied with its terms by performing, or offering to perform on his part, the acts which formed the consideration of the undertaking on the part of the defendant or that he is ready, able, and willing to perform his obligations under the contract.
6. **Corporations: Contracts: Specific Performance: Property.** Where it is sought to enforce specific performance of a contract for the sale of realty executed for a corporation by its officers in their individual names, it must be shown either that the corporation authorized the contract or that the execution of the same had been ratified by it.
7. **Corporations: Contracts: Ratification or Repudiation: Property.** Whether there has been a ratification in a particular case is ultimately and ordinarily a question of fact.
8. **Agency: Principal and Agent: Ratification or Repudiation: Time.** The rule applicable generally is that where an act is done without authority, under an assumed agency, it is the duty of the principal to disavow and repudiate it in a reasonable time after information of the transaction if he would avoid responsibility therefor. What constitutes a reasonable time must largely, if not wholly, depend upon the circumstances of the particular case.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

James C. Cripe, and Timothy J. McReynolds of Gross, Welch, Vinardi, Kauffman & Day, for appellants.

Walsh, Walentine & Miles, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

WHITE, C. J.

On March 22, 1977, plaintiff Tedco Development Corp. (hereinafter referred to as Tedco) filed a petition against the defendants Overland Hills, Inc. (hereinafter referred to as Overland Hills), and Harold R. Young, Jr. (hereinafter referred to as

Young), seeking specific performance of a purchase agreement for the sale of an 180-acre tract of land situated in Sarpy County, Nebraska. Young was named as a defendant in Tedco's action because he claimed an interest in the real estate in question via a previous purchase agreement he had with the defendant Overland Hills, and had filed an action against Overland Hills for specific performance of his purchase agreement, which was for the identical tract of land. Young and Tedco's actions were consolidated and the case tried to the District Court.

The District Court held that Tedco was entitled to specific performance of its purchase agreement. Young's petition was dismissed. Young and Overland Hills filed motions for a new trial or, in the alternative, for a judgment notwithstanding the verdict which were overruled. Both appeal. We affirm the judgment of the District Court.

Being equitable in character, this action is triable de novo subject, however, to the condition that when evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Marfisi v. Spagnola, 197 Neb. 211, 248 N. W. 2d 24 (1976); Kolc v. Krystyniak, 196 Neb. 16, 241 N. W. 2d 348 (1976).

The basic facts are not in dispute. On October 19, 1976, Odell and Eva Lopp entered into a purchase agreement for the land in question with Overland Hills. This agreement provided for a purchase price of $450,000, which included a $10,000 earnest deposit held in escrow. On February 1, 1977, the Lopps assigned this purchase agreement to Young. On February 4, 1977, Young and Overland Hills entered into an agreement which acknowledged the assignment. The closing date was rescheduled for February 25, 1977. The agreement contained the fol-

lowing provision: "If for any reason the Seller is unable to tender marketable title to real estate as described * * * at the time designated for closing, then the Purchaser is relieved of its obligation to tender the purchase price and shall be entitled to either elect to have his Ten Thousand Dollars ($10,000.00) deposit returned * * * or request specific enforcement of the Uniform Purchase Agreement and this amendment."

On February 14, 1977, Tedco and Overland Hills entered into a purchase agreement for the identical tract of land. This agreement called for a purchase price of $485,000 and provided: "It is understood and agreed by and between buyer and seller that there is presently existing an outstanding purchase agreement wherein the seller has agreed to sell to third parties pursuant to the terms and conditions of the purchase agreement and amendment thereof existing between them. It is agreed, however, that in the event the third parties fail to close said transaction per the terms and conditions of their agreement with seller on or before February 25, 1977, that buyer hereunder shall have the sole and only outstanding purchase agreement legally binding upon the seller."

Representatives of Young and Overland Hills met on February 25, 1977, for the purpose of closing their agreement. It is undisputed that on this date the agreement was not closed.

On March 2, 1977, Overland Hills sent a letter to the escrow agent demanding that the $10,000 earnest money of the Young contract be forfeited for failure to close in accordance with the terms of the Young contract. Upon learning that the Young contract had not been closed, Tedco demanded that its contract be closed. On April 6, 1977, Overland Hills sent a letter to Tedco returning its $10,000 earnest money and stating that the Tedco contract, which had been recorded sometime prior to February 25, 1977, was

the only impediment to the closing of the Young contract.

Both Young and Tedco requested specific performance. The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust and may be denied where the party seeking it has failed to perform. O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403 (1947); Wineberg v. Baker, 123 Neb. 411, 243 N. W. 122 (1932); Russell v. Western Nebraska Rest Home, Inc., 180 Neb. 728, 144 N. W. 2d 728 (1966). The burden is primarily on the party seeking specific performance to show his right in equity and good conscience to the relief sought. Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131 (1955). The evidence which entitles a party to specific performance must be clear, satisfactory, and unequivocal. Meyer v. Meyer, 180 Neb. 379, 142 N. W. 2d 922 (1966).

We shall first look at Young's purchase agreement. It provided that the balance of $440,000 was to be paid either by cash or by certified check at the time of delivery of the deed. The seller was to have good, valid, and marketable title, in fee simple, and to give the purchaser a warranty deed. The closing date was February 25, 1977. If the purchaser was unable to tender the purchase price at the time designated for closing the seller was entitled to receive the earnest deposit.

The record shows that on February 25, 1977, and for some time thereafter, vendor Overland Hills did not have marketable title to the subject real estate. Marketable title is defined as a title a man of reasonable prudence, familiar with the facts and questions of law involved, would accept as a title which could be sold to a reasonable purchaser. Podewitz

v. Gering Nat. Bank, 171 Neb. 380, 106 N. W. 2d 497 (1960). "Marketable title means title free from reasonable doubt both as to matters of law and matters of fact * * *." Robinson v. Bressler, 122 Neb. 461, 240 N. W. 564 (1932). A title search conducted by Fidelity National Title Insurance Company listed eight specific requirements which needed to be met before title insurance would be issued. The most significant of these irregularities involved a transaction in which Donald Graham, treasurer of Overland Hills, obtained deeds to Lots 1, 2, and 3 of the Overland Hills subdivision in consideration for Graham's payment to Commercial Federal Savings and Loan Association for the release of a mortgage on the lots. The release price for the lots should have been approximately $100,000, but Graham obtained a release for $9,000, by camouflaging his request for a release of the mortgage on these lots with a group of releases for other lots. As of February 25, 1977, the land had not yet been conveyed back to the corporation.

On February 25, 1977, Young's attorney brought with him two uncertified checks, both drawn upon the account of Nebraska Homestead Trade, Inc. (of which Young, his wife, and sister are the sole shareholders), at the First Westside Bank. One check was drawn in the amount of $80,000 and the other was blank, intended to cover the remaining purchase price. Young testified that there was slightly over $80,000 in this account, $40,000 had come from Kenneth Stahl and Ray Lemke, $20,000 apiece, $20,000 had come from Ted Caniglia, and $20,000 from Young from savings and by borrowing. Young stated that his attorney was to fill in the blank check in the amount of $370,000, the balance of the purchase price. He admitted that as of February 25, 1977, there were no funds in the account to cover the second check.

Kenneth Stahl testified that a day or so before the

scheduled closing he met with Lemke, Young, and Caniglia at Young's house. Young needed financing for the purchase. An agreement was reached whereby Stahl was to put up $170,000 ($20,000 of which was in Young's Nebraska Homestead account) toward the purchase and Lemke was to contribute $70,000 ($20,000 of which was in Young's Nebraska Homestead account). Ted Caniglia testified that he and Young agreed they would take approximately 75 to 80 acres and that the remaining 95 to 100 acres would be divided between Stahl and Lemke. He and Young would obtain a loan for their portion.

Eugene Tschida, president of the Bank of Papillion, testified that he did business with both Stahl and Lemke and that Stahl's line of credit was about $150,000, and that if Stahl had appeared on February 25, 1977, he would have been willing to give him a cashier's check for that amount. He stated that Lemke would have had $70,000 available to him on that date. He admitted, however, that neither Stahl nor Lemke had actually ever requested this money.

Introduced into evidence was a loan commitment from the Ames Bank in Omaha to Caniglia Builders in the amount of $150,000. This document states that the loan is subject to the following conditions: (1) Personal signatures of Young, Caniglia, and one Prentice Beebee, and their wives; (2) a first mortgage lien upon the property; (3) a survey satisfactory to the bank of the area to be mortgaged; and (4) a land development loan through the Ames Bank within 90 days. The loan commitment and its conditions were accepted on February 28, 1977, by Young and Caniglia. There is no indication in the record that Prentice Beebee accepted the conditions. Young stated that as of February 25, 1977, no survey, as referred to in the loan commitment, was available. Over objections by counsel for Tedco, Caniglia testified that the loan commitment was definitely available to them as of February 24, 1977.

Charles Clatterbuck, a real estate developer, testified that on February 24, 1977, around 2 p.m., Young and Caniglia approached him concerning the Overland Hills property. They stated they needed an investment of about $350,000 and that this money was needed by the following day when the contract was scheduled to close.

John Patrick "Pat" Kelly, Overland Hills' attorney, testified that he did not see any money on the scheduled closing date. John Fullenkamp, Tedco's attorney, testified that Kelly told him subsequent to February 25, 1977, that Young did not have the funds to close. Exhibit 21 is a letter dated March 2, 1977, from Overland Hills, drafted by Kelly and signed by Donald Graham, to Fidelity National Title Insurance Company demanding payment of Young's earnest money since the Young contract was not closed "pursuant to the terms of the amended contract."

In 71 Am. Jur. 2d, Specific Performance, § 60, p. 88, it is stated: "The failure or inability or refusal to carry out the terms of the contract *at the time when performance is due* will ordinarily be grounds for refusing specific performance, since specific performance will not generally be decreed in favor of a party who has himself been in default, * * *." (Emphasis supplied.)

When was performance due under Young's contract? The contract provided for a closing date of February 25, 1977. In 71 Am. Jur. 2d, Specific Performance, § 63, p. 91, it is stated: " * * * in the ordinary cases of sales of realty, the general object being to make a sale for an agreed sum, the time of payment is regarded in equity as formal, and as meaning only that the purchase shall be completed *within a reasonable time,* and substantially according to the contract, *regard being had to all the circumstances.*" (Emphasis supplied.)

In Dodge v. Galusha, 151 Neb. 753, 39 N. W. 2d 539 (1949), we held: " 'In the ordinary contract for the

sale of land, equity does not regard time as of the essence, though it may be made such where so expressly stipulated or an intention that it shall be such is clearly manifested by the agreement as a whole, *construed in the light of the surrounding circumstances.*' " (Emphasis supplied.) See, also, Willard v. Foster, 24 Neb. 205, 38 N. W. 786 (1888).

We conclude, in light of all the circumstances, particularly the existence of the Tedco purchase agreement, which was known to all the relevant parties no later than February 25, 1977, that Young's purchase agreement was required to close on February 25, 1977, or within a reasonable time thereafter.

We find that on February 25, 1977, and for a reasonable time thereafter, Young was not in a position to tender the purchase price under the contract. The record reveals frenzied activity on the part of Young to assemble the necessary funds to enable him to make the purchase. Numerous individuals and institutions were contacted. At 2 p.m., the day before the scheduled closing he and Caniglia approached Clatterbuck and sought $350,000. There is no evidence that Young ever successfully assembled all the pieces, either on February 25, 1977, or within a reasonable time thereafter. On March 2, 1977, Overland Hills demanded forfeiture of his earnest money. "A proposed purchaser is not able to perform when he is depending upon third parties to make the purchase, which funds such persons are in no way bound to furnish." 71 Am. Jur. 2d, Specific Performance, § 61, p. 89.

Having failed to tender the purchase price within the time due for performance under his contract, Young is not entitled to specific performance. He who asks a court of equity to specifically enforce what he claims are his rights under a contract must not himself be in default in his promises in the same contract. Clarke v. Koenig, 36 Neb. 572, 54 N. W. 842 (1893). "A party who seeks specific performance

must show not only that he has a valid legally enforceable contract but also that he has substantially complied with its terms, by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of defendant or that he is ready, able, and willing to perform his obligations under the contract * * *." Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176 (1953).

We next turn to Tedco's purchase agreement. The Tedco agreement was negotiated by Pat Kelly on behalf of Overland Hills, and John Fullenkamp on behalf of Tedco. The purchase agreement is dated February 14, 1977, and was signed on behalf of Overland Hills by Donald Graham, corporate treasurer and a director, who is designated as "seller." The agreement is not notarized, nor is it under corporate seal. Kelly testified that he had the informal approval of 52½ percent of the outstanding shareholders of Overland Hills to enter into the agreement. There is evidence that 47½ percent of the outstanding shareholders of Overland Hills were not aware, as of February 14, 1977, of this agreement. Kelly testified that he informed Fullenkamp, prior to Graham's signing, that the treasurer was the best that he could do for a signature and that he was not sure of his authority in this regard. Kelly stated that Fullenkamp expressed disappointment upon being so informed. On April 6, 1977, Kelly drafted, and Graham signed, a letter to Tedco returning its $10,000 earnest money and stating that its contract was the only impediment to closing the Young contract. On April 11, 1977, Kelly informed Fullenkamp that Tedco's purchase agreement was invalid.

Where it is sought to enforce specific performance of a contract for the sale of realty executed for a corporation by its officers in their individual names, it must be shown either that the corporation authorized the contract or that the execution of the same

had been ratified by it. Parmele v. Heenan & Finlen, 75 Neb. 535, 106 N. W. 662 (1906).

Much discussion is devoted to the issue of whether or not Graham was authorized to enter into the agreement with Tedco. We find it unnecessary to discuss this issue because we conclude that in any event, regardless of Graham's authority, his actions in entering into the purchase agreement with Tedco were ratified.

All the relevant parties knew of the existence of the Tedco agreement by no later than February 25, 1977. Young's contract was scheduled to close that date, but did not. By March 2, 1977, Overland Hills apparently felt that the Young contract had terminated and demanded forfeiture of Young's earnest money which, under the terms of the Young agreement, it was entitled to if the purchaser was unable to tender the purchase price. Upon learning that the Young agreement had failed to close, Tedco demanded the closing of its agreement. Fullenkamp testified that Kelly kept putting him off, but never mentioned that the Tedco agreement was invalid nor would not close at this time. Tedco offered to purchase the same property as Young for $35,000 more than offered by Young. On April 6, 1977, Overland Hills apparently felt that the Young contract was again valid, and returned Tedco's earnest money, stating that its agreement was the sole impediment to closing Young's contract. On April 11, 1977, Fullenkamp was told that the Tedco agreement was invalid.

The record shows that as of February 14, 1977, Kenneth Stahl and Ray Lemke owned 40 percent of the stock of Overland Hills. By April 11, 1977, Stahl and Lemke owned 100 percent of the stock of Overland Hills, the vendor. Young testified that he was a real estate associate with Action Real Estate owned by Lemke and his wife. As shown earlier, Stahl and Lemke had "bought in" to the Young contract by

offering to put up a total of $240,000 on the purchase price of $450,000.

"A principal, after receiving information that an act has been done without actual or apparent authority by one purporting to act as his agent on his behalf, is not bound by that act under the law of agency unless he ratifies the act; but he may and must elect to repudiate or ratify such act promptly or at least within a reasonable time." 3 Am. Jur. 2d, Agency, § 178, p. 563.

It is argued that the time period involved, from February 25 until April 6, 1977, is too short to permit a ratification by silence or acquiescence and that to do so in this case would be unconscionable.

"Whether there has been a ratification in a particular case is ultimately and ordinarily a question of fact." 3 Am. Jur. 2d, Agency § 178, p. 564. " * * * the rule applicable generally is that where an act is done without authority, under an assumed agency, it is the duty of the principal to disavow and repudiate it in a reasonable time after information of the transaction if he would avoid responsibility therefor. What constitutes a reasonable time must largely, if not wholly, depend upon the circumstances of the particular case." 3 Am. Jur. 2d, Agency § 179, p. 565.

All the relevant parties knew of the existence of the Tedco agreement by no later than February 25, 1977. The corporation was made up of a small group of individuals and operated in an informal manner. We conclude that under the circumstances, defendant Overland Hills, by its silence and acquiescence, ratified the actions of Donald Graham in entering into the purchase agreement with Tedco.

Specific performance for Tedco will be decreed. Defendant Young's petition for specific performance is dismissed. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICKY A. JOHNSON, APPELLANT.

266 N. W. 2d 193

Filed May 3, 1978. No. 41601.

1. **Criminal Law: Homicide: Intent.** Essential elements of the crime of murder in the second degree are that the killing be done purposely and maliciously. § 28-402, R. R. S. 1943.
2. **Criminal Law: Homicide: Indictments and Informations: Instructions.** Where the information charges murder in the first degree, murder in the second degree and manslaughter are included in the charge, and where different conclusions may be drawn from the evidence, the court does not commit error in submitting different degrees under proper instructions for the jury's determination.
3. **Criminal Law: Homicide: Evidence: Appeal and Error.** If, on a charge of first degree murder, the evidence is sufficient only to sustain a charge of manslaughter, it is reversible error to submit to the jury the issue of guilt of murder in the first degree.
4. **Criminal Law: Intent: Words and Phrases.** Malice, in its legal sense, denotes that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind.
5. **Criminal Law: Trial: Witnesses: Evidence: Appeal and Error.** Whether, in the course of laying foundation for impeachment of a witness, the inclusion of extraneous material containing a reference to the accused having been previously incarcerated, introduced as part of a question calling for the admission by the witness of a previous contradictory statement on a relevant or material matter, constitutes reversible error depends upon all the facts and circumstances of the case.
6. **Criminal Law: Trial: Prosecuting Attorneys.** It is not misconduct for a prosecutor in the course of his summation to the jury to draw reasonable inferences from the evidence so long as he does not misstate the evidence or mislead the jury as to the inferences it may draw.

Appeal from the District Court for York County: WILLIAM H. NORTON, Judge. Affirmed.

John R. Brogan and Joseph P. McCluskey, for appellant.

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

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

CLINTON, J.

The defendant Ricky A. Johnson was charged with having, on April 22, 1977, purposely and with deliberate and premeditated malice, killed James M. Richardson, II, an officer of the city of York police department. He was found guilty by a jury of murder in the second degree and was sentenced to a term of 20 years in the Nebraska Penal and Correctional Complex.

He has appealed and makes the following assignments of error: (1) The evidence is insufficient as a matter of law to support the verdict of murder in the second degree, because it will not support a finding that the killing was done purposely and maliciously and therefore the submission of the issue of guilt of murder in the second degree was error. (2) The court erred in permitting the jury to consider the issue of guilt of murder in the first degree. (3) The court erred in receiving in evidence a portion of an out-of-court statement of a prosecution witness, the defendant's mother, offered for the purpose of impeaching the witness, which impeaching statement contained a reference to the fact that the defendant had given alcoholic liquor to a minor and further contained the following: "You will spend a lot more time in jail than you have." (4) Misconduct of the prosecuting attorney in closing argument in attempting to draw conclusions as to the location from which the fatal shot was fired, based upon the testimony of the pathologist who performed the autopsy on the victim's body as to the path of the bullet through the chest of the victim. (5) Refusal of the trial court to receive, in support of the defendant's motion for a new trial, certain affidavits intended to establish prejudice from the argument referred to in assignment (4) and tending to establish that the

argument was ill-founded. (6) The trial court erred in overruling the defendant's plea in abatement, which plea was founded on the premise that the evidence at the preliminary hearing was insufficient to permit the defendant to be bound over for trial. (7) The sentence imposed was excessive. We affirm.

The evidence shows that on April 22, 1977, defendant Ricky A. Johnson, then age 17, and another young man of about the same age spent the hours from about 7:30 p.m. to about 10 p.m., driving about in the vicinity of the city of York, drinking beer. Near the end of their travels they came into the city of York and observed a group of young girls, among whom was the defendant's young sister, age 13, outside a recreation center. The girls were participating in a birthday party for the defendant's sister. The defendant and his companion picked up the group of girls and returned them to the Johnson home. During the trip from the center to the Johnson home, the defendant, who was not driving the car, gave one of the girls a drink of beer. The defendant's sister and other girls were upset by this incident and it came to the attention of the defendant's mother. At about 10:15 p.m. when defendant returned to the Johnson home, his mother admonished him about what he had done. He resented the correction and became very abusive. Blows were exchanged. The defendant then, in a fit of temper, obtained a package of .22 caliber cartridges from a shelf and a .22 caliber rifle from the basement where the group of girls were completing the birthday celebration. Defendant then went outside, loaded the rifle, and fired five shots through the living room window of the Johnson home. At that time Mrs. Johnson was on the telephone, reporting defendant's conduct to his older brother, Dennis. Dennis heard the shots and directed his mother to replace the receiver. Dennis then reported the matter to the police. Mrs. Johnson then observed her son going around the north side of a

church located diagonally across the street west of the Johnson home. This observation was reported to the York police department. Officer Richardson responded to these calls. He approached the church from the north and parked his patrol car adjacent to the curb, facing south near the front church yard. Eyewitnesses in a car passing on an adjacent street observed the police car stop, the officer get out, and, in a crouching position, move toward the front of the car. He was then observed by the witnesses to move back, open the car door and close it, and then, using the same crouching movement, go to the rear of the car, pass behind it, and move toward a sign in the front church yard. One of the witnesses stated that the officer was moving in a southwesterly direction. This projected path would take him toward the south side of the church where the church parking lot was located. As the officer neared the sign the witnesses heard a shot, or pop, and saw the officer fall. They saw no one other than the officer. They then proceeded in their car to the police department to report the matter.

The defendant took the stand on his own behalf. He acknowledged that the gun was in his hands when it discharged and that he was, at the time, on the south side of the church on a sidewalk adjacent to the wall of a section of the church which projected southerly from the main body of the structure. He testified that he did not see the officer before the shot was fired, that the discharge was accidental, and that he had no intention of shooting or killing him. After the shot he heard a coughing sound and he moved forward and observed Richardson's body. About that time defendant observed a second officer approaching in a patrol car and fled. Richardson died within a few minutes. Later that evening the defendant voluntarily surrendered. Additional details of the evidence will be discussed as necessary in connection with the various assignments of error.

The first two assignments of error will be discussed together. Essential elements of the crime of murder in the second degree are that the killing be done purposely and maliciously. § 28-402, R. R. S. 1943. First degree murder contains the additional element of deliberate and premeditated malice. § 28-401, R. R. S. 1943. Where the information charges murder in the first degree, murder in the second degree and manslaughter are included in the charge, and where different conclusions may be drawn from the evidence, the court does not commit error in submitting different degrees under proper instructions for the jury's determination. Jackson v. State, 133 Neb. 786, 277 N. W. 92. If, on a charge of first degree murder, the evidence is sufficient only to sustain a charge of manslaughter, it is reversible error to submit to the jury the issue of guilt of murder in the first or second degree. Clark v. State, 131 Neb. 370, 268 N. W. 87. Malice, in its legal sense, denotes that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind. McVey v. State, 57 Neb. 471, 77 N. W. 1111.

There were many factors in the evidence from which the jury could find that the killing was done purposely and maliciously and with deliberate and premeditated malice. The following facts, in addition to those already recited, were either shown by undisputed evidence, or permissible inferences from disputed evidence. (1) After the defendant fired the shots through the window of the Johnson home, he loaded the rifle with additional cartridges. This is some evidence of an intention to make further use of the weapon. (2) He had been informed that his mother was going to call the police and he therefore had reason to anticipate their arrival. A friend of the defendant, to whom he talked during his flight, testified that the defendant stated, ". . . old lady said

he [defendant] was drunk and she doesn't care about him and she called the pigs on him." His mother, although professing not to remember the impeaching statements earlier referred to, admitted she may have told him that she was "going to call the police." She did, after the conversation with her son, Dennis, call the police to report where defendant was going after she had observed him moving around the north side of the church. (3) The defendant obtained the ammunition and rifle after he was informed by his mother that she was going to call the police. (4) After the shooting and before his surrender, the defendant made various admissions to friends with whom he spoke. These include: " 'I shot a pig.' " In response to an expression of disbelief by a friend he said, " 'I did.' . . . 'For all I know, he could be dead.' " In the presence of the same friend he kept asking himself, " 'Why?' " Also, " 'I shot him right in the church parking lot.' " He "just didn't know why." And he said, " 'Damn it, why did I do it.' " Also, " 'Will you guys go find a cop for me, I just shot a pig.' " These expressions in the context of the circumstances all tend to show an intentional act. (5) The rifle was a pump action weapon with a tubular magazine having a capacity of 20 short cartridges. When the rifle was turned over to the police it had a live round in the chamber. The friend who retrieved the gun at the defendant's request and turned it over to the police, testified that he did not manipulate the mechanism in any way. This leads to the inference that the defendant deliberately pumped a live shell into the chamber after the shooting and was prepared to use it again. (6) Although the defendant testified that the firing was accidental, he also, at another point in his direct examination, acknowledged that sometime after the shooting he asked himself, " 'Why did I pull the trigger?' " At that time he slammed the weapon to the ground and damaged the stock. (7) The defend-

ant was an experienced hunter of rabbits, squirrels, and crows and he used the rifle for that purpose. He estimated that he had fired 5,000 rounds in hunting and target shooting. He was familiar with the operation of the gun and the use of the safety mechanism thereon. (8) The defendant testified that he did not see officer Richardson before the rifle discharged. However, there is substantial evidence that would permit the jury to find otherwise. The area in front of the church and the parking lot were well lighted by a street light and another similar light at the west edge of the parking lot. While the officer was moving from the rear of the car to the position where he was shot, his movements could have been observed by the defendant for a distance of about 18 feet to just a step or two, all depending upon the exact location of the car with reference to defendant's position and the southeast corner of the church structure which could have obstructed defendant's view. Details of the possible position of the car as it affects the matter of defendant's view of the officer's movements will be dealt with in more detail when we discuss assignments of error (4) and (5). The evidence would also indicate that defendant could have seen the officer when he made his first movement to the front of the parked patrol car. While an accidental, unaimed shot could have struck the officer, all the circumstances would tend to indicate the far greater likelihood of the shot having been aimed. (9) Expert opinion founded upon an examination and tests of the weapon showed that it was in good mechanical condition, that a pressure of 3¼ pounds was required to move the safety from the safe position, and that the trigger pull was 6½ pounds. The rifle was accurate and at a distance of 100 feet would fire a grouping 2 inches below the aiming point. It would not fire accidentally with the safety off on a 2-foot drop to the floor.

Even without the testimony of the defendant that

the gun was in his hands when the shot was fired, the State had made a prima facie case before it rested. We mention only one additional thing. Expert testimony established that the bullet which killed officer Richardson was fired from the defendant's rifle.

The evidence was without question sufficient to submit to the jury the issue of guilt of murder in the first degree and murder in the second degree. The jury, probably basing its verdict on the evidence that defendant had, in the 3-hour period preceding the killing, consumed six ordinary size cans of beer and one 25-ounce container of strong lager beer, together with the evidence of his seething anger, found him guilty only of murder in the second degree. It resolved the permissible inference in his favor. It was a proper verdict under the evidence which was sufficient to support a finding beyond a reasonable doubt of either first or second degree murder.

We now examine the claim of error in the admission of testimony of a police officer impeaching the denial of Mrs. Johnson that she had told the defendant that she was going to call the police. The impeaching statement included: " 'You can get into lots more trouble than you've been in giving minors, delinquency to minors, stuff like that,' I said, 'You will spend a lot more time in jail than you have.' " This portion of the statement, of course, was immaterial to the impeachment and should not have been admitted for it tended to show that the defendant had been in jail previously and therefore implied possible guilt on some sort of charge. No objection was made to the statement when first offered. However, counsel did shortly thereafter move for a mistrial, which motion the court denied and did then admonish the jury to disregard the statement.

The defendant relies upon our holdings in State v. Atwater, 193 Neb. 563, 228 N. W. 2d 274; and Balis v. State, 137 Neb. 835, 291 N. W. 477. In the first cited case we reversed and remanded for a new trial,

even though we regarded the evidence of guilt in that case as conclusive. It appears that there we were imposing a sanction because of the deliberate injection of the evidence which the prosecutor knew was inadmissible. That is not this case. Here the offending evidence was a portion of a longer statement which was properly received in laying the foundation for later impeachment.

The offending portion does not necessarily show that the defendant was guilty of a previous offense. Even insofar as it does imply possible guilt, the whole statement indicates that it would have been for a minor offense, i.e., something less than giving a minor an alcoholic beverage, which latter offense is, as is rather common knowledge, normally punishable only by a fine.

The record further shows that one of the officers to whom Mrs. Johnson made a statement about her altercation and conversation with the defendant prior to the shooting, made a written record of the questions and answers and this was signed by Mrs. Johnson. Defendant's counsel had been furnished with a copy of that document before trial. The impeaching statement and the matter on which the motion for mistrial were founded were both included in the same answer. It was therefore to be anticipated that the entire answer would be included in laying the foundation for impeachment in the course of a preliminary inquiry to the witness as to whether or not she had made the statement. Problems such as this could well have been anticipated by both the prosecutor and the defense counsel before trial and the matter resolved before a question such as this arose.

The critical issue in the case before us was the defendant's intention and his state of mind. When one considers the entire record, it is impossible to conclude that the jury would have founded its determination of that issue upon the fact that the defendant

may have been in jail on some minor charge. In the two cases relied upon by the defendant, the evidence of other crimes was of serious crimes of the identical nature of those on which the defendant was being tried, to wit, robbery and forgery, respectively. We conclude that, beyond any reasonable doubt, there was no prejudicial error requiring reversal and retrial.

We now turn to assignments (4) and (5) pertaining to alleged misconduct of the prosecutor in final argument to the jury. The defense advanced by defendant is that the rifle accidentally discharged as he was stumbling (apparently because of his intoxicated condition), along the west wall of the church at the point near the corner of the ell, apparently while carrying the gun in his right hand and supporting himself with his left. To bolster the position of lack of deliberation, he asserted in final argument that he could not have seen officer Richardson until the very moment the gun discharged because until that moment officer Richardson was hidden from view by the southwest corner of the building. The premise for that claim rested largely upon the assumed path that officer Richardson would have followed in moving from the rear of the patrol car to the point where he was shot. The testimony of various witnesses put the patrol car in different positions along the curb in front of the church. In the most northerly of these positions officer Richardson's movement could not have been seen by the defendant from the position he claimed to be in when the gun discharged except for the last step or two. If the car were further south in the approximate location fixed by other witnesses, then the defendant might have observed the officer's movement during a space of 15 to 20 feet before the shot was fired.

Shoe prints similar to prints made by the shoes of the defendant at the time of the shooting were found near points where the defendant said he was as well

as a considerable distance southerly away from the church and near the west edge of the parking lot.

The testimony of the pathologist who performed the autopsy, who had some practical experience in forensic medicine, together with the diagrams which he prepared show that the bullet entered the victim's upper left chest in the space between the first and second ribs and followed a straight path to the right and downward, passing through the left lung, the aorta just above the heart (the fatal wound), the lower right lung, and then struck the ninth rib (right) and then was deflected upward, coming to rest in the flesh adjacent to the seventh rib. The bullet, after being retrieved from the body, was only slightly deformed at the nose. As already noted, the eyewitnesses stated that officer Richardson was moving in a low crouch. This would account for the downward path of the bullet through the chest. The prosecutor, in final argument in response to defense counsel's argument that the defendant did not see the victim until after the shooting, argued that the path of the bullet through the victim's body from left to right supported the proposition that the shot may have been fired from a position along the north edge of the parking lot from a position more westerly than the location the defendant testified he was in when the shot was fired. If the defendant was in that position he could have seen the officer's movement from the rear of the car to the point where he was shot even though the car was in the most northerly position fixed by an eyewitness.

The defense relies upon the following proposition: "The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw." American Bar Association Standards Relating to the Prosecution Function, § 5.8 (a). The defense, in an attempt to demonstrate

that the prosecution's inferences from the evidence were not reasonable ones, makes three points: (1) There is no direct evidence to challenge the defendant's statement as to where he was when the bullet was fired; (2) the affidavit of the pathologist, offered by the defendant in support of his motion for a new trial, stated that the affiant did not determine from the path of the bullet through the body the trajectory of the bullet before it struck the victim and that his testimony at trial did not relate to that point; and (3) the affidavit of a retired member of the Nebraska State Patrol, who had been head of its criminal division and who had considerable experience in ballistics and firearms identification and which was also offered in evidence in support of the motion for new trial, was to the effect that the path of the bullet after it enters the body can give no reliable indication of the prior trajectory of the bullet.

The pathologist's affidavit does not exclude the possibility that the general trajectory may be determined if the exact position of the body is known at the time of impact. The affidavit of the retired ballistics expert contains the qualification, "unless the exact position of the victim's body at the time the bullet struck the body is known."

We believe the evidence supports the conclusion that until the bullet struck the ninth rib it hit no substance which would materially change its path. The only possible explanation of the downward path of the bullet through the chest is the fact, supported by evidence, that the victim was moving in a crouch at the time he was struck and that the upper part of his body formed an acute angle to the horizontal and with the trajectory of the bullet which was fired from a distance of 85 feet during which time its trajectory would be relatively flat.

Similar arguments support conclusions as to the direction from which the bullet came. No one knows the exact position the victim was facing at the

moment the bullet was fired. If he was moving southwesterly, as the eyewitnesses testified and as he would have been if the patrol car was in the estimated northerly most position and if the defendant was standing where he claimed, then the path of the bullet would have been from right to left, rather than left to right. If, on the other hand, the car was in one of the southerly estimated positions and the officer moved in a straight line from the rear of the car to the position where he was shot, he may have been turned somewhat sideways to the defendant's claimed position and the bullet would have followed a path from left to right, as was found by the autopsy. If he was moving south and facing southwesterly, then the bullet would have to have been fired from a more northerly position, perhaps from the westerly edge of the parking lot.

The arguments of the prosecutor were clearly not illogical, did not misstate any evidence, and were not contrary to reasonable conclusions which could be drawn from the evidence.

The defendant's counsel claims he could not have anticipated that the prosecutor would make argument on the above points because he was told by the pathologist before trial that the pathologist could not express an opinion on the bullet's trajectory before it struck the body. That fact obviously does not mean that the argument could not be made from the facts which were admitted.

We hold that the prosecutor's final argument did not constitute misconduct and the court did not err in not granting a new trial based upon the contents of the two affidavits.

The defendant's sixth assignment pertaining to the overruling of his plea in abatement is governed by our holding in State v. Franklin, 194 Neb. 630, 234 N. W. 2d 610, and is without merit.

The claim that the sentence is excessive is without merit. Although the defendant has no significant

criminal history, the seriousness of the offense and the circumstances surrounding it would not justify a lesser sentence.

AFFIRMED.

IN RE APPLICATION OF SYLVIA CONTRERAS FOR A WRIT OF HABEAS CORPUS. SYLVIA CONTRERAS, APPELLEE, V. REFUGIA ALSIDEZ ET AL., APPELLANTS.

265 N. W. 2d 452

Filed May 3, 1978. No. 41665.

1. **Habeas Corpus: Infants: Parent and Child.** When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent.
2. _____: _____: _____. In a habeas corpus proceeding to determine the custody of a child, the prime consideration is the welfare of the child.
3. **Courts: Parent and Child: Judgments: Appeal and Error.** In cases involving child custody determinations, the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Brian R. Watkins, Richard Scott, and William C. Peters, Jr., for appellants.

Benjamin M. Shaver of Hancock & Shaver, for appellee.

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

SPENCER, J.

This is an appeal in a habeas corpus proceeding involving the custody of a minor child. The trial court ordered the four respondents, Refugia Alsidez, Lorenzo Alsidez, Sr., Gloria Alsidez (now Morales),

and Lorenzo Alsidez, Jr., to deliver the child to her mother, Sylvia Contreras, and respondents appeal. We affirm.

Sylvia Contreras is the mother of Paula Contreras who was born on December 14, 1970, at the time when Sylvia was 14 years of age. Refugia and Lorenzo Alsidez, Sr., are the paternal grandparents of Paula. Gloria Alsidez (Morales) and Lorenzo Alsidez, Jr., are the paternal aunt and uncle of Paula. Refugia Alsidez was 62 years old at the time of the trial. Lorenzo Alsidez, Sr., who did not appear, was about 67 years of age. Refugia speaks very little English, and Lorenzo speaks none at all. Sylvia was never married to the father of the child, Guadalupe Alsidez, who died in an automobile accident September 26, 1976.

In May 1975, Sylvia was living with Guadalupe when her parents came to visit her. Guadalupe told them to leave. When Sylvia told him she was leaving with her parents, he beat her. He fired a few shots at the house with his rifle and then left. He returned the following morning and disabled the Contreras' car by removing the battery. Paula at that time was outside and he took her with him. Sylvia left for Texas with her parents. She was later informed by Guadalupe that she could not have Paula unless she came back to him. This she refused to do. Sylvia did not know of Guadalupe's death until she initiated divorce proceedings in October or November of 1976. At that time she was told by Guadalupe's mother, Refugia, that she could not have Paula.

It will serve no useful purpose to summarize the evidence presented on this custody issue. Suffice it to say the District Court determined Sylvia was a fit and proper parent; that she did not abandon Paula or forfeit her right to custody; and that it is in the best interests of Paula that she be returned to her mother, Sylvia.

In Bigley v. Tibbs, 193 Neb. 4, 225 N. W. 2d 27 (1975), which was a habeas corpus action to obtain custody of a child brought by the child's mother against the sister of the child's deceased father, we stated: "When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent." We also said in that case: "In a habeas corpus proceeding to determine the custody of a child, the prime consideration is the welfare of the child."

In cases involving child custody determinations, the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Rejda v. Rejda, 198 Neb. 465, 253 N. W. 2d 295 (1977).

Paula has known very little security in her 7½ years. We agree with the trial judge. The best interests of the child will be served by returning her custody to her mother. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAY CHARLES ADKINS, ALSO KNOWN AS MICHAEL A. WOODARD, APPELLANT.

265 N. W. 2d 454

Filed May 3, 1978. No. 41717.

1. **Criminal Law: Robbery: Sentences: Intent: Statutes.** Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the Nebraska Penal and Correctional Complex for a term of not less than 3 years and not more than 50 years. § 28-414, R. R. S. 1943.

2. **Criminal Law: Robbery: Pleadings: Proof.** Robbery may be committed either by force and violence, or by putting in fear. Pleading of these elements may be conjunctive and proof of accomplishment of the robbery by either method is sufficient.
3. **Criminal Law: Courts: Plea Bargains.** The trial court is afforded a large measure of discretion in deciding whether or not to accept plea bargain arrangements.
4. **Criminal Law: Indictments and Informations: Prosecuting Attorneys: Dismissal and Nonsuit.** Before a county attorney can dismiss an information, it is first necessary that approval of the court to do so be obtained.

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

John R. Hall of McDermott & Hall, for appellant.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellee.

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

CLINTON, J.

The defendant was found guilty of the crime of robbery as defined by section 28-414, R. R. S. 1943, and was sentenced to a term of 3 to 5 years in the Nebraska Penal and Correctional Complex.

On this appeal he makes the following assignments of error: (1) The court erred in not directing a verdict for the defendant on the charge of robbery for the failure of the State to prove that the theft was accomplished by force, violence, or by putting the victim in fear of harm. (2) The court erred in not allowing the plea bargain between the State and defendant. We affirm.

Section 28-414, R. R. S. 1943, provides as follows: "Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the Nebraska Penal and Correctional Com-

plex for a term of not less than three years and not more than fifty years." The defendant's argument in support of the first assignment is that the force used, as shown by the evidence, was insufficient to affect the transfer of the property. State v. Blunt, 187 Neb. 631, 193 N. W. 2d 434. He contends, therefore, that there is a failure of proof of one of the essential elements of the crime of robbery, namely, force or violence.

The record establishes that the defendant and a female accomplice conspired to "roll" the victim. All the parties at the time were drinking at a bar. The victim was induced to enter the accomplice' automobile on the pretense that she would go to his place for a "party." He had previously given her $20 for a kiss and promised more. The defendant accompanied the accomplice and the victim into the car on the pretense of being taken home. Instead, the accomplice drove to an isolated spot. There the defendant put his arm around the victim's neck and shoulder, squeezed, and said he would hurt him if he didn't give him his money. The defendant then reached over and took the victim's billfold and removed approximately $200 from it. There was evidence other threats were made and that the victim was placed in fear, and that the robbery was accomplished by that means. The accomplice, who turned State's evidence in exchange of dismissal of a robbery count and for the filing of a petit larceny charge, testified that the victim was "pretty shook up and his voice was real shaky." The evidence was clearly sufficient to permit the jury to find that the money was obtained by placing the victim in fear.

Robbery may be committed either by force and violence, or by putting in fear. The pleading of these elements may be conjunctive and proof of accomplishment by either method is sufficient. Brown v. State, 107 Neb. 120, 185 N. W. 344; Williams

v. State, 51 Neb. 711, 71 N. W. 729. The defendant's first assignment of error is not meritorious.

Prior to trial the prosecutor moved the court to permit the substitution of charges of assault and battery and petit larceny for the robbery charge and indicated to the court that a plea bargain had been made, under the terms of which the defendant would plead guilty to the substituted charges, the robbery charge would be dismissed, and the defendant would accept consecutive sentences on the charges pleaded to. The trial judge, after examining the defendant's previous record and interrogating the prosecutor as to the evidence on the robbery charge, declined to permit the dismissal of the robbery charge.

The defendant argues that the court should have approved the plea bargain and relies upon American Bar Association Standards Relating to Pleas of Guilty, § 1.8 (a) (i), (iv), pp. 36, 40, which advance the following grounds as appropriate considerations granting sentencing concessions: The plea of guilty or nolo contendere aids the ensuring of prompt and certain application of correctional measures to the defendant; the plea makes a public trial unnecessary, and if the State's evidence is weak, that should be considered. We have never adopted the standard and have left the matter in the discretion of the trial court. "The trial court is afforded a large measure of discretion in deciding whether or not to accept plea bargain arrangements." State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849. "Before a county attorney can dismiss an information, it is first necessary that approval of the court to do so be obtained." State v. Stewart, *supra*. See, also State v. Sanchell, 191 Neb. 505, 216 N. W. 2d 504.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JESSE JAMES FORD, APPELLANT.

265 N. W. 2d 456

Filed May 3, 1978. No. 41732.

1. **Criminal Law: Guilty Pleas: Attorney and Client.** A defendant who has heeded the advice of his attorney to plead guilty may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases.
2. **Criminal Law: Guilty Pleas: Attorney and Client: Post Conviction.** The requirement that a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing.

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

Thomas A. Vakulskas, for appellant.

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

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

WHITE, C. THOMAS, J.

This is an appeal from an order of the District Court denying post conviction relief to defendant following an evidentiary hearing. The District Court found that defendant's plea of guilty to a charge of rape was understandingly and voluntarily made. We affirm the decision of the District Court.

The defendant was originally charged with two counts of robbery, two of kidnapping, and one of rape. Pursuant to a plea bargain, the robbery and kidnapping charges were dropped and defendant entered a plea of guilty to the rape charge which was accepted by the court. The defendant was sentenced to a term of 15 to 25 years in the Nebraska Penal and Correctional Complex. This court upheld the sentence. State v. Ford, 194 Neb. 400, 231 N. W.

2d 515. The District Court dismissed the defendant's motion to vacate the sentence without an evidentiary hearing. This court vacated that order and remanded the cause for an evidentiary hearing. State v. Ford, 198 Neb. 376, 252 N. W. 2d 643. The appeal is from the finding pursuant to that hearing.

At the evidentiary hearing, the defendant, his wife, mother, sister, aunt, and the husband of his cousin testified that, prior to the defendant's arraignment, his attorneys had promised him a sentence of 3 to 15 years if he plead guilty to the charge of rape and a sentence of 50 years on each of the 5 charges against him if he did not. Defendant stated that he felt he would only have to serve 2 years. The attorneys who represented the defendant at his arraignment denied promising the defendant a 3 to 15 year sentence in return for his guilty plea. They testified that the defendant was fully advised of the terms of the plea bargain, i.e., a reduction of defendant's bond would not be opposed and the robbery and kidnapping charges dismissed. The attorneys testified that sentencing procedures were discussed with the defendant, but a specific sentence was not promised as part of the plea bargain.

The defendant also testified that since a possibility existed that the victim was pregnant, his guilty plea was somehow involuntary. The argument does not even merit discussion.

A defendant who has heeded the advice of his attorney to plead guilty may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases. See State v. Hall, 188 Neb. 130, 195 N. W. 2d 201. The requirement that a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing. See State v. Krider, 191 Neb. 285, 214 N. W. 2d 611.

The record here establishes that the defendant was represented by competent counsel throughout the original proceedings. The finding of the District Court that the defendant's plea of guilty was understandingly and voluntarily made and not induced by threats and promises is supported by the record.

The judgment of the District Court is affirmed.

AFFIRMED.

WAYNE R. RICHARDSON, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.
SHARON K. GILLISPIE, ADMINISTRATRIX OF THE ESTATE OF JUDITH ANN RICHARDSON, DECEASED, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

265 N. W. 2d 457

Filed May 10, 1978. No. 41235.

SUPPLEMENTAL OPINION

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. On motion for rehearing. See *ante* p. 225, 263 N. W. 2d 442, for original opinion. Motion for rehearing overruled.

M. J. Bruckner and John V. Hendry of Marti, Dalton, Bruckner, O'Gara & Keating and Frederick L. Swartz, for appellants.

Paul L. Douglas, Attorney General, Harold S. Salter, and John R. Thompson, for appellee.

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

MCCOWN, J.

The following sentence in our original opinion is withdrawn: "To the extent that Farmers Co-op Co. v. County of Dodge, 181 Neb. 432, 148 N. W. 2d 922, and Kudrna v. Sarpy County, 125 Neb. 83, 249 N. W. 87, are in conflict they are overruled." Those cases

are distinguishable from this case on their facts, and it is unnecessary to overrule them.

The following paragraph is also withdrawn: "The State also contends that if there was any defect in the shoulder at the point of the accident here it was a part of a general or overall condition of the highway and not a spot or localized defect and was, therefore, excluded by the statute. That contention is not supported by the evidence."

In the event the District Court, upon reconsideration of the evidence in this case, should find that the State was negligent in constructing and maintaining the shoulder of the highway at the point of the accident here, then the court should proceed to find and determine whether the defective condition of the shoulder, if any, was a spot or localized highway defect, or was a general or overall condition of the highway within the meaning of section 81-8,219 (2), R. R. S. 1943.

MOBIL OIL CORPORATION, A CORPORATION, APPELLEE, V. CHARLES E. (TIM) GRANTHAM, DOING BUSINESS AS GRANTHAM OIL COMPANY, APPELLANT.

265 N. W. 2d 669

Filed May 10, 1978. No. 41505.

Trial: Judgments: Appeal and Error. In a case where the jury is waived and there is a conflict in the evidence, the reviewing court will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly erroneous.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Richard J. Dinsmore of Dolan & Dinsmore, for appellant.

Tye, Worlock, Tye, Jacobsen & Orr and Patrick J. Nelson, for appellee.

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

CLINTON, J.

Mobil Oil Corporation, plaintiff, brought this action against the defendant, Charles E. (Tim) Grantham, doing business as Grantham Oil Company, one of its distributors, in two causes. The first cause was founded upon a "demand" promissory note, allegedly made by the defendant and payable to the plaintiff, dated December 20, 1966, in the principal sum of "($24,000.00) . . . with interest thereon at the rate of six and three-quarters (6-¾) percent per annum computed from the date hereof, payable ON DEMAND." The note also contained the following provision: "PENDING DEMAND, the Promisor hereby promises and agrees to pay the said sum of Twenty-four Thousand Dollars ($24,000.00), together with interest thereon, to the Promissee as follows: a sum equivalent to one cent ($0.01) per gallon for each gallon of motor fuel delivered into the storage tanks of Promissor's bulk plant at Kearney, Nebraska, payable at the time of delivery of the motor fuel but in no event less than Four Hundred Seventy-two and 41/100 Dollars ($472.41) per month, any deficiency under the above fixed minimum to be paid on or before the tenth day of the following month at the aforesaid office of the Promisee without demand being made therefor, until the entire principal sum with interest thereon has been paid or until demand." The balance claimed on the note was $9,814.31 principal and accrued interest. The second cause was based upon an open account balance of $21,932.83, covering the years 1967, 1968, 1969, and 1970, for the purchase of gasoline and other materials.

In his amended answer the defendant admitted execution of the note and alleged that the note and account were paid in full. In addition to the claim of

payment, the defendant asserted a claim of estoppel. The theory of estoppel we will set forth more fully when we deal with it later in the opinion. In an amended cross-petition the defendant sought judgment against the plaintiff as follows: (1) A balance of $1,077.34 for credit card accounts allegedly assigned to the plaintiff by the defendant and for which the defendant had not been given credit, and (2) the sum of $23,745.51 allegedly owed upon 38 separate oral agreements with the plaintiff for "price war assistance," i.e., discounts from the established price of fuel covering various periods during the years 1958 through 1969. To the latter claim the plaintiff pled the bar of the statute of limitations as to those agreements on which the cause of action may have accrued for more than 4 years previous to the filing of the suit.

A jury trial was waived and the cause was tried to the court. After trial the District Judge found for the plaintiff on the cause founded upon the note and rendered judgment for the principal sum of $7,414.60 and accrued interest in the amount of $3,474.97. The court further found that the plaintiff had not sustained its burden of proof on the open account and accordingly found against the plaintiff thereon. The court found that the defendant had not sustained his burden of proof on the two claims asserted in his cross-petition and denied recovery. It entered judgment for the plaintiff for the balance found due on the note.

The defendant alone appeals and makes the following assignments of error: (1) The court erred in not finding that the plaintiff was estopped from asserting its first cause of action; (2) the court erred in not permitting the defendant to offset the claims asserted in his cross-petition as a matter of recoupment even though a portion of the alleged price war assistance agreements may have been barred by the

passage of time; and (3) the court erred in determining the burden of proof.

We treat the assignments in order. The defendant's theory of estoppel is somewhat fuzzy, but it seems to be this: The plaintiff failed on some occasions to include in its billings the one cent charge per gallon for each gallon of motor fuel purchased and it should have billed the defendant for those amounts, or the required minimum payment of $472.41 when the one cent per gallon charges were less than the minimum monthly payment. The defendant was damaged by this failure because he was unable to adjust his retail charges accordingly. The evidence supports the finding of the trial court. The record would permit the judge to find that the one cent per gallon charges were shown as a separate item on each purchase invoice; that all of such invoices were furnished to the defendant in completed form shortly after each delivery of gasoline; and that in those cases when such charges were occasionally omitted, it was perfectly evident that such was the fact. In addition, the evidence permitted the court to find that each month the defendant was furnished with a statement of the payments made and credited on the promissory note, both interest and principal. The record permitted the court to find that the defendant was not damaged by the occasional failure to include the charges in the invoices of each purchase.

The claim regarding recoupment is not well founded. The defendant relies upon the principles stated in Nathan v. McKernan, 170 Neb. 1, 101 N. W. 2d 756, where the court stated: "The defense of recoupment or reduction of plaintiff's claim must arise out of the same transaction as plaintiff's claim, and survives as long as plaintiff's cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations." The record establishes that the court

denied the plaintiff's motion to dismiss those price war assistance causes allegedly barred by the statute. It decided the claims on the merits and that the defendant had not carried his burden of proof. The record would permit the court to find (1) that payment had been made on some of the 38 claims; and (2) that as to the others, no agreement had been made between the parties. The evidence permits the court to find that the procedure on such claims was as follows: When defendant considered he might be entitled to such support, he would telephone a report of the "war" to the Omaha office of Mobil; an on-site investigation of the locale would then be made by a representative of Mobil and, if the required criteria was found to exist, a recommendation would be made to the Kansas City office of Mobil which would then approve in writing defendant's written application; and that all of the 38 claims which were not paid had never been approved, having, in fact, been disallowed, and no unfulfilled contracts existed.

It is, of course, elemental that the burden of proof was upon the defendant to prove the facts necessary to recover on his cross-petition. No citation of authority is necessary.

The following principle governs our review of this appeal. "In a case where the jury is waived and there is a conflict in the evidence, the reviewing court will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly erroneous." Farmer's Union Co-op Co. of Mead v. Flamme Brothers, 196 Neb. 699, 245 N. W. 2d 464.

AFFIRMED.

ANN LOUISE KROCHMAN YOUNG, APPELLEE, V. GEORGE DALE YOUNG, APPELLANT.

265 N. W. 2d 666

Filed May 10, 1978. No. 41506.

1. **Evidence.** A statement against the interest of a party is an exception to the hearsay rule and, thus, admissible.
2. **Evidence: Parent and Child.** A statement concerning a mother's attempt to influence the attitude of a child against his father and frustrate his visitation rights is admissible and not too remote where the child's negative attitude toward the father developed a short time thereafter.
3. **Divorce: Alimony: Child Support: Taxation.** While the income tax consequences of the deductibility of certain payments and the claiming of exemptions are factors to be considered by the court in determining the amounts of alimony or support, the decision of the Internal Revenue Service as to their deductibility is not binding or persuasive in determining whether payments not denominated specifically as alimony or child support are in reality one or the other, or partly some of each.
4. **Trial: Evidence: Appeal and Error.** Where plaintiff's action is dismissed at the close of his evidence, on appeal plaintiff is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that reasonably could be deduced from the evidence.

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

Daniel J. Monen, Jr., for appellant.

Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellee.

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

WHITE, C. THOMAS, J.

This is an appeal from the District Court's dismissal of an action by the respondent-husband to seek modification of a child support obligation. The parties' marriage was dissolved by decree in November 1973. The decree approved a property settlement agreement proposed by the parties.

In the settlement, the respondent George Young agreed to pay to the clerk of the District Court as "alimony and child support" the sum of $833.33 per month through and including May 1, 1977, and thereafter $416.66 per month through and including October 1, 1980. The payment termination dates coincide with the months and years the two daughters reach their 19th year.

The agreement further provided that the payments would cease on the death of either the petitioner or respondent, but not on the remarriage of petitioner. The agreement went on to say: "It is the intent of the parties that payments of alimony and child support * * * shall be deductible for federal income tax purposes by the Respondent and reportable for federal income tax purposes by Petitioner *and this agreement shall be interpreted or amended to accomplish this objective.*" (Emphasis supplied.)

Shortly after the dissolution, the petitioner moved with the parties' daughters to Dallas, Texas, with the prior knowledge and consent of respondent. The settlement in general terms provided for rights of visitation by respondent in Texas as well as the right of respondent to take the children with him while on vacation.

The older of the two children has reached her 19th year. This matter concerns only the younger child, Melanie, now 16 years of age.

The respondent moved the District Court to eliminate his obligation to make "child support" payments by reason of the denial and frustration of his rights of visitation. The trial court at the close of the respondent's case, dismissed his motion. Respondent appeals.

At the outset, it should be pointed out that each of the parties is in a favorable financial condition. The petitioner is well able to support the minor child without contribution from the respondent; and the

respondent is able to make all payments agreed to in the settlement and has done so. The circumstances of the parties has not changed since the dissolution.

The respondent assigns as error: (1) The refusal of the trial court to admit into evidence a statement made by petitioner, before the dissolution, to the effect that she (petitioner) would turn the children against the respondent; (2) the determination of the trial court that the payments were alimony and no part thereof was child support, thus concluding that absent change of circumstance, no justification existed for reduction of the alimony payments; and (3) the trial court's holding that even if the payments were wholly, or in part, to be considered child support, petitioner was not shown to be the cause of the refusal of the younger daughter to associate with respondent.

In support of the motion, the respondent testified that he frequently traveled to Dallas and that a satisfactory relationship existed in his contacts with his daughters until mid-1974. Thereafter, until mid-1976, he called every other month asking for an opportunity to visit his daughters. He was met uniformly with excuses, i.e., visiting a friend, school functions, visiting relatives, or an out-of-town trip. The respondent would offer to reschedule to resolve the conflicts, only to be met with another excuse.

From mid-1976 to the date of hearing in May 1977, he saw the elder daughter once and the younger daughter twice. The only time they consented to see him was when he informed them that he had birthday or Christmas gifts. After Christmas 1976 he attempted to see them, but was met with the same evasive responses. He called the petitioner and was met with an uncooperative attitude. The petitioner told him that she had no control over the girls. Respondent then filed this application and in an attempt to reestablish relations, a letter was written

describing his feelings of affection, but the attempt was rebuffed.

On its own motion, the court met in chambers with the younger daughter, Melanie, and attempted to ascertain the reason for the estrangement. The recited reason for not wishing to reestablish relations with her father is that it made her "uncomfortable" and she disapproved of his choice of restaurants. The respondent did not offer any evidence of direct interference by petitioner in the exercise of his visitation rights.

The respondent further testified that although the parties had agreed to consult on the girls' education, he was never consulted; and it was only with some difficulty that he was able to ascertain the college the older daughter was attending. He further testified that his relations with the petitioner's mother were strained, that she did not care for him, and that the petitioner was greatly influenced by her. The petitioner's mother also lived in Dallas, apparently in the vicinity of the petitioner's home.

We will discuss the assigned errors in order: First, did the trial court err in refusing to admit the petitioner's statement concerning her resolve to turn the children against the respondent? We hold that it did. The statement was relevant and clearly a statement against interest of a party. § 27-401 and 27-801, R. R. S. 1943. In view of the noticeable change in attitude of the children during the relatively short period from November 1973 to mid-1974, the statement was not too remote.

Second, did the court err in concluding that the entire payment was alimony and therefore not subject to change by the trial court? The trial court placed great weight on the provisions inserted in the settlement relating to the deductibility of the payments by respondent and the listing of such payments by petitioner on her income tax return. The court did not consider that the same agreement characterized the

payments as *child support and alimony,* or that the characteristics of the payments more nearly resembled child support than alimony since (1) there had been a complete division of property in the agreement; (2) there was no demonstrable need for alimony by the petitioner whose income was substantial and presently and probably then in excess of the income of the respondent; and (3) the liability for the payments does not expire on remarriage of the petitioner, but terminates finally on a date approximating the dates on which the children respectively reach their majority.

While the income tax consequences of the deductibility of certain payments and the claiming of exemptions are factors to be considered by the court in determining the amounts of alimony or child support, the decision of the Internal Revenue Service as to their deductibility is not binding or persuasive in determining whether payments not denominated specifically as alimony or child support are in reality one or the other, or partly some of each. The entire area of trial courts attempting to direct, or by implication to control, the determination of federal tax has been characterized as a "Pandora's box" which the state Supreme Court should not open. See Gray v. Gray, 192 Neb. 392, 220 N. W. 2d 542, concurrence by White, C. J. It is obvious that at least a substantial part of the payment was child support. The trial court erred in not so determining.

The third assignment of error concerns the sufficiency of the evidence to sustain respondent's position that the petitioner had undermined and actively thwarted the respondent's visitation privileges. Where plaintiff's action is dismissed at the close of his evidence, on appeal plaintiff is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that reasonably could be deduced from the evidence. See, Hrabik v. Gottsch, 198 Neb. 86, 251 N. W. 2d 672; Lyons v. Wag-

ner, 185 Neb. 214, 174 N. W. 2d 730. Treating all the inferences favorable to the plaintiff, we feel there was sufficient evidence.

It is evident that a drastic change took place in the attitude of the children during the time they have been in the petitioner's custody. The petitioner expressed a determination to influence the children against their father. There is more than a reasonable possibility that she acccomplished what she threatened to do.

The trial court has not heard any evidence petitioner may desire to present. On remand, the trial court should determine the amount of the child support, whether petitioner caused the failure of the respondent's visitation rights and the alienation of the children, and in view of the peculiar circumstances in this case, where each party is well able to supply fully the needs of the minor child, whether the child support payments ought to be terminated completely. See, McGee v. McGee, 190 Neb. 415, 209 N. W. 2d 339; Snellings v. Snellings, 272 Ala. 254, 130 So. 2d 363.

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

REVERSED AND REMANDED.

LEIGHTON WESSEL ET AL., APPELLEES, V. HILLSDALE ESTATES, INC, A NONPROFIT CORPORATION, ET AL., APPELLEES, IMPLEADED WITH AUSTIN REALTY CO., APPELLANT.

265 N. W. 2d 62

Filed May 10, 1978. No. 41522.

1. **Covenants: Injunction: Damages.** It is a well-defined exception to the general rule requiring a showing of actual and substantial injury as a basis for entitlement to injunctive relief, that, where one who has entered into a restrictive covenant as to the use of the land

commits a distinct breach thereof, he may be enjoined irrespective of the amount of damage caused by his breach, and even if there appears to be no substantial monetary damage.

2. **Covenants: Injunction: Contracts: Damages.** In such a case, it is not necessary to prove that the injury will be irreparable, and injunction may lie where there is inadequacy of legal remedy, as where damages would be incalculable because of the loss of quiet enjoyment. A court of equity fastens on the real contract and compels the execution of the very thing covenanted to be done.
3. **Covenants: Injunction.** Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of the plan of development protected by such covenants.
4. **Covenants: Contracts.** A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property.

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

Pierson, Ackerman, Fitchett & Akin, for appellant and for appellee Hillsdale Estates, Inc.

Ginsburg, Rosenberg, Ginsburg & Krivosha and R. P. Cathcart, for appellees Wessel et al.

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

SPENCER, J.

This is an action for declaratory and injunctive relief by landowners in Hillsdale Estates, a platted subdivision in the city of Lincoln, on behalf of themselves and other homeowners, against Austin Realty Co. and Hillsdale Estates, Inc., its officers and directors. Defendant Austin Realty Co. appeals from an order of the District Court which enjoined defendants from proceeding with a plan to construct 40 townhouse units on Lot 19, Block 5, Hillsdale Es-

tates, and directed them to provide a reasonable area for park and recreation purposes. We affirm as modified.

Austin Realty Co. had replatted the area as Hillsdale Estates, 1st Addition. It will be referred to as Lot 19. The principal issue herein is whether the class represented by plaintiffs had acquired a vested right to the use of a reasonable portion of the real estate in question for park and recreational purposes.

On July 10, 1967, the Lincoln city council gave preliminary approval to Austin Realty Co. for construction and development of a community unit plan in the northeast section of the city. The city council approved special permit No. 383 on December 4, 1967, providing for construction of 162 units on the property. The property was platted and designated as Hillsdale Estates. The plat was approved by ordinance No. 9375, passed January 8, 1968.

Exhibit 28, introduced by the defendants, is a plat dated May 1967. It indicates Hillsdale Estates was divided into 122 lots for single-family dwellings, and one area with four 10-plexes, making a total of 162 dwelling units. The four 10-plexes on exhibit 28 were located in the western portion of Lot 19, on approximately 1½ acres. Lot 19 comprised approximately 4.35 acres. The 1½ acres was bounded on the east by a dead-end street and comprised an area of approximately 40 feet in width, the east 15 feet of which were marked "parking." The area to the east of the parking area appears to be outlined by trees or shrubs. This area, with the street and parking area, would comprise approximately 2.85 acres of Lot 19. The plat also shows a 30-foot walkway crossing the east 1½ acre-portion on which the four 10-plexes are indicated.

Exhibit 29, introduced by the defendants, indicates representations were made to the Buists, purchasers of a lot in Hillsdale Estates, that Lot 19 would be used for a private park. It also referred to multiple

units, which we interpret to be those shown on exhibit 28. It is dated March 22, 1968.

Lot 19 is located in the extreme northeast corner of Hillsdale Estates. It is an irregularly shaped piece of land, bounded on the west and south sides by 12 single-family dwellings. The walkway referred to connects Lot 19 with the street, which runs in front of the residences on the west side.

On January 23, 1968, Austin recorded protective covenants affecting all the lots in Hillsdale Estates. Those lots set aside for single-family dwellings are referred to as the "Properties," and Lot 19, is referred to as the "Commons." The document places several restrictions upon the use of the "Properties." Of importance herein are the provisions pertaining to the "Commons."

As a part of the preamble to the protective covenants, it is stated: "WHEREAS, Austin Realty Co. desires to create within the Commons parks, playgrounds, recreational areas and facilities, scenic areas, and such building, structures, improvements and personalty as may be incident thereto; * * *." It is further recited that a nonprofit corporation, known as Hillsdale Estates, Inc., has been created "for the purpose of enforcing the covenants and restrictions created and established against and upon the Properties and for the purpose of administering and maintaining the Commons." Articles of incorporation for Hillsdale Estates, Inc., were filed with the Secretary of State on January 17, 1968. Every property owner in Hillsdale Estates is a member of the corporation and is entitled to vote at the meetings.

Clause XIV of the protective covenants provides: "The Company (Austin) may retain legal title to the Commons until such time as the initial development thereof has been completed and may subdivide portions of the Commons into lots for the construction of multiple dwellings. Such multiple dwelling lots,

when subdivided, shall cease to be a part of the Commons; provided however, that any such subdivision shall be made so as to preserve and maintain the sidewalk access from the Properties to the Commons, as shown on the recorded plat of Hillsdale Estates."

Clause XVIII states: "Each member of the Corporation shall have the right to use and enjoy the Commons and shall have an easement over and upon the Commons for the use and enjoyment thereof, which shall be appurtenant to and shall pass with the interest requisite for membership held by such member."

Other provisions give the board of directors of Hillsdale Estates, Inc., the right, after the Commons has been conveyed to the corporation, to levy annual assessments of up to $50 against the members. Assessments for a greater amount, or special assessments for capital improvements, require approval of two-thirds of the members. The corporation is also granted the right to charge reasonable admission and other fees for use of the Commons. With member approval, all or part of the Commons may be dedicated or transferred to a public agency.

Clause XXIII provides the covenants shall run with the land and be binding for a period of 25 years, after which time they will be extended automatically for successive 10-year periods, unless terminated or modified by a vote of the property owners. Clause XXIV provides: "The enforcement of these covenants and restrictions shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any provision or provisions hereof. Such proceedings may be to restrain such violation, or to recover damages and, by the Corporation, may be to enforce any lien or obligation created hereby."

On June 9, 1969, the Lincoln city council granted special permit No. 465, permitting the number of

units to be increased to 170. In 1973, Austin applied for another special permit to amend the plan to provide for the construction of 40 townhouse units on Lot 19, and to reduce the amount of open area on the lot. This special permit was approved by the city council on January 29, 1973. On the same day, the city council considered and rejected an application by Leighton Wessel and Darrell E. Feit, plaintiffs herein, for the revocation of special permit No. 465.

On March 11, 1974, subsequent to the filing of the present action, the Lincoln city council accepted and approved a plat designated as Hillsdale Estates, 1st Addition. This is a replat of Lot 19, Hillsdale Estates, providing for the subdivision of 40 townhouse lots.

Plans for the development of Lot 19, changed several times over the years. As designated in exhibit 28 in 1967, 4 apartment buildings, each containing 10 living units, would be built on the western portion of the lot. The remaining land, comprising approximately 2.85 acres, would be a street and park area.

Several homeowners testified they were told by Austin salespeople when they purchased their lots there would be a park on Lot 19. Some were also informed the residents could decide whether they wanted to install tennis courts, a swimming pool, or other recreational facilities on the land.

Most purchasers were supplied with a brochure containing a copy of the original plat, with Lot 19 designated as "Community Unit Area" but showing nothing else.

A photographic reproduction of the billboards Austin used to sell the property was introduced into evidence. There were three billboards located on the area. On these billboards, Lot 19, was labeled as a "Community Unit Area." The billboard also stated that the development features a "private park" and a "recreation area."

Austin's 1969 plan provided for the construction of

four 12-plex apartments, together with 12 six-doored garages. This left only a small area on the western edge of the lot for a picnic area and another open area on the eastern edge designated as "community area." The total amount of the open space was, however, substantially reduced.

A townhouse plan, approved by the city council in 1973, provides a much smaller area of open land on the periphery of the building complex. In addition, the plan calls for laying a 50 by 80-foot concrete slab to be used for basketball, volleyball, and badminton.

Prior to the time the special permit for the townhouse plans was approved by the city, Austin held a meeting with area residents to explain the plan. In November 1972, it proposed an amendment to the protective covenants whereby all references to parks and recreation areas would be omitted. Membership in the corporation would be limited to owners of the multiple dwelling units and other homeowners would not be subject to assessments. This proposal was rejected by the property owners.

Although the present action was commenced by the plaintiffs on June 8, 1973, it did not come on for trial until July 8, 1976. There has been no construction on the lot in question although Austin did perform certain grading work and installed underground wiring as part of the initial development of the area. There was testimony that water mains and sewer lines were installed subsequent to the filing of this action.

In its decree, entered May 4, 1977, the District Court determined plaintiffs had a vested right to use a reasonable portion of Lot 19, for park and recreational purposes, based upon the protective covenants, Austin's advertising, and representations of the real estate agents. It found the plan for construction of townhouses, garages, and parking areas was unreasonable and enjoined its implementation. The court then ordered the defendants to provide a

suitable and reasonable area on the lot for park and recreational purposes. Austin Realty Co. prosecutes this appeal.

Austin argues the court erred in issuing the injunction because: (1) Plaintiffs did not plead or prove damages; (2) an action could not be based on fraud and misrepresentation; and (3) plaintiffs did not appeal from the action of the city council.

We will waste no time on the third assignment of error. It is the courts, and not the city council, which have the ultimate responsibility of enforcing protective covenants.

Austin contends plaintiffs are not entitled to injunctive relief since they failed to show they will suffer irreparable damage. In Schlitz Brewing Co. v. Nielsen, 77 Neb. 868, 110 N. W. 746 (1906), involving an action to enforce a restrictive covenant in a lease, this court stated: "Ordinarily, in a suit brought for that purpose, the plaintiff is entitled to an injunction without a showing of actual damages or that irreparable injury will result from a continued violation of the restrictive clause."

The rule is stated in 43A, C. J. S., Injunctions, § 100, p. 148: "It is a well-defined exception to the general rule requiring a showing of actual and substantial injury as a basis for entitlement to injunctive relief, that, where one who has entered into a restrictive covenant as to the use of the land commits a distinct breach thereof, he may be enjoined irrespective of the amount of damage caused by his breach, and even if there appears to be no substantial monetary damage. In such a case, it is not necessary to prove that the injury will be irreparable, and injunction may lie where there is inadequacy of legal remedy, as where damages would be incalculable because of the loss of quiet enjoyment. A court of equity fastens on the real contract and compels the execution of the very thing covenanted to be done."

Here, injunction is the only adequate remedy. On the billboard advertising and the brochures furnished to buyers, an area of 4.35 acres was set aside as a community unit area, which a prospective buyer, from the representations and the advertising, could reasonably interpret to be the area in which a private park and a recreation area would be established.

Exhibit 28, referred to heretofore, was on display in the office of Austin, where it could be examined by salesmen and prospective purchasers.

We said in Pool v. Denbeck, 196 Neb. 27, 241 N. W. 2d 503 (1976): "Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of the plan of development protected by such covenants."

It borders on the ridiculous to suggest that the homeowners in Hillsdale Estates are not damaged by the virtual elimination of the promised park, recreational area, swimming pool, etc., by reducing the area of 2.85 acres to a concrete slab 50 feet by 80 feet.

Austin argues that plaintiffs have no interest in Lot 19. Clause XVIII of the protective covenants grants each member of the corporation the right to use and enjoy the Commons, and an easement is created.

Austin relies on Clause XIV, which it quotes in its brief as follows: "The Company may retain legal title to the Commons until such time as the initial development thereof has been completed and may subdivide portions of the Commons into lots for the construction of multiple dwellings. Such multiple dwelling lots, when subdivided, shall cease to be a part of the Commons." The remainder of the clause states: "Provided however, that any such subdivision shall be made so as to preserve and maintain the sidewalk access from the Properties to the Commons, as shown on the recorded plat of Hillsdale Estates."

Although the clause does not place any restrictions upon the amount of land which may be subdivided, the clear implication is that a major portion of the lot will be preserved as the Commons. Clause XVII expressly provides: "The Company shall convey the Commons to the Corporation at such time as the initial development and the subdivision hereinabove described have been completed." In the preamble it is recited that "Austin Realty Co. desires to create within the Commons parks, playgrounds, recreational areas and facilities, scenic areas, and such building, structures, improvements and personalty as may be incident thereto; * * *." It is evident this cannot be done in the small area remaining in Lot 19 if Austin's construction of the agreements is accepted. The protective covenants, when read in their entirety, evidence an intention to preserve a sufficient area for park and recreational purposes.

In Lund v. Orr, 181 Neb. 361, 148 N. W. 2d 309 (1967), it is stated: "A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property."

We do not hesitate to suggest that the method of operation employed by Austin borders on sharp practice. The original plat described a park area. Its protective covenants suggested a substantial recreational area. All the advertising by Austin showed Lot 19 as a "Community Unit Area." Its billboards carried the following language in large type:

"FEATURING

"UNDERGROUND WIRING

"PRIVATE PARK
"RECREATION AREA
"ALL SPECIALS PAID."

Austin salesmen represented to prospective buyers there would be a park and recreation area, including picnic areas, tennis courts, and a swimming pool in the subdivision. It is evident this was a plan designed to further the sales of lots in Hillsdale Estates.

While the protective covenants did provide for the company to retain title to the Commons until such time as the initial development had been completed, and did permit it to subdivide a portion of the Commons into lots for the construction of multiple dwellings, anyone who checked exhibit 28 or the plat attached to exhibit 2 would have found approximately 2½ acres left for park and recreational purposes.

The language of the covenants must be interpreted in its entirety. The covenants read: "WHEREAS, Austin Realty Co. desires to create within the Commons parks, playgrounds, recreational areas and facilities, scenic areas, and such building, structures, improvements and personalty as may be incident thereto * * *." It is absurd to believe from this language that Austin was contemplating an eventual recreation area of 50 by 80 feet. It should be, and we so find, restricted to constructing its multiple dwelling units and parking on the west 2 acres of Lot 19. The balance of Lot 19 should be the Commons, to provide the park and recreational areas promised purchasers by Austin and contemplated in the protective covenants. This will provide the approximately 2.35-acre area described by one Austin representative. It should, however, include the 10-foot walkway across the west portion of Lot 19.

The District Court was correct in its determination in all respects, except that its judgment should be amended to restrict multiple dwelling units and parking to the west 2 acres of Lot 19, exclusive of the

walkway and the balance of Lot 19 should be set off to Hillsdale Estates, Inc., for recreational and park purposes for the benefit of the members of said corporation.

The judgment of the District Court is affirmed as modified.

AFFIRMED AS MODIFIED.

MERLIN R. WILKE, APPELLEE, V. HOLDREGE COOPERATIVE EQUITY EXCHANGE, A CORPORATION, APPELLANT.

265 N. W. 2d 672

Filed May 10, 1978. No. 41523.

1. **Trial: Summary Judgments: Evidence.** On a motion for summary judgment the trial court is to examine the evidence and pleadings only to discover if any real issue of fact exists, and to decide whether the moving party is entitled to judgment as a matter of law. The court must view the evidence in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn therefrom.
2. **Uniform Commercial Code: Contracts: Sales.** An oral contract for the sale of goods for the price of $500 or more, ordinarily unenforceable under section 2-201 (1), U. C. C., is enforceable with respect to goods which have been received and accepted, or if the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract for sale was made.
3. **Contracts: Sales: Frauds, Statute of: Estoppel.** Estoppel may not be utilized to defeat the defense of the statute of frauds in an action by a buyer on an oral contract where the seller does nothing more than fail to deliver goods.

Appeal from the District Court for Phelps County: NORRIS CHADDERDON, Judge. Affirmed.

Person, Dier & Person, for appellant.

Aten, Noble & Ide, for appellee.

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

BRODKEY, J.

Merlin R. Wilke, plaintiff and appellee herein,

filed this action against Holdrege Cooperative Equity Exchange, defendant and appellant herein, to recover a money judgment for 9,072 bushels of corn delivered to the defendant pursuant to a verbal agreement. The defendant entered a general denial, and filed a counterclaim in which it alleged that the plaintiff had contracted to deliver 20,000 bushels of corn to the defendant, but had delivered only 9,072 bushels, and failed and refused to deliver the balance due. The plaintiff denied the allegations of the counterclaim, and asserted as a defense thereto the statute of frauds, section 2-201, U. C. C. The plaintiff moved for summary judgment. After a hearing, the trial court sustained the motion, awarded the plaintiff $13,154.44 for 9,072 bushels of corn which had been delivered by the plaintiff to the defendant, and dismissed the defendant's counterclaim. Defendant has appealed, contending that the trial court erred in so doing. We affirm the judgment of the District Court.

It is well settled that on a motion for summary judgment the trial court is to examine the evidence and pleadings only to discover if any real issue of fact exists, and to decide whether the moving party is entitled to judgment as a matter of law. The court must view the evidence in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn therefrom. See, § 25-1332, R. R. S. 1943; Janssen v. Hamblet, 197 Neb. 705, 250 N. W. 2d 902 (1977); Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152 (1973). We review this case in accordance with these principles.

The relevant facts, viewed in the light most favorable to the defendant, are as follows. The parties entered into an oral agreement for the sale of 20,000 bushels of corn at a price of $1.45 per bushel. Shortly after the agreement, the defendant, in reliance on

the contract, sold 20,000 bushels on the futures market to protect itself from price fluctuations. The plaintiff delivered 9,072 bushels of corn to the defendant pursuant to the agreement, but further deliveries were refused by the defendant on the ground that the corn offered was damaged. Plaintiff demanded payment for the corn he had delivered, but payment was refused by the defendant on the ground that the plaintiff had not fulfilled his obligations under the oral contract by delivering 20,000 bushels of undamaged corn.

There is no dispute over the fact the plaintiff delivered 9,072 bushels of corn to the defendant and that the parties had orally agreed on a price of $1.45 per bushel. Although the agreement was verbal, an oral contract otherwise unenforceable under the Uniform Commercial Code statute of frauds is enforceable with respect to goods which have been received and accepted. See § 2-201 (3) (c), U. C. C. Therefore the trial court was clearly correct in concluding that the plaintiff was entitled to $13,154.44 for the corn he delivered to the defendant. The dispute in this case is whether the trial court erred in dismissing defendant's counterclaim.

Subsection (1) of section 2-201, U. C. C., provides that a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought. The alleged oral contract clearly falls within this provision, which renders it unenforceable unless an exception is found. Defendant sets forth two arguments in support of its contention that the oral contract is not rendered unenforceable under section 2-201, U. C. C.

First, it relies on subsection (3) (b) of section 2-201, U. C. C., which provides that an oral contract is enforceable "if the party against whom enforcement

is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted." Defendant contends that a letter written by plaintiff's attorney to the manager of the defendant in which a compromise was offered and the alleged oral contract was discussed satisfies the requirements of section 2-201 (3) (b), U. C. C. The letter was admitted into evidence at the hearing on the motion for summary judgment over the objection of the plaintiff, who contended that it was inadmissible as a letter of compromise under section 27-408, R. R. S. 1943.

The letter, even assuming, without deciding, that it was properly received in evidence, clearly does not support the defendant's argument. Subsection (3) (b) of section 2-201, U. C. C., applies only to admissions made in "pleading, testimony or otherwise in court," and the letter does not fulfill any of these requirements. At no time did the plaintiff admit in his pleadings, evidence, or otherwise in court that the oral contract called for delivery of more than 9,072 bushels of corn. The contention of the defendant on this point is clearly without merit.

The second argument of the defendant is that the plaintiff should be estopped from denying the existence of the alleged oral contract under the doctrines of equitable or promissory estoppel because the defendant relied on the oral contract to its detriment. Recent decisions of this court resolve this issue in favor of the plaintiff. In Schott Grain Co. v. Rasmussen, 197 Neb. 267, 248 N. W. 2d 42 (1976), and Farmland Service Coop, Inc. v. Klein, 196 Neb. 538, 244 N. W. 2d 86 (1976), we specifically held that the doctrine of promissory estoppel could not be utilized in situations like the one present in this case to defeat the statute of frauds. Language in our decision in Farmland Service Coop, Inc. v. Klein, *supra,* we believe, also indicates that the same rule would apply

to cases involving equitable estoppel. See, also, Del Hayes & Sons, Inc. v. Mitchell, 304 Minn. 275, 230 N. W. 2d 588 (1975); Sacred Heart Farmers Co-Op. Elevator v. Johnson, 305 Minn. 324, 232 N. W. 2d 921 (1975).

We conclude that the alleged oral contract on which the defendant relies is unenforceable under the statute of frauds, and the plaintiff was entitled to judgment as a matter of law. The judgment of the District Court is affirmed.

AFFIRMED.

EXCHANGE BANK AND TRUST COMPANY, A CORPORATION, APPELLEE, V. STEVEN D. TAMERIUS ET AL., APPELLANTS.

265 N. W. 2d 847

Filed May 10, 1978. No. 41529.

1. **Summary Judgments.** A motion for summary judgment should be granted only where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.
2. **States: Negotiable Instruments: Contracts.** Where a promissory note is made in one state, to be performed in another state, it is, ordinarily, to be regulated and governed by the laws of the place of performance, without regard to the place at which it was written, dated, or signed, unless it clearly appears that the parties intended that the contract should be governed by the law of the place where made.
3. **Public Policy: Usury: Contracts.** Usury laws are not so distinctive a part of public policy of the forum that courts will, on the ground of public policy, decline to enforce any contract which would be invalid, if tested by them, although valid according to its proper law.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed.

Thomas A. Wagoner, for appellants.

Joseph F. Chilen of Denney & Chilen, for appellee.

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

McCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. J.

This is an action to collect the unpaid principal and interest thereon of a promissory note. Plaintiff filed a motion for summary judgment which was sustained. Judgment was entered for plaintiff in the sum of $8,840.60 with interest at the rate of 12.83 percent per annum from May 18, 1976, until paid. Defendants filed a motion for a new trial which was overruled and now appeal. We affirm the judgment of the District Court.

Defendants contend that it was error for the District Court to grant plaintiff's motion for summary judgment. A motion for summary judgment should be granted only where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Randall v. Erdman, 194 Neb. 390, 231 N. W. 2d 689 (1975). The District Court properly disposed of this case upon plaintiff's motion for summary judgment. No factual dispute existed. The sole questions were those of law: What were the obligations and liabilities of the parties under the note, and was the note governed by the laws of Texas, or those of Nebraska?

Defendants' next contentions deal with the rate of interest allowed by the District Court. The first one is procedural in nature. In its petition plaintiff alleged that the sum of $8,840.60 together with interest thereon at a rate of 12.83 percent per annum from May 18, 1976, was owed by defendants to plaintiff. A copy of the promissory note was attached to and incorporated into the petition. In their answer defendants alleged that the rate of interest pled by plaintiff was greater than is permitted under the laws of the State of Nebraska and that the loan was usurious and void under the laws of the State of Nebraska. In its reply, plaintiff alleged that the promissory note was governed by the laws of Texas.

Defendants contend that it was error to permit plaintiff to plead the laws of Texas in its reply. Defendants argue that by alleging the laws of Texas were applicable to the loan in its reply, plaintiff injected new matter, inconsistent with its petition and, further, amended its theory of the case.

Section 25-820, R. R. S. 1943, provides: "* * * where the answer contains new matter the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer." The plaintiff cannot shift positions by means of the reply. Reed Bros. Co. v. First Nat. Bank of Weeping Water, 46 Neb. 168, 64 N. W. 701 (1895). It is not the province of the reply to introduce new causes of action. Wigton & Whitham v. Smith, 46 Neb. 461, 64 N. W. 1080 (1895).

We fail to see any merit in defendants' contention. Defendants in their answer essentially pled the defense of public policy, and that the loan was usurious and void. Plaintiff was certainly entitled to reply to this contention, and it did, alleging that the note was governed by the laws of Texas and that the note was not usurious thereunder. This was not inconsistent with its petition; nor did plaintiff thereby alter or shift its theory of the case. The cause of action, one of contract, remained the same. There is no merit to this contention.

The next issue is whether the District Court was correct in allowing interest at the rate of 12.83 percent per annum upon the note.

In August 1972, the defendant Steven D. Tamerius corresponded with plaintiff, which is located in Dallas, Texas, requesting a loan for $13,500 to finance a business venture. The loan was subsequently consummated. Tamerius experienced financial diffi-

culties and in May 1975, plaintiff corresponded with Tamerius concerning his delinquent payments. Enclosed in this correspondence was a new promissory note which refinanced the unpaid balance of the first note. This note, dated May 22, 1975, was executed by Tamerius at Grand Island, Nebraska, and guaranteed by his parents, the defendants Dean and Bonnie Tamerius, at Fairbury, Nebraska, and returned to plaintiff by mail. The note required that all payments be made at the plaintiff's office at Dallas, Texas. Tamerius made six payments to plaintiff at its Dallas office. In April 1976, plaintiff, because of defaults on payments due, elected to exercise its option to accelerate the maturity of the note and made demand for the remaining principal due and interest.

Section 1-105, U. C. C., provides in part that, "* * * when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such state or nation shall govern their rights and duties."

The promissory note clearly and specifically provided that: "Interest and/or charges are not in excess of those permitted under the *Texas Consumer Credit Code.* The holder of this Note may collect all lawful amounts actually incurred and permitted *under said Code* * * * and the Debtor agrees to pay such amount when assessed." (Emphasis supplied.)

It would seem, from this provision, that the parties clearly intended that the note should be governed by the laws of the State of Texas. In any event, even if our assessment of the parties' intent is erroneous, the note provided for payments at plaintiff's office at Dallas, Texas. The rule is well established that: " 'Where a promissory note is made in one state, to be performed in another state, it is, ordinarily, to be regulated and governed by the law of

the place of performance, without regard to the place at which it was written, dated, or signed, unless it clearly appears that the parties intended that the contract should be governed by the law of the place where made.' " United Bank & Trust Co. v. McCullough, 115 Neb. 327, 212 N. W. 762 (1927). See, also, Farm Mortgage & Loan Co. v. Beale, 113 Neb. 293, 202 N. W. 877 (1925); 16 Am. Jur. 2d, Conflict of Laws, § 40, p. 62.

The District Court correctly concluded that the note was governed by the laws of Texas and that under these laws the amount of interest called for on the note is permissible. See Article 5069-4.01, Vernon's Texas Statutes. Defendants argue that the rate of interest is usurious under Nebraska law. Usury laws are not so distinctive a part of the public policy of the forum that courts will, on the ground of public policy, decline to enforce any contract which would be invalid, if tested by them, although valid according to its proper law. Grady v. Denbeck, 198 Neb. 31, 251 N. W. 2d 864 (1977); 11 Am. Jur., Conflict of Laws, § 156, p. 458.

In conclusion, it appears that Nebraska will enforce contracts lawfully made and to be performed outside Nebraska jurisdiction even if such contracts subject a Nebraska citizen to a usurious interest rate. Grady v. Denbeck, *supra;* Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N. W. 2d 240 (1954); Coad v. Home Cattle Co., 32 Neb. 761, 49 N. W. 757 (1891); Hewit v. Bank of Indian Territory, on rehearing, 64 Neb. 468, 92 N. W. 741 (1902). See, also, Seeman v. Philadelphia Warehouse Co., 274 U. S. 403, 47 S. Ct. 626, 71 L. Ed. 1123 (1927).

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

AFFIRMED.

ALFRED E. KRASKI ET AL., APPELLEES, V. DAVID BANWELL ET AL., APPELLANTS.

265 N. W. 2d 458

Filed May 10, 1978. No. 41632.

SUPPLEMENTAL OPINION

Appeal from the District Court for Morrill County: ALFRED J. KORTUM, Judge. On motion for rehearing. See *ante* p. 279, 263 N. W. 2d 458, for original opinion. Motion for rehearing overruled.

Ronald Rosenberg, for appellants.

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, David T. Schroeder, and Padley & Dudden, for appellees.

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

WHITE, C. THOMAS, J.

The last full paragraph of the opinion at page 282 is withdrawn and the following is added:

The granting of a partial summary judgment to the appellees was erroneous. The judgment is reversed and the cause is remanded to the District Court for trial on the remaining issues raised in the pleadings.

STATE OF NEBRASKA, APPELLEE, V. STEVEN VAN ACKEREN, APPELLANT.

265 N. W. 2d 675

Filed May 10, 1978. No. 41647.

1. **Criminal Law: Evidence: Motions, Rules, and Orders: Appeal and Error.** In a criminal case, where a defendant has filed a timely pretrial motion to suppress evidence, and such motion is denied by the District Court after hearing, an objection at trial to the introduction of the evidence, or the renewal of the motion to suppress, is not essential to preserve the question for review.
2. **Criminal Law: Searches and Seizures.** A warrantless search of a

house may be justified when the police have obtained the consent to search from a party who possessed common authority over, or other sufficient relationship to, the premises sought to be inspected.

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

Dennis R. Keefe of Naylor & Keefe, for appellant.

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

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

MCCOWN, J.

On trial to the court, jury trial having been waived, the defendant was convicted on one count of burglary and on one count of possession of a firearm by a felon, and adjudged to be an habitual criminal. He was sentenced to imprisonment for a period of not less than 11 nor more than 14 years on each count, the sentences to run concurrently to each other and consecutively to any sentence being served. The defendant has appealed.

On December 24, 1976, the defendant escaped from the Nebraska Penal and Correctional Complex, where he was then serving a 7-year prison sentence. The defendant went to a house in Omaha, Nebraska, where Lita Longton, a woman he had previously known, was living with Billy Morris, a man who paid her living expenses. So far as the record shows, there were no other occupants of the house. Ms. Longton gave the defendant permission to stay in the house.

Morris' testimony was that the defendant arrived at the house on Christmas Eve and thereafter occupied quarters in the basement. Morris also said that sometime after the defendant's arrival at the house the defendant asked Morris if Morris wanted to join him in a burglary. On December 28 or 29,

1976, Morris and Van Ackeren went to a residence in Omaha, jimmied the back door, and took a shotgun, a rifle, and a suitcase filled with clothing.

The Omaha police department had been alerted as to the defendant's escape. On the afternoon of December 30, 1976, the police received a tip that the defendant might be living at 4315 Franklin Street. Five police officers went to the house at approximately 3 p.m. Three officers were assigned to guard the rear and side of the house while Officers Godberson and Jernigan approached the front door. Officer Godberson knocked on the front door and the door was opened by Morris. The officers displayed their identification, drew their guns, and asked if the defendant was hiding in the house. Morris nodded his head affirmatively. One of the officers told Morris to lie down on the living room floor. The other officer called to the defendant not to make a move, that the house was surrounded. Officer Godberson went into a bedroom to the left of the entrance where he found the defendant hiding under the bed. The defendant was arrested and handcuffed. The officers told Morris they wanted to see everything in the house that the defendant had brought in. Morris gave them permission to search the house and told them that the defendant was staying in the basement. The officers went to the basement with Morris. One of the officers picked up a leather jacket which was lying on the bed and Morris indicated that it was the defendant's jacket. Inside the jacket the officers found an automatic pistol with live rounds in the clip. In the basement area they also found a shotgun and a rifle, later identified as those taken in the burglary. The police had neither an arrest warrant nor a search warrant.

Prior to trial and in compliance with statutory requirements, the defendant moved to suppress all the items seized as a result of the search of the house. The District Court denied defendant's motion to sup-

press, held that the defendant had no standing to challenge the search, and that the search was not unreasonable in view of the defendant's status as an escapee. After trial and conviction, motion for new trial was filed and overruled, and this appeal followed.

The defendant's assignments of error center around the contention that the search and seizure in this case violated the defendant's constitutional right to be free from unreasonable searches and seizures, and that defendant's motion to suppress the evidence seized was erroneously denied.

In this case the defendant filed a motion to suppress the evidence obtained in the allegedly unreasonable search and seizure more than 10 days prior to trial in accordance with statutory requirements. After hearing in the District Court, the court denied the motion to suppress. The defendant did not again move to suppress the evidence at trial, nor make specific objection to its admission.

A preliminary issue on this appeal is therefore whether, after denial of a motion to suppress evidence, it is necessary at trial to move to suppress again or object to the admission of the evidence which the court has previously refused to suppress, and whether such objection is a prerequisite to review of the suppression issue on appeal.

Section 29-822, R. R. S. 1943, provides that motions to suppress evidence obtained by an unlawful search and seizure must be filed at least 10 days before trial or at the time of the plea to the complaint, whichever is the later, and provides: "Unless claims of unlawful search and seizure are raised by motion before trial as herein provided, all objections to use of the property as evidence on the ground that it was obtained by an unlawful search and seizure shall be deemed waived; Provided, that the court may entertain such motions to suppress after the commencement of trial where the defendant is surprised by the

possession of such evidence by the state, and also may in its discretion then entertain the motion where the defendant was not aware of the grounds for the motion before commencement of the trial."

In State v. Smith, 184 Neb. 363, 167 N. W. 2d 568, the court said: "We conclude that section 29-822, R. R. S. 1943, intends, unless within the exceptions contained in the statute, that motions to suppress evidence should be finally determined before trial, but that a trial court is not precluded from correcting errors at the trial." In the case now before us there are no facts which bring it within the exceptions contained in the statute.

The State now contends that since the trial court is not precluded from correcting errors at trial, the failure to again object to the evidence at trial constitutes a waiver of all objections to admission and precludes any review of the suppression issue on appeal. We disagree.

The issue is one of first impression in this state but has been dealt with extensively in other jurisdictions. In Lawn v. United States, 355 U. S. 339, 78 S. Ct. 311, 2 L. Ed. 2d 321, the United States Supreme Court noted: "It is quite true generally that the overruling of a pretrial motion to suppress the use at the trial of particular evidence preserves the point and renders it unnecessary to object when such evidence is offered at the trial." In that particular case, however, defense counsel had made use of the evidence in his argument, and had stated that he had no objection to its introduction. The court therefore held that he had waived the objection.

A leading case for the view that reassertion of the objection at trial is not necessary is Waldron v. United States, 219 F. 2d 37. In that case the court was applying Rule 41 (e) of the Federal Rules of Criminal Procedure, a rule very similar to section 29-822, R. R. S. 1943. That case very effectively sets forth the reasons for such a rule. The court said:

"It seems clear to us that a ruling on a motion to suppress evidence becomes a controlling rule in the case just as does a ruling made during a trial. * * * It seems to us the same elementary principles must apply when a motion to suppress has been made under Rule 41 (e) and denied by the court. In denying such a motion based upon an allegation of unconstitutional search and seizure, the court passes upon an important point of law, frequently one of the most important in the case. The court conducts a hearing for the purpose, receives evidence, and renders a legal judgment. If it were necessary that the point be raised again during the course of the trial, the whole procedure of hearing, testimony, etc., would have to be repeated, a useless performance; or the court would merely enter again its prior conclusion without further hearing, an equally useless performance. The movant has a right to renew his point; it would be safer and more skillful to interpose an objection when the evidence is offered; but we think he is not required to do so. He does not waive it and is not barred from pressing it upon appeal, if he merely abides the court's ruling and tries the remainder of his case accordingly. To hold otherwise would be to inject a pure technicality, without a purpose, into the conduct of trials, requiring counsel to repeat a contention already disposed of in the proceeding; and this in respect to a waiver of a constitutional right. The fact that the court might in its discretion entertain a motion to suppress during the trial does not make it obligatory upon parties to renew such motions during trial or to object in any other way to the evidence at the trial."

Not only federal courts but state courts have also followed that rule under statutes or rules similar to section 29-822, R. R. S. 1943. In State v. Baker, 26 Ariz. App. 255, 547 P. 2d 1055 (1976), the court said: "Appellant's counsel sufficiently preserved the issue for appeal by formally moving to suppress the gun

and then following through with the suppression hearing. We will not require defense counsel to waste the trial court's time with futile objections to the introduction of evidence when a motion to suppress has already been made and denied."

In State v. Michaels, 60 Wash. 2d 638, 374 P. 2d 989, the Supreme Court of Washington said: "In this case * * * the trial court had all the facts before it when the pretrial motions were made, and the ruling which it made on the last of them was final in its terms. To have objected to the introduction of the evidence after this definitive ruling would have been a useless act, and this the law does not require."

3 Wright, Federal Practice and Procedure, Criminal, § 678, p. 141, states the federal rule: "It ordinarily cannot be claimed on appeal that a search and seizure were illegal if there was neither a motion to suppress nor an objection to the introduction of the evidence at the trial. If the motion was made and denied, this should be enough to preserve the question for appeal without renewing the motion at the trial, but this is not an inexorable rule and careful counsel should renew the objection to avoid any question."

States which require additional objections at trial generally justify the rule on the ground that it is settled law in their jurisdictions which they decline to depart from, or that the trial judge may not be the same judge who ruled on the motion to suppress. See, Sisson v. State, 141 Ga. App. 559, 234 S. E. 2d 146; State v. Cage, 218 N. W. 2d 582 (Iowa); State v. Bryson, 506 S. W. 2d 358 (Mo.).

It is evident from the record here that the defendant did not intend to waive the suppression issues. The same judge who denied the pretrial motion to suppress was also the judge at the trial. The evidence at trial was stipulated, and no objection was made to any evidence, including the suppression evidence. Before the trial concluded, however, the

defendant renewed all motions previously made. The court had previously been made aware that the suppression issue was the only realistic ground for appeal, and the suppression issue was specifically presented and argued in defendant's motion for new trial.

Where a defendant has filed a timely pretrial motion to suppress evidence, and such motion is denied by the District Court after hearing, an objection at trial to the introduction of the evidence, or the renewal of the motion to suppress, is not essential to preserve the question for review. The defendant has a right to renew his motion at trial, and it would be prudent and skillful to interpose an objection when the evidence is offered, but he is not required to do so to preserve his point for review, nor does the acceptance of a court's prior suppression ruling constitute a waiver of the right to appellate review of the suppression issue in the absence of other affirmative evidence of waiver. Nothing in this ruling obviates the necessity for presenting the issue to the trial court in a motion for new trial as a prerequisite to consideration by this court on appeal.

An additional preliminary issue in this case is the contention that the defendant, as an escapee, had no standing to challenge the search and seizure here. As a general rule a defendant must establish that he was "legitimately on premises where a search occurs." Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697. It must also be established that "the area was one in which there was a reasonable expectation of freedom from governmental intrusion." Mancusi v. DeForte, 392 U. S. 364, 88 S. Ct. 2120, 20 L. Ed. 2d 1154. At least one court has held that an escapee from prison has no standing to challenge a search such as this. See Robinson v. State, 312 So. 2d 15 (Miss., 1975).

There may be some question as to whether the defendant lacked standing to challenge the seizure of

the handgun here in view of the nature of the charge, which requires personal possession. See State v. Schrader, 196 Neb. 632, 244 N. W. 2d 498. In view of the disposition we make on the reasonableness of the search and seizure here, we find it unnecessary to pass upon the issue of standing.

The evidence in this case is undisputed that the police were given permission by Billy Morris to search the house in which the evidence was found. The evidence is also uncontradicted that Morris was one of two cotenants of the house, who paid the expenses of the other cotenant. It is quite clear that a warrantless search of a house may be justified when police have obtained the consent to search from a "party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." State v. Schrader, *supra*. This is the generally accepted rule. See United States v. Finch, 557 F. 2d 1234 (8th Cir., 1977).

At the preliminary hearing Morris was asked whether he had told the police they could search the house and he responded: "Yeah. I gave them permission to." The search here was clearly consented to by a party having authority to do so. The search was neither unreasonable nor invalid. The District Court properly denied the defendant's motion to suppress.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LLOYD D. SADDLER, APPELLANT.

265 N. W. 2d 679

Filed May 10, 1978. No. 41650.

1. **Criminal Law: Appeal and Error: Presentence Reports.** A defendant cannot assert error in the failure to inspect a presentence

investigation report when no demand was made for such inspection prior to sentence.

2. **Statutes: Presentence Reports.** Presentence investigation report examined and held to be in compliance with section 29-2261 (3), R. R. S. 1943.

Appeal from the District Court for Phelps County: NORRIS CHADDERDON, Judge. Affirmed.

William A. Tringe, Jr., of Tringe & Illingworth, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

WHITE, C. J.

On July 19, 1976, defendant was charged with drawing and uttering an insufficient fund check, second offense. Defendant waived his right to counsel at the arraignment on this charge and was bound over to the District Court for trial. On November 22, 1976, defendant was charged with failure to appear before the county court of Phelps County on another charge of second offense insufficient fund check. Defendant also waived his right to counsel on this charge and was bound over to the District Court for trial.

On July 27, 1977, defendant was arraigned in the District Court on both charges. Defendant waived his right to counsel and pled guilty to both charges. A presentence investigation report was ordered and on August 10, 1977, defendant was sentenced to a term of 1 year imprisonment in the Nebraska Penal and Correctional Complex with credit for 23 days served on each charge, the sentences to run concurrently. Defendant has appealed from his conviction for drawing and uttering an insufficient fund check,

second offense. We affirm the judgment and sentence of the District Court.

On appeal defendant first contends that the presentence investigation report was inadequate and incomplete under section 29-2261 (3), R. R. S. 1943.

We have examined the presentence investigation report as to all of the areas of inquiry that are required to be covered, when available, by the statute. The report covers an analysis of the circumstances attending the commission of the crime; and defendant's history of delinquency or criminality, his condition of mental and physical health, his family situation, his financial resources and work background, his educational history, and many other details relating to his personality and background that are not particularly mentioned in the statute. The report is 8 pages long and, prior to its preparation, defendant was interviewed for approximately 45 minutes by the adult probation officer. Defendant contends that he does not like the report because, in his opinion, it does not portray sufficient positive aspects of his record. We note that the defendant does not specify what information he would have provided. There is no merit to this contention.

Defendant's next alleged error relates to the examination of the presentence investigation report. No actual request to inspect the report was made by the defendant. In our very recent case of State v. Javins, 199 Neb. 38, 255 N. W. 2d 872 (1977), we said: "The record further shows that a sentencing hearing was set for October 4, 1976, and was rescheduled for October 13, 1976. Defendant's counsel was notified of the date set for sentencing and of the rescheduled date. Trial counsel for the defendant furnished an affidavit to the trial court that he did not examine the contents of the presentence investigation report prior to sentencing and had no opportunity therefore to comment on any errors in the report. The answer to the defendant's contention is stated in State v.

Keller, 195 Neb. 209, 237 N. W. 2d 410: 'The obvious answer is that no request was made for an inspection of the report.' *The defendant cannot assert error in the failure to inspect a presentence investigation report when no demand was made for such inspection prior to sentence.*" (Emphasis supplied.) It is undisputed that no such request was made. The defendant's contention is without merit.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY SIMPSON, APPELLANT.

265 N. W. 2d 681

Filed May 10, 1978. No. 41713.

1. **Trial: Venue: Appeal and Error.** A motion for a change of venue is directed to the sound discretion of the trial court. In the absence of an abuse of discretion the ruling will not be disturbed.
2. **Criminal Law: Trial: Plea Bargains.** A trial judge should not enter into any agreement that the defendant will be permitted to withdraw his plea if the judge does not accept the county attorney's recommendation on sentence.
3. **Criminal Law: Attorney and Client: Waiver.** Where the rules stated in Miranda v. Arizona, 384 U. S. 436, have been complied with and the prisoner has waived the right to assistance of counsel, an officer may interrogate the prisoner without making inquiry concerning whether counsel had been appointed for the prisoner on an unrelated charge.
4. **Criminal Law: Evidence.** Photographs of a gruesome nature are admissible if they are relevant, but the probative value of such evidence should be weighed against its possible prejudicial effect.
5. **Criminal Law: Homicide: Evidence: Instructions.** In a homicide case the jury should be instructed only as to those degrees of homicide that are supported by the evidence.
6. **Criminal Law: Confessions.** A statement in which a defendant admits participation in the essential elements of the crime may properly be referred to as a confession.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Affirmed.

Gerald E. Matzke of Martin, Mattoon & Matzke, for appellant.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of robbery and felony murder. He was sentenced to life imprisonment on the murder count and to imprisonment for 16⅔ years to 50 years for the robbery. He has appealed and contends the trial court erred in refusing a change of venue from Kimball County, Nebraska; in refusing to sustain his motion regarding plea bargaining procedures; in receiving the defendant's confession in evidence; in receiving photographs of the victim in evidence; in failing to instruct the jury as to lesser-included offenses; in characterizing the defendant's statement as a confession; and in imposing excessive sentences.

The record shows that on November 12, 1976, the defendant and his sister, Jackie, were hitchhiking across Nebraska when they were picked up by Fred J. Skiba. They formed a plan to rob Skiba which involved asking him to stop the car. The defendant asked Skiba to stop the automobile when they were at a point just west of Sidney in Cheyenne County, Nebraska. Skiba stopped the automobile as requested and the defendant got out of the automobile on the pretext of going to the bathroom. At that time Jackie, who was in the rear seat, was supposed to "pull a gun" on Skiba and they would rob him. Jackie did nothing so the defendant got back in the car. As Skiba was pulling back on to the highway, Jackie drew the gun, told Skiba to keep his hands on the steering wheel, and stop the car. Skiba reached into the back seat in an attempt to disarm Jackie

and the gun discharged. Skiba then turned back to the front of the automobile and Jackie shot him in the back, paralyzing him and inflicting a fatal wound. The defendant and Jackie then dragged Skiba out of the automobile to a point near the fence at the edge of the right-of-way. Jackie went through Skiba's pockets and took his money. The defendant fired several shots into Skiba's body intending to kill him. They then drove away in Skiba's car which they abandoned near Kimball, Nebraska.

The defendant and Jackie were traced to Los Angeles where the defendant was being held in jail for a California offense. The defendant was interviewed there by two Nebraska officers and made a statement which amounted to a full confession.

An information was filed in Cheyenne County, Nebraska, but on the defendant's motion the venue was changed to Kimball County, Nebraska. A second motion objected to a trial in Kimball County, Nebraska, on the ground that pretrial publicity would prevent the defendant from having a fair trial. The motion referred specifically to a magazine, "Front Page Detective," which contained a story of the crime and had been distributed in Kimball County.

A record of the hearing on the motion was not preserved and the voir dire of the jury does not appear in the record. Such a motion is addressed to the sound discretion of the trial court and upon the record as presented we find nothing that would as a matter of law prevent the defendant from receiving a fair trial in Kimball County.

Before trial the defendant moved for an order that would permit the defendant to withdraw any plea entered pursuant to a plea bargain in the event the court did not accept the recommendation of the county attorney as to sentence. This procedure was disapproved in State v. Evans, 194 Neb. 559, 234 N. W. 2d 199, and State v. Alegria, 198 Neb. 750, 255 N. W. 2d 419. Furthermore, there is nothing in the rec-

ord to indicate that a plea bargain was made or considered.

The record shows that when the defendant was interviewed in California by the Nebraska officers there was a full compliance with the rules stated in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. The defendant stated specifically that he was willing to make a statement to the officers "without the services of a lawyer." The defendant now contends that the confession was not admissible because the officers made no attempt to ascertain if the defendant was represented by California counsel in connection with the California offense. The contention is without merit. The interview had no relation to the California offense and the defendant specifically waived his right to counsel.

The State introduced a number of photographs of the body of the deceased taken at the scene of the crime and later at the autopsy. The photographs, although gruesome, had some relevance and tended to corroborate other evidence of the State. The applicable rules have been discussed in a number of recent cases including State v. Partee, 199 Neb. 305, 258 N. W. 2d 634. Under all the circumstances in this case, we are not prepared to say that the possible prejudicial effect of these photographs outweighed their probative value.

The trial court refused the defendant's request that the lesser-included offenses of second degree murder and manslaughter be submitted to the jury. The evidence in this case established that the victim was killed during the commission of robbery in which both the defendant and his sister participated. The crime was clearly felony murder and there was no evidence which would support a finding of guilty of either second degree murder or manslaughter. See State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849.

In several of the instructions to the jury the trial court referred to "admissions or confessions" of the

defendant which had been received in evidence. The statement which the defendant made to the Nebraska officers in California was a full confession as to his participation in the robbery and murder of Skiba. The instructions criticized were not erroneous.

The last assignment of error contends that the sentences imposed on the defendant were excessive. The contention is based on the fact, which does not appear of record in this case, that the defendant's sister was sentenced to 40 years imprisonment upon a plea of guilty to second degree murder. We, of course, do not have before us the presentence report concerning the defendant's sister and do not know what facts and circumstances may have persuaded the trial court to impose a 40-year sentence in that case. However, by obtaining a plea of guilty from one of the participants the State was then in a position to use the testimony of that participant to obtain a conviction against the second participant.

The circumstances of the crime in this case fully justify the sentences imposed. We find no basis upon which they could be said to be excessive.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY B. JACKSON, APPELLANT.

265 N. W. 2d 850

Filed May 10, 1978. No. 41748.

1. **Criminal Law: Homicide: Evidence.** If a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome. The admission of photographs of a gruesome nature rests largely in the sound discretion of the trial court.
2. _____: _____: _____. In a homicide case, photographs of the victim, upon proper foundation may be received in evidence for the purposes of identification to show the condition of the body, the na-

ture and extent of wounds or injuries, and to establish malice or intent.

3. **Criminal Law: Intent: Words and Phrases.** Malice in a legal sense denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse.
4. **Criminal Law: Evidence: Witnesses.** 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 credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
5. **Criminal Law: Sentences.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

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

E. Dean Hascall, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

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

WHITE, C. J.

Defendant entered a plea of not guilty to a charge of second degree murder, was convicted by a jury, and sentenced by the District Court to a term of 25 years imprisonment in the Nebraska Penal and Correctional Complex. Defendant appeals. We affirm the judgment and sentence of the District Court.

On appeal, defendant raises four contentions: That the District Court erred in admitting into evidence exhibits 2, 3, 5, 7, 8, and 9 for the reason that these exhibits were prejudicial, irrelevant, inflammatory, and cumulative; that the District Court erred in giving instruction No. 9 and in failing to give certain instructions tendered by the defendant; that the District Court erred in failing to sustain defendant's motion for a directed verdict; and that the sentence imposed is excessive. We shall address each contention in order.

Defendant's first contention concerns exhibits 2, 3,

5, 7, 8, and 9. Exhibits 7, 8, and 9 depict the fatal wound. In State v. Partee, 199 Neb. 305, 258 N. W. 2d 634 (1977), we stated: " 'Although it is true that the probative value of such evidence should be weighed against its possible prejudicial effect before it is admitted, if a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome.' * * * The admission of photographs of a gruesome nature rests largely in the sound discretion of the trial court. * * * 'In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent.' "

At trial, defendant contended that the shooting was accidental; that it occurred as he was placing the gun in a closet; and that the victim was approximately 3 feet away when the gun discharged. Expert testimony was introduced by the State, based upon analysis of the wound, that the muzzle of the gun was approximately ½ inch from the victim when it was discharged. The probative value of exhibits 7, 8, and 9 to support and elucidate this expert testimony clearly is sufficient to outweigh any potential prejudicial effect inherent in these three photographs. The District Court was correct in receiving them into evidence.

Exhibit 2 shows the victim's face and upper torso, areas not affected by the shotgun blast, and was introduced for the purpose of identification. There was no error in its admission.

Exhibits 3 and 5 are photographs of the weapon involved. Exhibit 3 shows it lying, opened and with a live shell next to it, on a couch in the apartment of a Mr. White, as it was found when police arrived upon the scene. Defendant testified that after the victim was shot he went to Mr. White's apartment, with the

gun, because his apartment did not have a phone. Exhibit 5 merely shows the gun against a neutral background. An expert witness for the State testified that he tested the weapon depicted in exhibit 5 for the possibility of accidental discharge. Both of these exhibits had probative value and there was no error in their admission.

Defendant argues that exhibits 2, 7, 8, and 9 and exhibits 3 and 5 are cumulative. The admission of cumulative evidence rests within the sound discretion of the trial judge. Whether evidence is cumulative to the extent that it constitutes reversible error depends upon the circumstances of each case. We do not believe that the exhibits in this case were prejudicially cumulative.

Defendant next contends that the District Court erred in giving instruction No. 9 to the jury. This instruction is identical to NJI No. 14.52 and refers to "admissions or confessions." Defendant objects to the word "confessions" contained therein and argues that this somehow plants a prejudicial feeling in the minds of the jurors. This contention is without merit, as are defendant's other contentions relating to instructions. There is no error regarding instructions.

Defendant next contends that the District Court erred in failing to sustain his motion for a directed verdict. He argues that there was insufficient evidence to show malice or to indicate that the victim's death was not the result of an accident. " 'Malice in a legal sense denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse.' " State v. Schumacher, 189 Neb. 138, 201 N. W. 2d 249 (1972).

Defendant testified that the victim's death was the result of an accident which occurred when his gun discharged as he was putting it in a closet. He stated that the victim was about 3 feet away when the gun discharged. Two expert witnesses for the

State testified that the victim's wound was a contact one and that the end of the gun barrel was in virtual contact with the victim when the shot was fired. Another expert witness for the prosecution testified that he examined the gun involved for the possibility of accidental discharge, with negative results.

"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 credibility of witnesses, determine the plausibility of explanations, or weigh the evidence." State v. Bartlett, 194 Neb. 502, 233 N. W. 2d 904 (1975). In a criminal proceeding, 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, 195 Neb. 299, 237 N. W. 2d 650 (1976). The District Court committed no error by denying defendant's motion for a directed verdict.

The defendant was sentenced to a term of 25 years imprisonment in the Nebraska Penal and Correctional Complex. The crime here is second degree murder. It appears in the presentence investigation report that this was not a murder committed in the heat of passion. There was no finding of a struggle prior to the killing. The victim was shot at close range. It appears there was a lack of any remorse by the defendant at the time or during the subsequent investigation, trial, and sentencing. The presentence investigation report reveals defendant's trouble with the law over a period of time beginning in 1973, including numerous arrests and a conviction for disorderly conduct, numerous fines for traffic complaints, and an arrest for rape. The defendant's version of the killing was rejected by the jury and is unsupported under the undisputed evidence introduced in the case. The presentence investigation report consists of more than 30 pages of text and supporting exhibits. Further review is unnecessary. It

amply supports the conclusion that the trial judge did not abuse his discretion in imposing the sentence. We further point out that the defendant's sentence was, in fact, an indeterminate sentence of 10 to 25 years imprisonment. In our very recent decision in State v. Suggett, *ante* p. 693, 264 N. W. 2d 876 (1978), the court, in reviewing a flat sentence of 30 years for second degree murder, stated as follows: "The court then imposed a sentence of 30 years, the same as the maximum term of defendant's original sentence. The effect of the new sentence, however, is that the defendant has a minimum term of 10 years, for the purpose of determining eligibility for parole. See, State v. Blankenship, 195 Neb. 329, 237 N. W. 2d 868 (1976); State v. Thompson, 189 Neb. 115, 201 N. W. 2d 204 (1972)." The defendant misconceives the nature of his sentence. His argument for excessiveness is predicated upon the premise that he has been sentenced to a flat sentence of 25 years imprisonment. The fact is that the effect of his sentence is an indeterminate sentence of 10 to 25 years as stated above. The sentence imposed was within the statutory limits and was clearly not an abuse of discretion by the trial court. State v. Stahl, 197 Neb. 683, 250 N. W. 2d 639 (1977).

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

AFFIRMED.

Abatement, Survival, and Revival.

1. As a general rule, actions in contract or in tort, and actions involving personal property, survive to or against the personal representative of a deceased party and ordinarily a cause of action involving realty passes to the heirs of the person having the cause, and survives against the heirs of those against whom the liability exists, although the personal representative may continue the action when he is authorized by statute to do so. Spradlin v. Myers 559
2. Section 25-1410, R. R. S. 1943, provides that upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representative, the revivor shall be in his name; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names. Spradlin v. Myers 559
3. Where the subject matter of an action is personal property, the action may and should, after the death of plaintiff, be revived in the names of his personal representatives, and not in the names of his heirs, devisees or legatees, but if defendant consents or fails to object properly to a revival or continuance of the action in the name of the heir or heirs at law, instead of the personal representative, he waives the right to complain. Spradlin v. Myers 559
4. Under our system of practice, where a party dies or his authority as a representative ceases, two methods of revivor coexist. Spradlin v. Myers 559
5. A conditional order of revivor may issue and be served and the order made final unless cause be shown against it, or the court may substitute the new party and supplemental pleadings may be filed and summons served. Spradlin v. Myers 559
6. If the conditional and final order method of revivor be pursued, the proper method of traversing the claim, of the person in whose name revivor is attempted, is by showing cause against the absolute order. An issue is thus tendered, and if the court makes the order absolute, that order becomes res judicata as to the right of the person named to proceed with the action, and the issue cannot be again made and tried with the main case. Spradlin v. Myers 559

Accord and Satisfaction.

Neither a compromise and settlement nor an accord and satisfaction may take place unless the parties have

agreed that some payment or performance shall be paid and accepted in full satisfaction of a disputed claim. Lovell v. City of Kearney 478

Acknowledgments.

1. There must be some irrevocable element such as depositing the acceptance in the mail so that it is placed beyond the power or control of the sender before the acceptance becomes effective and the contract is made. Prible v. Ruther 161
2. Where transmission by mail is authorized, the deposit of the signed agreement in the mail with the proper address and postage will complete the contract. Pribil v. Ruther 161

Actions.

1. As a general rule, actions in contract or in tort, and actions involving personal property, survive to or against the personal representative of a deceased party and ordinarily a cause of action involving realty passes to the heirs of the person having the cause, and survives against the heirs of those against whom the liability exists, although the personal representative may continue the action when he is authorized by statute to do so. Spradlin v. Myers 559
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Administrative Law.

1. The burden of proof is upon a taxpayer to establish his contention that the determination of a tax situs by the board of equalization is discriminatory, unjust, or unfair. Berkshire & Andersen v. Douglas County Board

of Equalization 113
2. The determinations of both the county board of equalization and the State Board of Equalization and Assessment are clothed with a presumption of validity. Berkshire & Andersen v. Douglas County Board of Equalization 113
3. A decision of the county board of equalization will not be disturbed on appeal unless clearly wrong. Berkshire & Andersen v. Douglas County Board of Equalization 113
4. Decisions under the National Labor Relations Act are helpful, but not controlling upon the courts of this state. American Fed. of S., C. & M. Emp. v. State 171
5. Sections 23-2517 to 23-2533, R. R. S. 1943, relating to personnel administration in counties having a population of 150,000 to 300,000 inhabitants, did not repeal the Court of Industrial Relations Act except to the extent the acts are in conflict. American Fed. S., C. & M. Emp. v. County of Lancaster 301
6. The board of county commissioners in such counties is required to bargain with its employees on all matters relating to employment except those which are covered by specific provisions of sections 23-2517 to 23-2533, R. R. S. 1943. American Fed. S., C. & M. Emp. v. County of Lancaster 301
7. Due process of law requires notice and an opportunity to be heard, as a matter of right and not by the let or leave of administrative officers or agencies, when the rights, duties, or privileges of interested parties are involved by an exercise of quasi-judicial power pursuant to the terms of a statute. Fauss v. Messerly 326

Adverse Possession.

1. One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. Barnes v. Milligan 450
2. Claim of right or of ownership mean hostile and these terms describe the same element of adverse possession. Barnes v. Milligan 450
3. Ordinarily the intent with which the occupier possesses the land can best be determined by his acts and the nature of his possession. Barnes v. Milligan 450
4. The statute of limitations will not run in favor of an occupant of real estate, unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his owner-

ship of the property. Barnes v. Milligan 450

Affidavits.

1. Where an affidavit in application of a search warrant to search a residence for controlled substances is based on information supplied by an informant, the court must be informed of some of the underlying circumstances from which the informant concluded that the contraband was where he claimed it to be, and some of the underlying circumstances from which the applicant concluded that the informant was credible or his information reliable. State v. Britt 601
2. An affidavit for a search warrant based on information concerning an event occurring 7 months previously is not insufficient where the evidence sought was in the nature of mementos or keepsakes. State v. Ernest 615
3. An affidavit for a search warrant which lists three possible locations where the evidence might be found is not insufficient where the person believed to be in possession of the evidence has no permanent address but is known to stay at each of the locations and keep personal belongings at each place. State v. Ernest 615

Agency.

The rule applicable generally is that where an act is done without authority, under an assumed agency, it is the duty of the principal to disavow and repudiate it in a reasonable time after information of the transaction if he would avoid responsibility therefor. What constitutes a reasonable time must largely, if not wholly, depend upon the circumstances of the particular case. Tedco Development Corp. v. Overland Hills, Inc. 748

Alimony.

1. 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. Phillips v. Phillips 253
2. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment. Jenks v. Jenks 298
   Wenger v. Wenger 446
3. Alimony may be ordered in addition to a property settlement award. The relevant circumstances in determin-

ing whether alimony should be awarded and in what amount will vary from case to case. Wenger v. Wenger 446
4. A judgment of the trial court fixing the amount of alimony or making distribution of property will not be disturbed on appeal unless it is patently unfair on the record. Remmers v. Remmers 647
5. In determining the question of alimony and division of property, 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 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. Remmers v. Remmers 647
6. While the income tax consequences of the deductibility of certain payments and the claiming of exemptions are factors to be considered by the court in determining the amounts of alimony or support, the decision of the Internal Revenue Service as to their deductibility is not binding or persuasive in determining whether payments not denominated specifically as alimony or child support are in reality one or the other, or partly some of each. Young v. Young 787

Appeal and Error.

1. It is not within the province of the Supreme Court to resolve conflicts in or to weigh evidence and it will be presumed that controverted facts were decided by the trial court in favor of the successful party. Omaha Paper Stock Co. v. California Union Ins. Co. 31
2. In an action where a plaintiff prevails against an insurance company, the court shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings. Omaha Paper Stock Co. v. California Union Ins. Co. 31
3. The amount of an award of an attorney's fee is largely within the discretion of the trial court. While trial courts and appellate courts equally are regarded as experts on the value of legal services, a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will interfere only to correct a patent injustice where the allow-

ance is clearly excessive, or insufficient. Omaha Paper Stock Co. v. California Union Ins. Co. 31

4. A decision of the county board of equalization will not be disturbed on appeal unless clearly wrong. Berkshire & Andersen v. Douglas County Board of Equalization 113

5. Review by this court of an order or decision of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Fed. of S., C. & M. Emp. v. State 171

6. This court on appeal will give consideration to the fact the trial court inspected the premises. Bahm v. Raikes 195

7. An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. State v. Kelly 276

8. In a divorce action, the case is to be tried de novo upon the issues presented on appeal. The court in reaching its own finding, however, 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. Farmer v. Farmer 308

9. The findings of fact made by the Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong. Boults v. Church 319

10. In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom. Boults v. Church 319

11. A finding of fact by a court of law where the jury has been waived has the effect of a verdict by a jury and will not be set aside on appeal unless clearly wrong. Fisher v. Beebe & Runyan Furniture Co. 349

12. It is an elementary proposition of law that when a judgment is clearly against the weight of the evidence it should be set aside. Fisher v. Beebe & Runyan Furniture Co. 349

13. It is the duty of the trial court, without request, to submit to and properly instruct the jury on all material

issues presented by the pleadings and supported by the evidence. This principle applies to theories of defense as well as those upon which the plaintiff's cause of action is founded. The failure to so instruct is prejudicial error. Herman v. Midland Ag Service, Inc. 356

14. In order for an error of law occurring at trial to be considered by the Supreme Court on appeal, the alleged error must be properly presented to the trial court and properly preserved. State v. Penas 387

15. A presumption arises that the trial court, trying a case without a jury, in arriving at a decision, will consider such evidence only as it is competent and relevant and the Supreme Court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence admitted sufficient to sustain the trial court's judgment. Murdoch v. Murdoch 429

16. 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 on appeal is the sufficiency of the pleadings to sustain the judgment of the trial court. Hubbell v. Farmers Ins. Group 472

17. Depositions, affidavits, answers to interrogatories, and requests for admissions offered in evidence on a motion for summary judgment must be included in a bill of exceptions to be reviewed in this court on appeal. Hubbell v. Farmers Ins. Group 472

18. The discretion of the trial court in determining issues of custody is subject to review, but will not be disturbed on appeal unless it is shown to be a clear abuse of discretion or clearly against the weight of the evidence. Mason v. Mason 476

19. The Supreme Court will take judicial notice of all rules of District, Separate Juvenile, County, Municipal, and Workmen's Compensation Courts on file with the Clerk of the Supreme Court. State v. Barrett 553

20. In an appeal in an equity action, it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. Such independent conclusions of fact must be determined by this court in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence. Schupack v. McDonald's System, Inc. 485

21. When the punishment of an offense created by statute is left to the discretion of the trial court, to be exer-

cised within certain prescribed limits, a sentence imposed within these limits should not be disturbed on appeal unless the record reveals an abuse of discretion. State v. Davis 557
22. On appeal this court considers only those errors assigned and argued in an appellant's brief. State v. Britt 601
23. Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction, but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review. State v. Suggett 693
24. A bill of exceptions is the only vehicle for bringing evidence before this court. State v. Spurgeon 719
25. Evidence which does not appear in the record cannot be considered by this court on appeal. State v. Spurgeon 719
26. The rule that appellate courts will ordinarily dismiss an appeal which has become moot because no actual controversy still exists between the parties is subject to an exception where the issues involved present matters of public interest. Braesch v. DePasquale 726
27. The rule requiring the submission on appeal to the District Court of the same issues tried in county court does not require separate verdicts or special findings as to the type of damages sustained. Langenheim v. City of Seward 740
28. Under the provisions of section 27-103, R. R. S. 1943, error may not be predicated upon a ruling admitting evidence unless the specific ground of objection has been stated, if such ground is not apparent from the context. Langenheim v. City of Seward 740
29. A party cannot complain of error when, by his own action, he has acquiesced therein. Langenheim v. City of Seward 740
30. When evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Tedco Development Corp. v. Overland Hills, Inc. 748
31. If, on a charge of first degree murder, the evidence is sufficient only to sustain a charge of manslaughter, it is reversible error to submit to the jury the issue of

guilt of murder in the first degree. State v. Johnson .. 760
32. Whether, in the course of laying foundation for impeachment of a witness, the inclusion of extraneous material containing a reference to the accused having been previously incarcerated, introduced as part of a question calling for the admission by the witness of a previous contradictory statement on a relevant or material matter, constitutes reversible error depends upon all the facts and circumstances of the case. State v. Johnson 760
33. In cases involving child custody determinations, the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Contreras v. Alsidez 773
34. In a case where the jury is waived and there is a conflict in the evidence, the reviewing court will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly erroneous. Mobil Oil Corp. v. Grantham 782
35. Where plaintiff's action is dismissed at the close of his evidence, on appeal plaintiff is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that reasonably could be deduced from the evidence. Young v. Young 787
36. In a criminal case, where a defendant has filed a timely pretrial motion to suppress evidence, and such motion is denied by the District Court after hearing, an objection at trial to the introduction of the evidence, or the renewal of the motion to suppress, is not essential to preserve the question for review. State v. Van Ackeren 812
37. A defendant cannot assert error in the failure to inspect a presentence investigation report when no demand was made for such inspection prior to sentence. State v. Saddler 820
38. A motion for a change of venue is directed to the sound discretion of the trial court. In the absence of an abuse of discretion the ruling will not be disturbed. State v. Simpson 823

Apportionment.

Whenever an area is annexed to a city subsequent to the most recent federal census, the population of that area must be taken into account in any subsequent redistricting, in addition to the population of the city as deter-

mined by the federal census. Pelzer v. City of Bellevue 541

Assault.

Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury, and proof thereof is indispensable to sustain a conviction. State v. Judd 344

Assignments.

1. The assignee of an account receivable has the burden of proving that the account-debtor received notification of the assignment and that the notification reasonably identified the rights assigned. Progressive Design, Inc. v. Olson Brothers Manuf. Co. 291
2. Subject to certain exceptions in case of contracts involving relations of personal confidence or trust or being for personal services all contracts are assignable. Schupack v. McDonald's System, Inc. 485
3. A contract, which shows by its nature or terms that it is personal in character, that is, that reliance for its performance is placed on the integrity, credit, or responsibility of a party, or that confidence or trust is reposed in him personally for its performance, is not assignable, even in the sense of its performance being delegated to another without the consent of the other party to the contract. Schupack v. McDonald's System, Inc. 485
4. Rights arising out of a contract cannot be transferred if they are coupled with liabilities or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided. Schupack v. McDonald's System, Inc. 485
5. Whether rights and duties under a contract are too personal in character to permit assignment is a question of construction to be resolved from the nature of the contract and the express or presumed intention of the parties. Schupack v. McDonald's System, Inc. ... 485

Assumption of Risk.

Defense of assumption of risk presupposes that the plaintiff had some actual knowledge of the danger, that he understood and appreciated the risk therefrom, and that he voluntarily exposed himself to such risk. Hurlbut v. Landgren 413

Athletic Code of Conduct.

1. With regard to what process is due, where student athletes admit the misconduct with which they are charged, the function of procedural protections in insuring a fair and reliable determination of the issue of "guilt" is not essential. Braesch v. DePasquale 726
2. In order to overturn rules for the expulsion of participants from interscholastic athletics on the ground that such rules are unreasonable or arbitrary, or that they invade private rights, the evidence of such facts must be clear and satisfactory. Braesch v. DePasquale 726
3. Where a board of education has provided effective, reasonable, and prompt procedures for notice, hearing, and review of an order of expulsion from participation in interscholastic athletics, and the athlete neglects or refuses to follow or comply with such procedures and exhaust such remedies, such neglect or refusal ordinarily constitutes a waiver of any right to subsequent injunctive relief. Braesch v. DePasquale 726

Attorney and Client.

1. The person challenging competency of counsel has the burden of proof to establish counsel's incompetence. State v. Auger & Uitts 53
2. Trial counsel's performance in a particular case is measured against that of a lawyer with ordinary training and skill in the criminal law in his area, as well as a showing of conscientious protection of the interests of his client. State v. Auger & Uitts 53
3. If, in the representation of more than one defendant, a conflict of interest arises, the mere existence of such a conflict vitiates the proceedings, even though no actual harm results. State v. Stevenson & Jackson 624
4. Representation of two codefendants in a joint trial, where the confession of each was introduced into evidence and the confessions implicated the other defendant, raises a conflict of interest on behalf of the single defense attorney. State v. Stevenson & Jackson 624
5. A defendant who has heeded the advice of his attorney to plead guilty may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases. State v. Ford 779
6. The requirement that a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing. State v. Ford 779

7. Where the rules stated in Miranda v. Arizona, 384 U. S. 436, have been complied with and the prisoner has waived the right to assistance of counsel, an officer may interrogate the prisoner without making inquiry concerning whether counsel had been appointed for the prisoner on an unrelated charge. State v. Simpson 823

Attorneys at Law

1. While in the context of the entire closing argument, singular remarks of an attorney may be objectionable, this court cannot determine such remarks, standing alone, to be prejudicial in the absence of a complete record of the argument. Caradori v. Fitch 186
2. An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal. State ex rel. Nebraska State Bar Assn. v. Bremers 481
3. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach upon the courts or the legal profession, constitute grounds for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Bremers 481
4. Defense counsel has discretion to formulate trial tactics whether or not to make objections to evidence and whether or not to call certain witnesses; the adequacy of his conduct of the defense will be measured according to a comparison with that of a lawyer with ordinary training and skill in the criminal law in his area. State v. Mackey 549

Attorney's Fees.

1. In an action where a plaintiff prevails against an insurance company, the court shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings. Omaha Paper Stock Co. v. California Union Ins. Co. 31
2. The amount of an award of an attorney's fee is largely within the discretion of the trial court. While trial courts and appellate courts equally are regarded as experts on the value of legal services, a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will interfere

only to correct a patent injustice where the allowance is clearly excessive, or insufficient. Omaha Paper Stock Co. v. California Union Ins. Co. 31

3. An award of attorney's fees in a divorce action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. Weber v. Weber 659

Bailment.

A contract of bailment of a chattel for consideration may give rise to an implied warranty of fitness of the chattel for the purpose for which it was bailed. Herman v. Midland Ag Service, Inc. 356

Breach of Contract.

1. In awarding compensatory damages for breach of promise to marry, the trier of fact may consider the injury to the plaintiff's health, the effect of the breach on the plaintiff's feelings, mental suffering, wounded pride, humiliation, pain, and mortification. Loss of pecuniary benefits of the promised marriage may be an element of damages, but the wealth of the defendant does not establish the measure of damages. Kuhlman v. Cargile 151
2. In an action for breach of promise to marry, there are no precise rules for measuring damages, and the amount of recovery should be left to the sound discretion of the trier of fact. Kuhlman v. Cargile 151

Canons.

1. An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal. State ex rel. Nebraska State Bar Assn. v. Bremers 481
2. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach upon the courts or the legal profession, constitute grounds for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Bremers 481

Case Overruled.

Spurrier v. Mitchell Irr. Dist., 119 Neb. 401, 229 N. W. 273, overruled. Halstead v. Farmers Irr. Dist. 314

Census.

1. Whenever an area is annexed to a city subsequent to the most recent federal census, the population of that area must be taken into account in any subsequent redistricting, in addition to the population of the city as determined by the federal census. Pelzer v. City of Bellevue 541
2. Where the most recent federal census does not contain detailed block by block information sufficient to determine the population of a specific portion of a census enumeration district, any material relevant evidence may be admitted to establish that population. Pelzer v. City of Bellevue 541

Certificate of Title Act.

1. No person shall acquire any right, claim, or interest in or to a motor vehicle until he shall have had delivered to him physical possession of such motor vehicle and a certificate of title. Wolfson Car Leasing Co., Inc. v. Weberg 420
2. The purpose of the Nebraska Certificate of Title Act is to provide a means of identifying motor vehicles, ascertaining motor vehicle owners, and preventing theft of motor vehicles and fraud in the transfer of motor vehicles. Wolfson Car Leasing Co., Inc. v. Weberg 420
3. The Nebraska Certificate of Title Act is the exclusive means of transferring title. Wolfson Car Leasing Co., Inc. v. Weberg 420

Child Support.

While the income tax consequences of the deductibility of certain payments and the claiming of exemptions are factors to be considered by the court in determining the amounts of alimony or support, the decision of the Internal Revenue Service as to their deductibility is not binding or persuasive in determining whether payments not denominated specifically as alimony or child support are in reality one or the other, or partly some of each. Young v. Young 787

Collective Bargaining.

The board of county commissioners in such counties is required to bargain with its employees on all matters

relating to employment except those which are covered by specific provisions of section 23-2517 to 23-2533, R. R. S. 1943. American Fed. S., C. & M. Emp. v. County of Lancaster 301

Comity.

1. Recognition of foreign divorce decrees under the principles of comity is neither a matter of absolute obligation nor mere courtesy. As a general rule, a foreign judgment will not be given effect under the principles of comity if opposed to the settled public policy of this state. Weber v. Weber 659
2. A person may be estopped from attacking the validity of a foreign divorce decree if, under the circumstances, it would be inequitable for him or her to do so. Weber v. Weber 659

Confessions.

1. A voluntary confession is insufficient, standing alone, to prove that a crime has been committed; but it is competent evidence of that fact and may, with slight corroboration, establish the corpus delicti as well as the defendant's guilty participation. Where the crime involves physical damage to a person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. In such a case there need be no link, outside the confession, between the injury and the accused who admits having inflicted it. State v. Scott 265
2. Where the question of the voluntariness of an oral or written confession is at issue, the court must properly instruct the jury, whether requested or not, as to what constitutes a voluntary confession and to disregard the alleged confession if it is found to be involuntary. The same rule, however, does not apply to the question of whether the defendant was advised of, and waived, his Miranda rights, before being questioned by police officers. State v. Scott 265
3. Police deception is not sufficient to make an otherwise valid confession inadmissible unless it is such as to produce a false or unworthy confession. State v. Stevenson & Jackson 624
4. The trial court is not required to submit to the jury for determination whether the Miranda warnings were given prior to statements of the defendants. State v. Stevenson & Jackson 624

5. A statement in which a defendant admits participation in the essential elements of the crime may properly be referred to as a confession. State v. Simpson 823

Conflict of Interests.

1. If, in the representation of more than one defendant, a conflict of interests arises, the mere existence of such a conflict vitiates the proceedings, even though no actual harm results. State v. Stevenson & Jackson 624
2. Representation of two codefendants in a joint trial, where the confession of each was introduced into evidence and the confessions implicated the other defendant, raises a conflict of interest on behalf of the single defense attorney. State v. Stevenson & Jackson 624

Consideration.

The purchase of business property is a sufficient consideration for a contract by the seller that, for a reasonable time in a limited territory, he will not engage in the buyer's business. D. W. Trowbridge Ford, Inc. v. Galyen 103

Constitutional Law.

1. The courts of this state decide controversies and are not empowered to render advisory opinions. American Fed. of S., C. & M. Emp. v. State 171
2. The Constitution of Nebraska is a limitation of power and not a grant. American Fed. of S., C. & M. Emp. v. State 171
3. Since the recognition and creation of bargaining units within the executive departments are not prohibited by any Article of the Constitution of Nebraska, the Legislature possesses the authority to grant such powers to the Court of Industrial Relations. American Fed. of S., C. & M. Emp. v. State 171
4. Nebraska divorce laws are not unconstitutional under the due process or equal protection clauses of the United States and Nebraska Constitutions. Roberts v. Roberts 256
5. An irrigation district organized under Chapter 46, R. R. S. 1943, is liable for seepage damage under Article I, section 21, of the Constitution of Nebraska, without regard to negligence. Halstead v. Farmers Irr. Dist. 314
6. A claim that a statute is unconstitutional must be raised at or before the time of trial, or it will be considered waived. Such a claim, first made in the motion for

new trial, does not satisfy the requirement. State v. Mackey 549
7. A tax classification, although discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. Ralston v. County of Dawson 678
8. Previous inheritance tax law which distinguished between nephews related by blood and nephews related by marriage is constitutional. Ralston v. County of Dawson 678
9. There is no colorable merit in the proposition that a criminal defendant is constitutionally vested with the right of assistance or representation by a lay person. State v. Spurgeon 719

Contempt.

1. The authority to punish for contempt is a power inherent in all courts of general jurisdiction such as the District Court of this state. Bahm v. Raikes 195
2. Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a civil contempt. Bahm v. Raikes 195
3. In civil contempt proceedings, willfulness is an essential element. Bahm v. Raikes 195
4. In contempt proceedings, it is necessary to establish guilt beyond a reasonable doubt. Bahm v. Raikes 195

Continuances.

A motion for continuance of trial is addressed to the sound discretion of the court and will stand unless there has been an abuse of discretion. Veik v. The Tilden Bank 705

Contracts.

1. A misrepresentation by an insured in a proof of loss or deposition may void an insurance policy only if the misrepresentation is material. Omaha Paper Stock Co. v. California Union Ins. Co. 31
2. In determining whether a misrepresentation is material, reliance and resulting injury are essential elements to be considered. Omaha Paper Stock Co. v. California Union Ins. Co. 31
3. When one in possession of any right secured by contract does something inconsistent with the existence of his right or with his intention to rely upon it, he is precluded from afterwards claiming anything by reason of

it. Omaha Paper Stock Co. v. California Union Ins. Co. 31

4. An insurance policy should be interpreted in accordance with reasonable expectations of the insured at the time of the contract. Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co. 46
5. A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured. Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co. 46
6. In an insurance policy an exclusion is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed. Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co. 46
7. In an automobile insurance policy providing coverage against theft, in which the term is not defined, the term "theft" will be construed broadly to include loss caused by any unlawful or wrongful taking of the insured vehicle with criminal intent. Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co. 46
8. The purchase of business property is a sufficient consideration for a contract by the seller that, for a reasonable time in a limited territory, he will not engage in the buyer's business. D. W. Trowbridge Ford, Inc. v. Galyen 103
9. Partial restraints are not unreasonable if they are ancillary to a purchase of property made in good faith and are necessary to afford protection to the purchaser. What is a reasonable restraint depends largely upon the facts of the particular case. D. W. Trowbridge Ford, Inc. v. Galyen 103
10. While the measure of damages in an action for the breach of an agreement by the seller not to reenter business in competition with the buyer is usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact. D. W. Trowbridge Ford, Inc. v. Galyen 103
11. In order to recover substantial damages, the plaintiff must furnish sufficient data to enable the court, with a reasonable degree of certainty and exactness, to estimate the actual damages. D. W. Trowbridge Ford, Inc. v. Galyen 103
12. The amount recoverable for breach of an agreement by the seller of a business not to engage in competition with the buyer is the loss which the latter has sustained, naturally resulting from the breach. D. W.

Trowbridge Ford, Inc. v. Galyen 103
13. A party who seeks to compel specific performance of a written contract has the burden of proving the contract. Pribil v. Ruther 161
14. An express contract is proved by evidence of a definite offer and an unconditional acceptance. Where the offer requires a promise on the part of the offeree, a communicated acceptance is essential. Pribil v. Ruther .. 161
15. There must be some irrevocable element such as depositing the acceptance in the mail so that it is placed beyond the power or control of the sender before the acceptance becomes effective and the contract is made. Pribil v. Ruther 161
16. Where transmission by mail is authorized, the deposit of the signed agreement in the mail with the proper address and postage will complete the contract. Pribil v. Ruther 161
17. This case is controlled by Hastings v. Fireman's Fund American Ins. Co., 193 Neb. 417, 227 N. W. 2d 418 (1975). Worobec v. State Farm Mut. Auto. Ins. Co. 210
18. An antenuptial contract is valid if the formalities of the statute are met and it is fair and fairly made by persons legally qualified to contract. Such contracts are not against public policy and are enforceable if freely and intelligently made. Moss v. Stueven 215
19. In determining whether an antenuptial agreement is valid, the basic issue is fraud or overreaching and not the absence of disclosure. Moss v. Stueven 215
20. An apparently unreasonable provision for a wife, or a disproportion between what she is to receive and the value of the property of the husband does not in and of itself afford a basis for voiding an antenuptial contract. Unless there be fraud or overreaching the contract is valid. Moss v. Stueven 215
21. When each party to an antenuptial contract is chargeable with knowledge of the extent and value of the other's property, a disproportionate allowance for the prospective wife does not shift the burden of proof to the husband or to the representatives of his estate to sustain the contract. Moss v. Stueven 215
22. Receipt of a written confirmation of an oral contract more than 6 months after the oral contract was made was not a receipt "within a reasonable time" as required by subsection (2) of section 2-201, U.C.C. Kimball County Grain Coop v. Yung 233
23. A contract complete in itself will be conclusively presumed to supersede and discharge another one made

prior thereto between the same parties concerning the same subject matter, where the terms of the later are inconsistent with those of the former so that they cannot subsist together. Goings v. Gerken 247
24. When a lease confers on the lessee an option to purchase the property at any time during the term of the lease, and the lease is thereafter extended in accordance with its terms, the option to purchase is also extended for the period of the extended term. Kraski v. Banwell 279
25. It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of an agreement. Kraski v. Banwell 279
26. A contract cannot be said to be ambiguous where the interpretation given appears to represent the true intention of the parties from the instrument itself. Kraski v. Banwell 279
27. At a hearing before a board of education to terminate the contract of a tenured teacher under section 79-1254, R. R. S. 1943, the evidence at the hearing must be sufficient to establish just cause for termination. Sanders v. Board of Education 282
28. Under section 79-1254, R. R. S. 1943, the term "just cause" means incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duty. Sanders v. Board of Education 282
29. If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon. Fisher v. Beebe & Runyan Furniture Co. 349
30. In an action for breach of contract, it is incumbent upon the plaintiff to establish both that he is one of the persons entitled to enforce such contract and that defendant failed to perform one or more provisions thereof to his damage. Rapp v. Wilson & Co., Inc. 383
31. When the evidence is insufficient to establish plaintiff's right to sue, or the breach of any contractual provisions, the trial court has a duty to direct a verdict in favor of the defendant. Rapp v. Wilson & Co., Inc. 383
32. Unless an insurer contracts for the making of repairs to damaged property or exercises possession or control over the insured property, said insurer is not liable for damages for negligence in the making or delaying of such repairs. Clemon v. Occidental Fire & Cas. Co. 469
33. Subject to certain exceptions in case of contracts in-

volving relations of personal confidence or trust or being for personal services all contracts are assignable. Schupack v. McDonald's System, Inc. 485

34. A contract, which shows by its nature or terms that it is personal in character, that is, that reliance for its performance is placed on the integrity, credit, or responsibility of a party, or that confidence or trust is reposed in him personally for its performance, is not assignable, even in the sense of its performance being delegated to another without the consent of the other party to the contract. Schupack v. McDonald's System, Inc. 485

35. Rights arising out of a contract cannot be transferred if they are coupled with liabilities or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided. Schupack v. McDonald's System, Inc. 485

36. Whether rights and duties under a contract are too personal in character to permit assignment is a question of construction to be resolved from the nature of the contract and the express or presumed intention of the parties. Schupack v. McDonald's System, Inc. 485

37. Whether a duty is personal such that it cannot be delegated is a question of the intention of the parties to be ascertained from the contract, its nature, and attending circumstances. Schupack v. McDonald's System, Inc. 485

38. When a writing shows upon inspection a complete legal obligation without uncertainty or ambiguity as to object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein. Blome v. Hottell 528

39. It is only when there is uncertainty, indefiniteness, or ambiguity in a contract that it is open to construction. Metropolitan Utilities Dist. v. Fidelity & Deposit Co. 635

40. 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. Any ambiguity or doubt as to its meaning must be resolved against the party preparing the contract. Metropolitan Utilities Dist. v. Fidelity & Deposit Co. 635

41. Presumably a wife joins in a land contract solely to release her inchoate right of inheritance, but the presumption is rebuttable, and is to be accorded effect

in the absence of a showing to the contrary. Roberts v. Shriners Hospitals for Crippled Children 672
42. Evidence sufficient to rebut a presumption that a wife has joined with her husband in a land contract solely to release her inchoate right of inheritance must be special language which is inserted in the contract and tends to establish an agreement that the wife is to share in the ownership of payments to be made or evidence dehors the contract tending to prove such an agreement. Roberts v. Shriners Hositals for Crippled Children 672
43. Contracts against public policy are those which tend to be injurious to the public, or against the public good. Beaver Lake Assn. v. Beaver Lake Corp. 685
44. Courts should be cautious in holding contracts void on ground of public policy and before they do so prejudice to the public interest should clearly appear. Beaver Lake Assn. v. Beaver Lake Corp. 685
45. A writing is sufficient to avoid the bar of section 2-201, U. C. C., if it evidences a contract for the sale of goods, is authenticated in any manner by the party to be charged and identifies such party, and specifies the quantity of goods involved, notwithstanding other terms of the contract need be shown by parol evidence. Veik v. The Tilden Bank 705
46. Absent fraud or overreaching, mistake as a ground for reformation of a contract must be a mutual mistake. Universal Surety Co. v. Jed Constr. Co., Inc. 712
47. One who does not read a contract before signing it cannot relieve himself of its burdens. Universal Surety Co. v. Jed Constr. Co., Inc. 712
48. The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust and may be denied where the party seeking it has failed to perform. Tedco Development Corp. v. Overland Hills, Inc. 748
49. The burden is primarily on the party seeking specific performance to show his right in equity and good conscience to the relief sought. Tedco Development Corp. v. Overland Hills, Inc. 748
50. The evidence which entitles a party to specific performance must be clear, satisfactory, and unequivocal. Tedco Development Corp. v. Overland Hills, Inc. 748
51. A party who seeks specific performance must show not

only that he has a valid, legally enforceable contract, but also that he has substantially complied with its terms by performing, or offering to perform on his part, the acts which formed the consideration of the undertaking on the part of the defendant or that he is ready, able, and willing to perform his obligations under the contract. Tedco Development Corp. v. Overland Hills, Inc. 748

52. Where it is sought to enforce specific performance of a contract for the sale of realty executed for a corporation by its officers in their individual names, it must be shown either that the corporation authorized the contract or that the execution of the same had been ratified by it. Tedco Development Corp. v. Overland Hills, Inc. 748

53. Whether there has been a ratification in a particular case is ultimately and ordinarily a question of fact. Tedco Development Corp. v. Overland Hills, Inc. 748

54. In such a case, it is not necessary to prove that the injury will be irreparable, and injunction may lie where there is inadequacy of legal remedy, as where damages would be incalculable because of the loss of quiet enjoyment. A court of equity fastens on the real contract and compels the execution of the very thing covenanted to be done. Wessel v. Hillsdale Estates, Inc. 792

55. A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property. Wessel v. Hillsdale Estates, Inc. 792

56. An oral contract for the sale of goods for the price of $500 or more, ordinarily unenforceable under section 2-201 (1), U. C. C., is enforceable with respect to goods which have been received and accepted, or if the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract for sale was made. Wilke v. Holdrege Coop. Equity Exchange 803

57. Estoppel may not be utilized to defeat the defense of the statute of frauds in an action by a buyer on an oral contract where the seller does nothing more than fail to

deliver goods. Wilke v. Holdrege Coop. Equity Exchange 803

58. Where a promissory note is made in one state, to be performed in another state, it is, ordinarily, to be regulated and governed by the laws of the place of performance, without regard to the place at which it was written, dated, or signed, unless it clearly appears that the parties intended that the contract should be governed by the law of the place where made. Exchange Bank & Trust Co. v. Tamerius 807

59. Usury laws are not so distinctive a part of public policy of the forum that courts will, on the ground of public policy, decline to enforce any contract which would be invalid, if tested by them, although valid according to its proper law. Exchange Bank & Trust Co. v. Tamerius 807

Controlled Substances.

1. Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knows of the existence and nature of the narcotics at the place where they were found, but mere presence at a place where a narcotic drug is found is not sufficient. State v. Britt 601

2. Ordinarily, when narcotics or contraband materials are found on a defendant's premises, the evidence is deemed sufficient to sustain a conviction for unlawful possession in the absence of any reasonable explanation for their presence. State v. Britt 601

Convictions.

A conviction may rest upon circumstantial evidence if it is substantial. State v. Morosin 62

Corporations.

1. A managing agent of a foreign corporation upon whom service of summons may be made under section 25-511, R. R. S. 1943, is an agent who has charge of the business activities of the corporation, or some branch, department, or division thereof; and in respect to matters entrusted to him, he exercises judgment and discretion in the conduct of the corporation affairs within this state; and who, under the circumstances here, is of sufficient position and rank to make

it reasonably certain the defendant will be apprised of the service of summons. Keriakedes v. J.C. Penney Co., Inc. 399
2. A nursing home owned and operated by a nonprofit corporation is exempt from taxation under section 77-202, R. R. S. 1943, when it is not owned or used for financial gain or profit to either the owner or user. Bethesda Foundation v. County of Saunders 574
3. A bylaw which gives a developer control of the board of directors of a homeowners' association, even though valid initially, may be contrary to public policy and become void when used to defeat the quasi-municipal functions of a homeowners' association and in aid of conflicting private purposes of the developer. Each such case will necessarily have to be considered on its own facts. Beaver Lake Assn. v. Beaver Lake Corp. 685
4. An action for declaratory judgment may be an appropriate remedy for determining the validity of a bylaw of a homeowners' association. Beaver Lake Assn. v. Beaver Lake Corp. 685
5. Where it is sought to enforce specific performance of a contract for the sale of realty executed for a corporation by its officers in their individual names, it must be shown either that the corporation authorized the contract or that the execution of the same had been ratified by it. Tedco Development Corp. v. Overland Hills, Inc. 748
6. Whether there has been a ratification in a particular case is ultimately and ordinarily a question of fact. Tedco Development Corp. v. Overland Hills, Inc. 748

Counties.

1. Sections 23-2517 to 23-2533, R. R. S. 1943, relating to personnel administration in counties having a population of 150,000 to 300,000 inhabitants, did not repeal the Court of Industrial Relations Act except to the extent the acts are in conflict. American Fed. S., C. & M. Emp. v. County of Lancaster 301
2. The board of county commissioners in such counties is required to bargain with its employees on all matters relating to employment except those which are covered by specific provisions of sections 23-2517 to 23-2533, R. R. S. 1943. American Fed. S., C. & M. Emp. v. County of Lancaster 301

Court of Industrial Relations.

1. Since the recognition and creation of bargaining units within the executive departments are not prohibited

by any Article of the Constitution of Nebraska, the Legislature possesses the authority to grant such powers to the Court of Industrial Relations. American Fed. of S., C. & M. Emp. v. State 171
2. A run-off election is a continuation of an original election and is designed to carry out the purposes of the original election. American Fed. of S., C. & M. Emp. v. State 171
3. The determination that a run-off election should be held is appropriate where a majority of workers in a unit desire representation but where a unit fails to get the required majority of votes. American Fed. of S., C. & M. Emp. v. State 171
4. Review by this court of an order or decision of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Fed. of S., C. & M. Emp. v. State 171
5. Sections 23-2517 to 23-2533, R. R. S. 1943, relating to personnel administration in counties having a population of 150,000 to 300,000 inhabitants, did not repeal the Court of Industrial Relations Act except to the extent the acts are in conflict. American Fed. S., C. & M. Emp. v. County of Lancaster 301

Courts.

1. The courts of this state decide controversies and are not empowered to render advisory opinions. American Fed. of S., C. & M. Emp. v. State 171
2. In a proceeding in juvenile court under section 43-202 (1) or (2) and section 43-209, R. S. Supp., 1976, to declare children to be neglected or dependent children, when the jurisdiction of the court to terminate parental rights has been properly invoked and appropriate service of summons has been had, the jurisdiction of the court to terminate parental rights continues until the matter is finally determined. State v. Williams ... 182
3. The authority to punish for contempt is a power inherent in all courts of general jurisdiction such as the District Court of this state. Bahm v. Raikes 195
4. A trial court does not have jurisdiction to adjudicate matters outside the issues submitted by the pleadings. Lauts v. Prokop 218
5. When a court of competent jurisdiction has acquired jurisdiction over the subject of a controversy, no other

court may acquire jurisdiction over it. Lauts v. Prokop 218

6. Trial courts have the inherent power, independent of any statute or rule of court, to dismiss a case for failure to prosecute with due diligence. The exercise of this power rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion. Schaeffer v. Hunter 221
7. An appellant court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. State v. Kelly 276
8. In the absence of statute, when a valid sentence has been put into execution by commitment of a prisoner, the court has no authority to set aside, modify, amend, or revise the sentence, either during or after the term or session of court at which the sentence was imposed. State v. McDermott 337
9. Where a portion of a sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence. State v. McDermott 337
10. When the evidence is insufficient to establish plaintiff's right to sue, or the breach of any contractual provisions, the trial court has a duty to direct a verdict in favor of the defendant. Rapp v. Wilson & Co., Inc. 383
11. The matter of the vacation of a default judgment rests in the sound discretion of the trial court but this discretion is not an arbitrary one and it must be exercised reasonably. Steinberg v. Stahlnecker 466
12. The Supreme Court will take judicial notice of all rules of District, Separate Juvenile, County, Municipal, and Workmen's Compensation Courts on file with the Clerk of the Supreme Court. State v. Barrett 553
13. Section 25-2001, R. R. S. 1943, specifically grants the power to the District Court to vacate or modify its own judgments after term time for the reasons stated therein. Tietsort v. Ranne 651
14. Within 3 days after the rendition of any judgment, except judgments by default rendered in divorce or separate maintenance cases, where proper service has been obtained or an appearance of the defaulting party has been made, the clerk of the court shall send a post card by United States mail to each party who

has made an appearance in the action, or to his attorney or attorneys of record, advising that a judgment has been rendered and the date of rendition thereof. Tietsort v. Ranne 651
15. Where evidence upon an issue is undisputed, the question is one for decision by the court as a matter of law. Veik v. The Tilden Bank 705
16. A trial judge may, in his discretion, question witnesses during trial. A party may object thereto at the time or at the next available opportunity when the jury is not present. § 27-614, R. R. S. 1943. Veik v. The Tilden Bank 705
17. Failure of the trial court to file instructions with the clerk of the court is not, in and of itself, prejudicial. Langenheim v. City of Seward 740
18. In cases involving child custody determinations, the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Contreras v. Alsidez 773
19. The trial court is afforded a large measure of discretion in deciding whether or not to accept plea bargain arrangements. State v. Adkins 775

Covenants.

1. An option to purchase real estate contained in a lease agreement is not terminated by the death of the lessee during the term and before the exercise of the option, in the absence of express limitation. Von Seggern v. Freeland 570
2. It is a well-defined exception to the general rule requiring a showing of actual and substantial injury as a basis for entitlement to injunctive relief, that, where one who has entered into a restrictive covenant as to the use of the land commits a distinct breach thereof, he may be enjoined irrespective of the amount of damage caused by his breach, and even if there appears to be no substantial monetary damage. Wessel v. Hillsdale Estates, Inc. 792
3. In such a case, it is not necessary to prove that the injury will be irreparable, and injunction may lie where there is inadequacy of legal remedy, as where damages would be incalculable because of the loss of quiet enjoyment. A court of equity fastens on the real contract and compels the execution of the very thing covenanted to be done. Wessel v. Hillsdale Estates, Inc. 792

4. Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of the plan of development protected by such covenants. Wessel v. Hillsdale Estates, Inc. 792
5. A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property. Wessel v. Hillsdale Estates, Inc. 792

Criminal Law.

1. Where an individual signs a document which outlines his conditions of parole and which contains a clause stating that violation of the conditions is cause for parole revocation, he is held to have notice of such conditions. State v. Stroud 27
2. Whether successive presentence investigations are necessary, before the revocation of an order of probation is entered, rests in the sound discretion of the sentencing judge. State v. Stroud 27
3. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Stroud 27
State v. Davis 557
4. An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures. State v. Auger & Uitts 53
5. A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant in circumstances free from taint. State v. Auger & Uitts 53
6. In determining whether photographic identification procedures have been impermissibly suggestive, the question must be determined by an evaluation of all the surrounding circumstances. State v. Auger & Uitts 53
7. The person challenging competency of counsel has the

burden of proof to establish counsel's incompetence. State v. Auger & Uitts 53
8. As a general rule evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. State v. Morosin 62
9. Evidence of other crimes similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. State v. Morosin 62
10. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Morosin 62
State v. Walker 273
11. Evidence of other similar offenses may be admissible to show intent where there is, or may be, from the evidence, an inference of mistake, accident, want of guilty knowledge, lawful purpose, or innocent intent. State v. Morosin 62
12. A conviction may rest upon circumstantial evidence if it is substantial. State v. Morosin 62
13. In a criminal case where there is sufficient evidence to justify the verdict, the verdict will not be set aside unless clearly wrong. State v. Morosin 62
14. The primary burden is upon the State to bring an accused person to trial within the time provided by law. State v. Hankins 69
15. Upon a motion for discharge, the burden is upon the State to prove by a substantial preponderance of the evidence that one or more of the excluded periods is applicable, if the trial is not commenced within 6 months after the filing of the information. The trial court is required to make specific findings as to the cause of any extension and the period of extension attributable to such cause. State v. Hankins 69
16. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court on appeal to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. State v. Owen & Sweet 259
State v. Jackson 827
17. A voluntary confession is insufficient, standing alone, to prove that a crime has been committed; but it is competent evidence of that fact and may, with slight corroboration, establish the corpus delicti as well as the defendant's guilty participation. Where the crime involves physical damage to a person or property,

the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. In such a case there need be no link, outside the confession, between the injury and the accused who admits having inflicted it. State v. Scott 265

18. Where the qustion of the voluntariness of an oral or written confession is at issue, the court must properly instruct the jury, whether requested or not, as to what constitutes a voluntary confession and to disregard the alleged confession if it is found to be involuntary. The same rule, however, does not apply to the question of whether the defendant was advised of, and waived, his Miranda rights, before being questioned by police officers. State v. Scott 265

19. Two or more offenses of the same or similar character which were committed 90 days apart may be charged in one information. State v. Walker 273

20. A defendant is not prejudiced by a joinder of two offenses in one information if evidence as to both would be admissible at a trial of either offenses separately. State v. Walker 273

21. Evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity although such evidence relates to other offenses. State v. Walker 273

22. In the absence of statute, when a valid sentence has been put into execution by commitment of a prisoner, the court has no authority to set aside, modify, amend, or revise the sentence, either during or after the term or session of court at which the sentence was imposed. State v. McDermott 337

23. Where a portion of a sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence. State v. McDermott 337

24. A court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Olson 341

25. Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury, and proof thereof is indispensable to sustain a conviction. State v. Judd 344

26. Because the intent with which an act is done exists

only in the mind of the actor, its proof must be inferred from the act itself and from the facts surrounding the act. State v. Judd 344

27. When a citizen has knowingly placed himself in a public place, and valid police action is commenced in that public place, the citizen cannot thwart police action by fleeing into a private place. State v. Penas 387

28. Defense counsel has discretion to formulate trial tactics whether or not to make objections to evidence and whether or not to call certain witnesses; the adequacy of his conduct of the defense will be measured according to a comparison with that of a lawyer with ordinary training and skill in the criminal law in his area. State v. Mackey 549

29. Evidence examined and held sufficient to require the submission of a charge of felonious entry and attempt to steal for determination by the jury. State v. Mackey 549

30. A lesser-included offense may not be submitted with a greater charge, if such lesser offense includes any element irrelevant to such greater charge. State v. Mackey 549

31. An instruction stating that the elements of felonious entry under section 28-533, R. R. S. 1943, are (1) a willful and malicious entry with intent to steal, (2) a subsequent attempt to steal, and (3) the time and place of the offense, is proper. State v. Mackey 549

32. It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively, as opposed to concurrently. State v. Davis 557

33. Where an affidavit in application of a search warrant to search a residence for controlled substances is based on information supplied by an informant, the court must be informed of some of the underlying circumstances from which the informant concluded that the contraband was where he claimed it to be, and some of the underlying circumstances from which the applicant concluded that the informant was credible or his information reliable. State v. Britt 601

34. Evidence that the accused had physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knows of the existence and nature of the narcotics at the place where they were found, but mere presence at a place where

a narcotic drug is found is not sufficient. State v. Britt 601
35. Ordinarily, when narcotics or contraband materials are found on a defendant's premises, the evidence is deemed sufficient to sustain a conviction for unlawful possession in the absence of any reasonable explanation for their presence. State v. Britt 601
36. Under the statutory exception in section 28-1001, R. R. S. 1943, one may carry a weapon concealed on or about his person when engaged in a lawful business, calling, or employment, and when the circumstances are such as to justify a prudent person in carrying a weapon for defense of his person, property, or family. State v. Britt 601
37. Carrying a weapon in a bag held in the hand or placed under the arm constitutes concealment of a weapon on or about one's person. State v. Britt 601
38. The asking of improper questions of a witness to which objections are sustained by the court do not constitute prejudicial error in the absence of a showing that defendant was thereby deprived of a fair and impartial trial. State v. Bruns 612
39. A court may order a presentence investigation in any case. State v. Bruns 612
40. In passing sentence, it is proper for the trial court to take into consideration other offenses that have been committed by an accused. State v. Bruns 612
41. An affidavit for a search warrant based on information concerning an event occurring 7 months previously is not insufficient where the evidence sought was in the nature of mementos or keepsakes. State v. Ernest 615
42. An affidavit for a search warrant which lists three possible locations where the evidence might be found is not insufficient where the person believed to be in possession of the evidence has no permanent address but is known to stay at each of the locations and keep personal belongings at each place. State v. Ernest 615
43. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. State v. Ernest 615
44. The presence of the defendant is required at an evidentiary hearing on a charge of being an habitual criminal and a sentencing hearing. State v. Ernest 615
45. Police deception is not sufficient to make an other-

wise valid confession inadmissible unless it is such as to produce a false or unworthy confession. State v. Stevenson & Jackson 624

46. The trial court is not required to submit to the jury for determination whether the Miranda warnings were given prior to statements of the defendants. State v. Stevenson & Jackson 624

47. If, in the representation of more than one defendant, a conflict of interest arises, the mere existence of such a conflict vitiates the proceedings, even though no actual harm results. State v. Stevenson & Jackson 624

48. Representation of two codefendants in a joint trial, where the confession of each was introduced into evidence and the confessions implicated the other defendant, raises a conflict of interest on behalf of the single defense attorney. State v. Stevenson & Jackson 624

49. A defendant who has appealed from a conviction cannot secure a second review of the identical propositions examined in that appeal by resorting to a post conviction procedure. State v. Suggett 693

50. Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction, but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review. State v. Suggett 693

51. A sentence of imprisonment ought not exceed the minimum period consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. State v. Suggett 693

52. There is no colorable merit in the proposition that a criminal defendant is constitutionally vested with the right of assistance or representation by a lay person. State v. Spurgeon 719

53. A guilty plea is not rendered involuntary simply because it is the product of legitimate plea bargaining. State v. Robbins 723

54. Essential elements of the crime of murder in the second degree are that the killing be done purposely and maliciously. § 28-402, R. R. S. 1943. State v. Johnson 760

55. Where the information charges murder in the first degree, murder in the second degree and manslaughter are included in the charge, and where different conclusions may be drawn from the evidence, the court does not commit error in submitting different degrees under proper instructions for the jury's determination.

State v. Johnson 760
56. If, on a charge of first degree murder, the evidence is sufficient only to sustain a charge of manslaughter, it is reversible error to submit to the jury the issue of guilt of murder in the first degree. State v. Johnson .. 760
57. Malice, in its legal sense, denotes that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind. State v. Johnson 760
58. Whether, in the course of laying foundation for impeachment of a witness, the inclusion of extraneous material containing a reference to the accused having been previously incarcerated, introduced as part of a question calling for the admission by the witness of a previous contradictory statement on a relevant or material matter, constitutes reversible error depends upon all the facts and circumstances of the case. State v. Johnson 760
59. It is not misconduct for a prosecutor in the course of his summation to the jury to draw reasonable inferences from the evidence so long as he does not misstate the evidence or mislead the jury as to the inferences it may draw. State v. Johnson 760
60. Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the Nebraska Penal and Correctional Complex for a term of not less than 3 years and not more than 50 years. § 28-414, R. R. S. 1943. State v. Adkins 775
61. Robbery may be committed either by force and violence, or by putting in fear. Pleading of these elements may be conjunctive and proof of accomplishment of the robbery by either method is sufficient. State v. Adkins 775
62. The trial court is afforded a large measure of discretion in deciding whether or not to accept plea bargain arrangements. State v. Adkins 775
63. Before a county attorney can dismiss an information, it is first necessary that approval of the court to do so be obtained. State v. Adkins 775
64. A defendant who has heeded the advice of his attorney to plead guilty may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases. State v. Ford 779

65. The requirement that a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing. State v. Ford 779
66. In a criminal case, where a defendant has filed a timely pretrial motion to suppress evidence, and such motion is denied by the District Court after hearing, an objection at trial to the introduction of the evidence, or the renewal of the motion to suppress, is not essential to preserve the question for review. State v. Van Ackeren 812
67. A warrantless search of a house may be justified when the police have obtained the consent to search from a party who possessed common authority over, or other sufficient relationship to, the premises sought to be inspected. State v. Van Ackeren 812
68. A defendant cannot assert error in the failure to inspect a presentence investigation report when no demand was made for such inspection prior to sentence. State v. Saddler 820
69. A trial judge should not enter into any agreement that the defendant will be permitted to withdraw his plea if the judge does not accept the county attorney's recommendation on sentence. State v. Simpson 823
70. Where the rules stated in Miranda v. Arizona, 384 U. S. 436, have been complied with and the prisoner has waived the right to assistance of counsel, an officer may interrogate the prisoner without making inquiry concerning whether counsel had been appointed for the prisoner on an unrelated charge. State v. Simpson 823
71. Photographs of a gruesome nature are admissible if they are relevant, but the probative value of such evidence should be weighed against its possible prejudicial effect. State v. Simpson 823
72. In a homicide case the jury should be instructed only as to those degrees of homicide that are supported by the evidence. State v. Simpson 823
73. A statement in which a defendant admits participation in the essential elements of the crime may properly be referred to as a confession. State v. Simpson 823
74. If a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome. The admission of photographs of a gruesome nature rests largely in the sound discretion of the trial court. State v. Jackson 827
75. In a homicide case, photographs of the victim, upon

proper foundation may be received in evidence for the purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent. State v. Jackson 827

76. Malice in a legal sense denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. State v. Jackson 827

77. A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. State v. Jackson 827

Crops.

A tenant who plants crops knowing the terms of his lease will expire before they can be harvested loses all his interest in the crops upon the termination of the lease. Goings v. Gerken 247

Custody.

1. In a determination of the custody of children of parties whose marriage has been dissolved, the paramount consideration is the best interests and welfare of such children. Mason v. Mason 476

2. The discretion of the trial court in determining issues of custody is subject to review, but will not be disturbed on appeal unless it is shown to be a clear abuse of discretion or clearly against the weight of the evidence. Mason v. Mason 476

Damages.

1. The measure of recovery in all civil cases is compensation for the injuries sustained. Prather v. Eisenmann 1

2. In determining whether a misrepresentation is material, reliance and resulting injury are essential elements to be considered. Omaha Paper Stock Co. v. California Union Ins. Co. 31

3. When it has been proven that damage has resulted and the only uncertainty is the exact amount, it is sufficient if there is evidence from which the amount of the damages can be ascertained with reasonable certainty. Omaha Paper Stock Co. v. California Union Ins. Co. 31

4. The rule concerning ascertainment of damages with reasonable certainty is not peculiar to cases against insurance companies. In all cases the law requires, not mathematical certainty, but merely the best evidence obtainable under the condition existing, and

some reliance must be placed upon the integrity and good faith of witnesses and the discretion of the jury. Omaha Paper Stock Co. v. California Union Ins. Co. ... 31
5. If a person, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury therefrom. Garcia v. Howard 57
6. While the measure of damages in an action for the breach of an agreement by the seller not to reenter business in competition with the buyer is usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact. D. W. Trowbridge Ford, Inc. v. Galyen 103
7. In order to recover substantial damages, the plaintiff must furnish sufficient data to enable the court, with a reasonable degree of certainty and exactness, to estimate the actual damages. D. W. Trowbridge Ford, Inc. v. Galyen 103
8. The amount recoverable for breach of an agreement by the seller of a business not to engage in competition with the buyer is the loss which the latter has sustained, naturally resulting from the breach. D. W. Trowbridge Ford, Inc. v. Galyen 103
9. In awarding compensatory damages for breach of promise to marry, the trier of fact may consider the injury to the plaintiff's health, the effect of the breach on the plaintiff's feelings, mental suffering, wounded pride, humiliation, pain, and mortification. Loss of pecuniary benefits of the promised marriage may be an element of damages, but the wealth of the defendant does not establish the measure of damages. Kuhlman v. Cargile 151
10. In an action for breach of promise to marry, there are no precise rules for measuring damages, and the amount of recovery should be left to the sound discretion of the trier of fact. Kuhlman v. Cargile 151
11. Upon a finding of liability, the jury is required to fix damages in accordance with the instructions so as to reasonably compensate those entitled to recover. Caradori v. Fitch 186
12. The measure of damages for wrongful death of a minor child includes the loss of society, comfort, and companionship of the child. Caradori v. Fitch 186
13. If a breach of an implied warranty of fitness is not the proximate cause of an injury and consequential damages, there can be no recovery for the breach. Herman v. Midland Ag Service, Inc. 356

14. The burden is on the defendant to prove that plaintiff should have taken some action to lessen her damages. Hurlbut v. Landgren 413
15. Where the defendant totally fails to sustain the burden with respect to mitigation of damages the trial court is correct in refusing to submit a tendered instruction. Hurlbut v. Landgren 413
16. The law of restitution and unjust enrichment deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly suffer loss. Wolfson Car Leasing Co., Inc. v. Weberg 420
17. The measure of recovery by an insured for the partial damage of the insured property is the actual cash value of the part damaged, or the cost of repair or replacement thereof with like kind and quality with deduction for depreciation, not exceeding the limit of liability stated in the policy. Such a policy is "open" and not "valued." Clemon v. Occidental Fire & Cas. Co. .. 469
18. Unless an insurer contracts for the making of repairs to damaged property or exercises possession or control over the insured property, said insurer is not liable for damages for negligence in the making or delaying of such repairs. Clemon v. Occidental Fire & Cas. Co. 469
19. A property owner whose property does not abut upon a portion of a street which a municipality proposes to vacate or obstruct has no right of action to restrain the vacation or prevent the obstruction unless the access to his property is interfered with and he suffers a special or peculiar damage differing in kind from that of the general public. Cather & Sons Constr., Inc. v. City of Lincoln 510
20. The measure of damages for the wrongful eviction of a tenant by his landlord is ordinarily the rental value of the property for the unexpired term, less the amount of rent reserved by the lease. In a proper case special damages in addition may be awarded, where such damages are certain and the natural result of the wrong complained of. Sempek v. Minarik 532
21. Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation. As a general rule, the evidence should be such as to enable the court or jury to determine the injury and the amount of damages with reasonable certainty or accuracy. Hatch v. Heim 735
22. When a damaged automobile can be repaired and restored substantially to its original condition, the rea-

sonable cost of repair is the proper measure of damages. However, the reasonable cost of repair must not exceed the value of the vehicle immediately prior to the accident. Hatch v. Heim 735

23. In an eminent domain proceeding the date of valuation for property taken and for severance damages suffered is the date condemner files its petition in condemnation in the county court. Langenheim v. City of Seward 740

24. The rule requiring the submission on appeal to the District Court of the same issues tried in county court does not require separate verdicts or special findings as to the type of damages sustained. Langenheim v. City of Seward 740

25. A joint award to landlord and tenant, standing alone, affords no basis of allocation of that award between the parties. Langenheim v. City of Seward 740

26. It is a well-defined exception to the general rule requiring a showing of actual and substantial injury as a basis for entitlement to injunctive relief, that, where one who has entered into a restrictive covenant as to the use of the land commits a distinct breach thereof, he may be enjoined irrespective of the amount of damage caused by his breach, and even if there appears to be no substantial monetary damage. Wessel v. Hillsdale Estates, Inc. 792

27. In such a case, it is not necessary to prove that the injury will be irreparable, and injunction may lie where there is inadequacy of legal remedy, as where damages would be incalculable because of the loss of quiet enjoyment. A court of equity fastens on the real contract and compels the execution of the very thing covenanted to be done. Wessel v. Hillsdale Estates, Inc. 792

Declaratory Judgments.

An action for declaratory judgment may be an appropriate remedy for determining the validity of a bylaw of a homeowners' association. Beaver Lake Assn. v. Beaver Lake Corp. 685

Deeds.

1. To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that she could not understand and comprehend the purport and effect of what she was then doing. Ander-

son v. Claussen 74
2. A prima facie case of undue influence is made out in case of a deed where it is shown by clear and satisfactory evidence (1) that the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. Anderson v. Claussen 74

Disciplinary Proceedings.

1. An attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal. State ex rel. Nebraska State Bar Assn. v. Bremers 481
2. Violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney in his professional capacity which tends to bring reproach upon the courts or the legal profession, constitute grounds for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Bremers 481

Dismissal and Nonsuit.

Before a county attorney can dismiss an information, it is first necessary that approval of the court to do so be obtained. State v. Adkins 775

Divorce.

1. 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. Phillips v. Phillips 253
2. Nebraska divorce laws are not unconstitutional under the due process or equal protection clauses of the United States and Nebraska Constitutions. Roberts v. Roberts 256
3. When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together the marriage is irretrievably broken. Roberts v. Roberts 256
4. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment. Jenks v. Jenks 298
Wenger v. Wenger 446

5. In a divorce action, the case is to be tried de novo upon the issues presented on appeal. The court in reaching its own finding, however, 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. Farmer v. Farmer 308
6. Children of the parties to a marriage dissolution proceeding are not by that fact alone rendered incompetent as witnesses, but whether it is reversible error to refuse to hear their testimony depends upon the circumstances of the case. Murdoch v. Murdoch 429
7. Alimony may be ordered in addition to a property settlement award. The relevant circumstances in determining whether alimony should be awarded and in what amount will vary from case to case. Wenger v. Wenger 446
8. In a determination of the custody of children of parties whose marriage has been dissolved, the paramount consideration is the best interests and welfare of such children. Mason v. Mason 476
9. The discretion of the trial court in determining issues of custody is subject to review, but will not be disturbed on appeal unless it is shown to be a clear abuse of discretion or clearly against the weight of the evidence. Mason v. Mason 476
10. On review this court will not disturb a division of property made by the trial court unless it is patently unfair. Marymee v. Marymee 539
11. The determination of custody and fixing of child support rests in the sound discretion of the trial court, and in the absence of an abuse of discretion will not be disturbed on appeal. Greenfield v. Greenfield 608
12. In a default divorce case where facts, existing at the time of the decree, affecting the custody and best interests of children, have not been called to the attention of the court, the court may, upon a subsequent application for modification, consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody. Cline v. Cline 619
13. 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. Remmers v. Remmers 647
14. In the matter of child support, while the father has the primary responsibility to support his children, the trial court should not ignore the ability of the mother. It has the responsibility of adjusting the equities between the parties. Remmers v. Remmers 647

15. A judgment of the trial court fixing the amount of alimony or making distribution of property will not be disturbed on appeal unless it is patently unfair on the record. Remmers v. Remmers 647
16. In determining the question of alimony and division of property, 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 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. Remmers v. Remmers 647
17. The area of domestic relations is virtually the exclusive province of the states, which have the right to prescribe the conditions upon which the marriage relation between their own citizens shall be created and dissolved, and which have an interest in the continuation and dissolution of the marital relation. Weber v. Weber 659
18. Public policy concerning divorce and its incidents is a matter for the Legislature, not the courts, to decide. Weber v. Weber 659
19. Under section 42-341, R. R. S. 1943, a divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state if both parties to the marriage were domiciled in this state at the time the proceeding for divorce was commenced. Weber v. Weber 659
20. Recognition of foreign divorce decrees under the principles of comity is neither a matter of absolute obligation nor mere courtesy. As a general rule, a foreign judgment will not be given effect under the principles of comity if opposed to the settled public policy of this state. Weber v. Weber 659
21. A person may be estopped from attacking the validity of a foreign divorce decree if, under the circumstances, it would be inequitable for him or her to do so. Weber v. Weber 659
22. Under section 42-366, R. R. S. 1943, a property settlement agreement entered into by the parties to a marriage shall not be binding upon the trial court if, considering the economic circumstances of the parties and any other relevant evidence, the agreement is unconscionable. An agreement is unconscionable when it is manifestly unfair or inequitable. Weber v. Weber 659
23. This court is not inclined to disturb the division of property made by the trial court in a divorce action un-

less it is patently unfair on the record, or unless good cause is shown. Weber v. Weber 659

24. An award of attorney's fees in a divorce action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. Weber v. Weber 659

25. While the income tax consequences of the deductibility of certain payments and the claiming of exemptions are factors to be considered by the court in determining the amounts of alimony or support, the decision of the Internal Revenue Service as to their deductibility is not binding or persuasive in determining whether payments not denominated specifically as alimony or child support are in reality one or the other, or partly some of each. Young v. Young 787

Domicile.

Under section 42-341, R. R. S. 1943, a divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state if both parties to the marriage were domiciled in this state at the time the proceeding for divorce was commenced. Weber v. Weber 659

Due Process.

1. Nebraska divorce laws are not unconstitutional under the due process or equal protection clauses of the United States and Nebraska Constitutions. Roberts v. Roberts 256

2. Due process of law requires notice and an opportunity to be heard, as a matter of right and not by the let or leave of administrative officers or agencies, when the rights, duties, or privileges of interested parties are involved by an exercise of quasi-judicial power pursuant to the terms of a statute. Fauss v. Messerly 326

3. The presence of the defendant is required at an evidentiary hearing on a charge of being an habitual criminal and a sentencing hearing. State v. Ernest 615

4. The trial court is not required to submit to the jury for determination whether the Miranda warnings were given prior to statements of the defendants. State v. Stevenson & Jackson 624

5. With regard to what process is due, where student athletes admit the misconduct with which they are charged, the function of procedural protections in insuring a fair and reliable determination of the issue of "guilt" is not essential. Braesch v. DePasquale 726

Elections.

1. A run-off election is a continuation of an original election and is designed to carry out the purposes of the original election. American Fed. of S., C. & M. Emp. v. State 171
2. The determination that a run-off election should be held is appropriate where a majority of workers in a unit desire representation but where a unit fails to get the required majority of votes. American Fed. of S., C. & M. Emp. v. State 171
3. It shall be presumed, in the case of governmental subdivisions such as municipalities, counties, power districts, or utility districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate. American Fed. of S., C. & M. Emp v. State 171
4. The policy of section 48-838, R. R. S. 1943, is opposition to undue fragmentation of bargaining units. American Fed. of S., C. & M. Emp. v. State 171
5. Section 48-838, R. R. S. 1943, is not limited in applicability only to those governmental subdivisions enumerated. American Fed. of S., C. & M. Emp. v. State 171

Eminent Domain.

1. An owner of land taken by virtue of eminent domain proceedings, who has been paid and has accepted the award of damages, cannot afterwards contest the validity of the taking by collateral action. Duffey v. School Dist. No. One 702
2. In an eminent domain proceeding the date of valuation for property taken and for severance damages suffered is the date condemner files its petition in condemnation in the county court. Langenheim v. City of Seward 740
3. The rule requiring the submission on appeal to the District Court of the same issues tried in county court does not require separate verdicts or special findings as to the type of damages sustained. Langenheim v. City of Seward 740
4. A joint award to landlord and tenant, standing alone, affords no basis of allocation of that award between the parties. Langenheim v. City of Seward 740

Equity.

1. When a cause of action for equitable relief is stated and when the plaintiff prays for equitable relief, a jury trial cannot be demanded as a matter of right by the defendant, even if the defendant pleads legal defenses or files a counterclaim for damages. Kuhlman v. Cargile 150
2. It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. Kuhlman v. Cargile 150
3. Actions to declare a resulting or constructive trust are equitable actions. Kuhlman v. Cargile 150
4. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. The existence of a constructive trust is to be determined on the peculiar facts, circumstances, and conditions presented in each case. Kuhlman v. Cargile 150
5. In an appeal in an equity action, it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. Such independent conclusions of fact must be determined by this court in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence. Schupack v. McDonald's System, Inc. 485
6. A constructive trust may arise by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of the legal title. Fleury v. Chrisman 584
7. The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement

would be unjust and may be denied where the party seeking it has failed to perform. Tedco Development Corp. v. Overland Hills, Inc. 748

8. The burden is primarily on the party seeking specific performance to show his right in equity and good conscience to the relief sought. Tedco Development Corp. v. Overland Hills, Inc. 748

Estates.

1. The law favors the early vesting of estates and a remainder will be declared a vested one unless a contrary intent is apparent from the will. Hanley v. Craven 81

2. It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty of the right of future possession or enjoyment if the remainderman, who is ascertained, lives until the determination of the preceding estate. Where the devise is to the remainderman "from and after" or "after" or "at" or "on" the death of the life tenant, or words of similar import are employed, such expressions are construed as relating to the time of the enjoyment of the estate and not as to its vesting, and such remainder is a vested one. The uncertainty as to whether or not the remainderman will live to come into actual possession or enjoyment of the estate does not make the remainder contingent, for that is an uncertainty which attaches to all remainders. Hanley v. Craven 81

3. Testators are ordinarily and primarily concerned in the commencement, continuance, and termination of the enjoyment of property by them devised and bequeathed. Apart from statute, the weight of authority recognizes this fact, and, when a contrary intent is not clearly expressed, construes such expressions as "upon the death of" as, in effect, relating to and affecting the enjoyment of property, rather than establishing and vesting technical estates and involved titles. Hanley v. Craven 81

4. If a person, to whom a prior interest in the subject matter of the conveyance has been given, is the sole heir of the designated ancestor at the death of such ancestor, there is an incongruity in also giving such person all the interest under limitation to "heirs" or "next of kin," or "heirs-at-law by blood relation," and thus to avoid the incongruity, the determination of the class of persons who qualify as such heirs is ordinarily to be made as of the death of the taker of the prior interest. Hanley v. Craven 81

5. While ordinarily such words as "at her death" do not have the effect of postponing the vesting of an estate in remainder, this is not true if, when they are read in context, the intention of the testator would appear to be otherwise. Hanley v. Craven 81
6. Under our system of practice, where a party dies or his authority as a representative ceases, two methods of revivor coexist. Spradlin v. Myers 559
7. A conditional order of revivor may issue and be served and the order made final unless cause be shown against it, or the court may substitute the new party and supplemental pleadings may be filed and summons served. Spradlin v. Myers 559
8. If the conditional and final order method of revivor be pursued, the proper method of traversing the claim, of the person in whose name revivor is attempted, is by showing cause against the absolute order. An issue is thus tendered, and if the court makes the order absolute, that order becomes res judicata as to the right of the person named to proceed with the action, and the issue cannot be again made and tried with the main case. Spradlin v. Myers 559
9. Presumably a wife joins in a land contract solely to release her inchoate right of inheritance, but the presumption is rebuttable, and is to be accorded effect in the absence of a showing to the contrary. Roberts v. Shriners Hospitals for Crippled Children 672
10. Evidence sufficient to rebut a presumption that a wife has joined with her husband in a land contract solely to release her inchoate right of inheritance must be special language which is inserted in the contract and tends to establish an agreement that the wife is to share in the ownership of payments to be made or evidence dehors the contract tending to prove such an agreement. Roberts v. Shriners Hospitals for Crippled Children 672

Estoppel.

1. The essential elements of equitable estoppel are: As to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other

party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. Omaha Paper Stock Co. v. California Union Ins. Co. 31

2. Equitable estoppel operates where a party is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon. Omaha Paper Stock Co. v. California Union Ins. Co. 31
3. In the absence of evidence of statements or conduct by one party upon which the opposite party might rely to its prejudice, no estoppel arises. Lovell v. City of Kearney 478
4. A person may be estopped from attacking the validity of a foreign divorce decree if, under the circumstances, it would be inequitable for him or her to do so. Weber v. Weber 659
5. The application of the principles of equitable estoppel cannot be subjected to fixed and settled rules of universal application, but rests largely on the facts and circumstances of each particular case. Weber v. Weber 659
6. An owner of land taken by virtue of eminent domain proceedings, who has been paid and has accepted the award of damages, cannot afterwards contest the validity of the taking by collateral action. Duffey v. School Dist. No. One 702
7. Estoppel may not be utilized to defeat the defense of the statute of frauds in an action by a buyer on an oral contract where the seller does nothing more than fail to deliver goods. Wilke v. Holdrege Coop. Equity Exchange 803

Evidence.

1. It is the rule in Nebraska that the violation of a safety regulation, established by statute or ordinance, is not negligence as a matter of law, but is evidence of negligence which may be considered in connection with all the other evidence in the case in deciding that issue. Similarly, the violation of a statute is not negligence per se, but only evidence of negligence. Clark Bilt, Inc. v. Wells Dairy Co. 20

2. In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the party against whom the motion is directed. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference which may be drawn therefrom. Clark Bilt, Inc. v. Wells Dairy Co. 20
3. Existence of fraud or false swearing with respect to a fire loss represented to an insurer to have been sustained is for the trier of facts. Omaha Paper Stock Co. v. California Union Ins. Co. 31
4. It is not within the province of the Supreme Court to resolve conflicts in or to weigh evidence and it will be presumed that controverted facts were decided by the trial court in favor of the successful party. Omaha Paper Stock Co. v. California Union Ins. Co. 31
5. When it has been proven that damage has resulted and the only uncertainty is the exact amount, it is sufficient if there is evidence from which the amount of the damages can be ascertained with reasonable certainty. Omaha Paper Stock Co. v. California Union Ins. Co. ... 31
6. The rule concerning ascertainment of damages with reasonable certainty is not peculiar to cases against insurance companies. In all cases the law requires, not mathematical certainty, but merely the best evidence obtainable under the condition existing, and some reliance must be placed upon the integrity and good faith of witnesses and the discretion of the jury. Omaha Paper Stock Co. v. California Union Ins. Co. 31
7. An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures. State v. Auger & Uitts 53
8. A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant in circumstances free from taint. State v. Auger & Uitts 53
9. In determining whether photographic identification procedures have been impermissibly suggestive, the question must be determined by an evaluation of all the surrounding circumstances. State v. Auger & Uitts 53
10. The party against whom a motion for a directed verdict is directed 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. Garcia v. Howard 57
11. Ordinarily the questions of negligence, contributory

negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper. Garcia v. Howard 57

12. As a general rule evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. State v. Morosin 62

13. Evidence of other crimes similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. State v. Morosin 62

14. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Morosin 62
State v. Walker 273

15. Evidence of other similar offenses may be admissible to show intent where there is, or may be, from the evidence an inference of mistake, accident, want of guilty knowledge, lawful purpose, or innocent intent. State v. Morosin 62

16. A conviction may rest upon circumstantial evidence if it is substantial. State v. Morosin 62

17. In a criminal case where there is sufficient evidence to justify the verdict, the verdict will not be set aside unless clearly wrong. State v. Morosin 62

18. If the defendant in a negligence case pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to prove that defense. If there is no competent evidence to support a defendant's plea of contributory negligence, it is prejudicial error to submit that issue and the issue of comparative negligence to the jury. Fangmeyer v. Reinwald 120

19. The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence; it is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury. Fangmeyer v. Reinwald 120

20. A motion for a directed verdict 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. 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. Fangmeyer v.

Reinwald 120
21. Where the undisputed physical facts demonstrate that a party was not negligent in the operation of his automobile at the time of a collision, the evidence is not sufficient to support a verdict for the other party; and where contributory negligence is charged against a plaintiff but the physical facts disclose conclusively that he was not guilty, it is error for the court to submit that question as an issue to the jury. The physical facts, however, must indisputably demonstrate that the collision out of which the cause of action arose was not caused by the party charged with negligence or contributory negligence before a verdict should be directed in favor of that party. Fangmeyer v. Reinwald 120
22. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown its determination will not be disturbed on appeal. State v. French 137
23. New cumulative evidence tendered in support of a motion for a new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. French 137
24. A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial. State v. French 137
25. The newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in result. Such evidence must be competent, material, and credible, and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial. State v. French 137
26. An express contract is proved by evidence of a definite offer and an unconditional acceptance. Where the offer requires a promise on the part of the offeree, a communicated acceptance is essential. Pribil v. Ruther 161
27. Where there is evidence of a decedent's negligence, the instruction to the jury that the instinct of self-preservation and the disposition to avoid personal harm may, in the absence of evidence, raise the presumption that the person killed was in the exercise of ordinary care is not prejudicial error if, as part of the same instruction, the jury is told that this presumption of due care arising out of natural instinct of self-preservation is not evidence but a mere rule of law, and obtains only in the

absence of direct or circumstantial evidence justifying reasonable inferences one way or another upon the subject and then, when evidence is produced, the presumption disappears and cannot be considered. Caradori v. Fitch 186

28. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and in so doing we will look to the totality of the circumstances. State v. Owen & Sweet 259

29. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court on appeal to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. State v. Owen & Sweet 259
State v. Jackson 827

30. A voluntary confession is insufficient, standing alone, to prove that a crime has been committed; but it is competent evidence of that fact and may, with slight corroboration, establish the corpus delicti as well as the defendant's guilty participation. Where the crime involves physical damage to a person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. In such a case there need be no link, outside the confession, between the injury and the accused who admits having inflicted it. State v. Scott 265

31. Where the question of the voluntariness of an oral or written confession is at issue, the court must properly instruct the jury, whether requested or not, as to what constitutes a voluntary confession and to disregard the alleged confession if it is found to be involuntary. The same rule, however, does not apply to the question of whether the defendant was advised of, and waived, his Miranda rights, before being questioned by police officers. State v. Scott 265

32. A defendant is not prejudiced by a joinder of two offenses in one information if evidence as to both would be admissible at a trial of either offenses separately. State v. Walker 273

33. Evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity although such evidence relates to other offenses. State v. Walker 273

34. Only a preponderance of the evidence is necessary to sustain a finding of paternity in Nebraska. Farmer v. Farmer 308
35. A court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Olson 341
36. It is an elementary proposition of law that when a judgment is clearly against the weight of the evidence it should be set aside. Fisher v. Beebe & Runyan Furniture Co. 349
37. Where proof is by circumstantial evidence, the circumstances adduced by proof must render the existence of the inferred facts reasonably probable and proof of mere possibility is insufficient. Herman v. Midland Ag Service, Inc. 356
38. In a proper case where sufficient foundation is laid, the results of scientific experiments may be admissible as substantive evidence to prove the existence of a condition as well as for the purpose of proving that the condition was the proximate cause of a result. Herman v. Midland Ag Service, Inc. 356
39. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. § 27-401, R. R. S. 1943. Herman v. Midland Ag Service, Inc. 356
40. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. § 27-403, R. R. S. 1943. Herman v. Midland Ag Service, Inc. 356
41. Where evidence is presented which could, if accepted by the jury, give rise to application of the sudden emergency rule, an instruction on that rule is proper. Bedke v. Kucera 380
42. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. § 27-801 (3), R. R. S. 1943. Murdoch v. Murdoch 429
43. A presumption arises that the trial court, trying a case without a jury, in arriving at a decision, will consider such evidence only as it is competent and relevant

and the Supreme Court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence admitted sufficient to sustain the trial court's judgment. Murdoch v. Murdoch 429

44. One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. Barnes v. Milligan 450

45. Declarations of an existing state of mind, if material, are admissible as exceptions to the hearsay rule. § 27-803 (2), R. R. S. 1943. Barnes v. Milligan 450

46. 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 on appeal is the sufficiency of the pleadings to sustain the judgment of the trial court. Hubbell v. Farmers Ins. Group 472

47. Depositions, affidavits, answers to interrogatories, and requests for admissions offered in evidence on a motion for summary judgment must be included in a bill of exceptions to be reviewed in this court on appeal. Hubbell v. Farmers Ins. Group 472

48. Finding that appellee was not negligent in the operation of appellant's vehicle, held supported by competent evidence. Lovell v. City of Kearney 478

49. In the absence of evidence of statements or conduct by one party upon which the opposite party might rely to its prejudice, no estoppel arises. Lovell v. City of Kearney 478

50. When a writing shows upon inspection a complete legal obligation without uncertainty or ambiguity as to object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein. Blome v. Hottell 528

51. Evidence examined and held sufficient to require the submission of a charge of felonious entry and attempt to steal for determination by the jury. State v. Mackey 549

52. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. Fleury v. Chrisman 584

53. The fact that a party is indemnified for loss by an insurance company is irrelevant to the issue of negligence and it is reversible error to permit the plaintiff to show the fact of insurance. Motis v. Manning 593

54. Evidence that the accused had physical or constructive

possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knows of the existence and nature of the narcotics at the place where they were found, but mere presence at a place where a narcotic drug is found is not sufficient. State v. Britt 601

55. Ordinarily, when narcotics or contraband materials are found on a defendant's premises, the evidence is deemed sufficient to sustain a conviction for unlawful possession in the absence of any reasonable explanation for their presence. State v. Britt 601

56. An affidavit for a search warrant which lists three possible locations where the evidence might be found is not insufficient where the person believed to be in possession of the evidence has no permanent address but is known to stay at each of the locations and keep personal belongings at each place. State v. Ernest 615

57. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. State v. Ernest 615

58. Fraud is never presumed but must be established by the party alleging it by clear and satisfactory evidence. Page v. Andreasen 641

59. Where evidence upon an issue is undisputed, the question is one for decision by the court as a matter of law. Veik v. The Tilden Bank 705

60. A trial court, in its sound discretion, may permit a party to withdraw his rest and offer additional evidence. Such action will stand unless there has been an abuse of discretion. Veik v. The Tilden Bank 705

61. A bill of exceptions is the only vehicle for bringing evidence before this court. State v. Spurgeon 719

62. Evidence which does not appear in the record cannot be considered by this court on appeal. State v. Spurgeon 719

63. Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation. As a general rule, the evidence should be such as to enable the court or jury to determine the injury and the amount of damages with reasonable

certainty or accuracy. Hatch v. Heim 735
64. When evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Tedco Development Corp. v. Overland Hills, Inc. 748
65. The evidence which entitles a party to specific performance must be clear, satisfactory, and unequivocal. Tedco Development Corp. v. Overland Hills, Inc. 748
66. A party who seeks specific performance must show not only that he has a valid, legally enforceable contract, but also that he has substantially complied with its terms by performing, or offering to perform on his part, the acts which formed the consideration of the undertaking on the part of the defendant or that he is ready, able, and willing to perform his obligations under the contract. Tedco Development Corp. v. Overland Hills, Inc. 748
67. If, on a charge of first degree murder, the evidence is sufficient only to sustain a charge of manslaughter, it is reversible error to submit to the jury the issue of guilt of murder in the first degree. State v. Johnson .. 760
68. Whether, in the course of laying foundation for impeachment of a witness, the inclusion of extraneous material containing a reference to the accused having been previously incarcerated, introduced as part of a question calling for the admission by the witness of a previous contradictory statement on a relevant or material matter, constitutes reversible error depends upon all the facts and circumstances of the case. State v. Johnson 760
69. A statement against the interest of a party is an exception to the hearsay rule and, thus, admissible. Young v. Young 787
70. A statement concerning a mother's attempt to influence the attitude of a child against his father and frustrate his visitation rights is admissible and not too remote where the child's negative attitude toward the father developed a short time thereafter. Young v. Young 787
71. Where plaintiff's action is dismissed at the close of his evidence, on appeal plaintiff is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that reasonably could be deduced from the evidence. Young v. Young 787
72. On a motion for summary judgment the trial court is

to examine the evidence and pleadings only to discover if any real issue of fact exists, and to decide whether the moving party is entitled to judgment as a matter of law. The court must view the evidence in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn therefrom. Wilke v. Holdrege Coop. Equity Exchange 803

73. In a criminal case, where a defendant has filed a timely pretrial motion to suppress evidence, and such motion is denied by the District Court after hearing, an objection at trial to the introduction of the evidence, or the renewal of the motion to suppress, is not essential to preserve the question for review. State v. Van Ackeren 812

74. Photographs of a gruesome nature are admissible if they are relevant, but the probative value of such evidence should be weighed against its possible prejudicial effect. State v. Simpson 823

75. In a homicide case the jury should be instructed only as to those degrees of homicide that are supported by the evidence. State v. Simpson 823

76. If a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome. The admission of photographs of a gruesome nature rests largely in the sound discretion of the trial court. State v. Jackson 827

77. In a homicide case, photographs of the victim, upon proper foundation may be received in evidence for the purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent. State v. Jackson 827

Fraud.

1. A misrepresentation by an insured in a proof of loss or deposition may void an insurance policy only if the misrepresentation is material. Omaha Paper Stock Co. v. California Union Ins. Co. 31

2. In determining whether a misrepresentation is material, reliance and resulting injury are essential elements to be considered. Omaha Paper Stock Co. v. California Union Ins. Co. 31

3. When one in possession of any right secured by contract does something inconsistent with the existence of his right or with his intention to rely upon it, he is precluded from afterwards claiming anything by reason of it. Omaha Paper Stock Co. v. California Union Ins. Co. 31

4. Existence of fraud or false swearing with respect to a

fire loss represented to an insurer to have been sustained is for the trier of facts. Omaha Paper Stock Co. v. California Union Ins. Co. 31

5. A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property. Fleury v. Chrisman 584
6. The essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage. Page v. Andreasen 641
7. Fraud is never presumed but must be established by the party alleging it by clear and satisfactory evidence. Page v. Andreasen 641

Frauds, Statute of.

1. The statute of frauds embodied in section 36-103, R. R. S. 1943, does not prevent any trust in land arising by operation of law. § 36-104, R. R. S. 1943. Fleury v. Chrisman 584
2. Estoppel may not be utilized to defeat the defense of the statute of frauds in an action by a buyer on an oral contract where the seller does nothing more than fail to deliver goods. Wilke v. Holdrege Coop. Equity Exchange 803

Gifts.

A municipality may not make a gift of its property to private persons for purposes other than corporate ones, and may not sell its property for wholly inadequate consideration such that a gift is in fact being made. Cather & Sons Constr., Inc. v. City of Lincoln 510

Governmental Subdivisions.

1. It shall be presumed, in the case of governmental subdivisions such as municipalities, counties, power districts, or utility districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate. American Fed. of S., C. & M. Emp. v. State 171

2. Section 48-838, R. R. S. 1943, is not limited in applicability only to those governmental subdivisions enumerated. American Fed. of S., C. & M. Emp. v. State 171

Guarantor-Guarantee.

1. If an obligee in a guaranty draws it in a form requiring explanation, the guarantor is a favorite of the law in the interpretation of the ambiguous provision. Metropolitan Utilities Dist. v. Fidelity & Deposit Co. 635
2. A guarantor is entitled to stand upon the letter of his contract. His guaranty is not to be extended by a standard construction of the language used. Metropolitan Utilities Dist. v. Fidelity & Deposit Co. 635

Guaranty.

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Guilty Plea.

1. A guilty plea is not rendered involuntary simply because it is the product of legitimate plea bargaining. State v. Robbins 723
2. A defendant who has heeded the advice of his attorney to plead guilty may not subsequently attack the voluntariness of a guilty plea so long as the counsel's advice was within the range of competence demanded of attorneys in criminal cases. State v. Ford 779
3. The requirement that a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing. State v. Ford 779

Habeas Corpus.

1. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent. Contreras v. Alsidez 773
2. In a habeas corpus proceeding to determine the custody of a child, the prime consideration is the welfare of the child. Contreras v. Alsidez 773

Habitual Criminals.

1. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. State v. Ernest 615
2. The presence of the defendant is required at an evidentiary hearing on a charge of being an habitual criminal and a sentencing hearing. State v. Ernest 615

Hearings.

The presence of the defendant is required at an evidentiary hearing on a charge of being an habitual criminal and a sentencing hearing. State v. Ernest 615

Hearsay.

Declarations of an existing state of mind, if material, are admissible as exceptions to the hearsay rule. § 27-803 (2), R. R. S. 1943. Barnes v. Milligan 450

Highways.

1. A driver having the right-of-way may not, on that account, proceed in disregard of the surrounding circumstances and potential dangers, and is not thereby relieved from the duty of exercising ordinary care to avoid accidents. Although a driver may have the right-of-way, if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way. Clark Bilt, Inc. v. Wells Dairy Co. 20
2. Where two vehicles, traveling in opposite directions, approach a bridge on a public highway, it is the duty of each driver to keep on the right of the center if the bridge is a safe, two-way drive. In approaching a bridge too narrow to permit the vehicles to pass each other, however, a driver should exercise due care to avoid being on the bridge simultaneously with the other vehicle. Clark Bilt, Inc. v. Wells Dairy Co. 20
3. The duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of its highways extends to and includes the shoulders of a paved or hard-surfaced state highway. Richardson & Gillispie v. State 225
4. It is the duty of the State to use reasonable and ordi-

nary care in the construction, maintenance, and repair of the shoulders of a paved or hard-surfaced highway to keep them reasonably safe for ordinary and reasonably anticipated use by a traveler using the highway while in the exercise of due care. Richardson & Gillispie v. State 225

5. Where a sidewalk is not available, any pedestrian walking along and upon a highway shall walk only on a shoulder, as far as practicable from the edge of the roadway. Where neither a sidewalk nor a shoulder is available, any pedestrian who walks along and upon a highway shall walk as near as practicable to the edge of the roadway and, if on a two-way roadway, shall walk only on the left side of such roadway. Hurlbut v. Landgren 413
6. A driver approaching an unprotected intersection, where he knows and can readily observe that his view is obstructed, must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe. Where his view is completely obstructed and his speed is such that he has given himself no opportunity at all to observe and react appropriately he may, where the facts are undisputed, be found negligent as a matter of law. Crink v. Northern Nat. Gas Co. 460

Homicide.

1. Essential elements of the crime of murder in the second degree are that the killing be done purposely and maliciously. § 28-402, R. R. S. 1943. State v. Johnson 760
2. Where the information charges murder in the first degree, murder in the second degree and manslaughter are included in the charge, and where different conclusions may be drawn from the evidence, the court does not commit error in submitting different degrees under proper instructions for the jury's determination. State v. Johnson 760
3. If, on a charge of first degree murder, the evidence is sufficient only to sustain a charge of manslaughter, it is reversible error to submit to the jury the issue of guilt of murder in the first degree. State v. Johnson 760
4. In a homicide case the jury should be instructed only as to those degrees of homicide that are supported by the evidence. State v. Simpson 823
5. If a photograph illustrates or makes clear some contro-

verted issue in a homicide case, a proper foundation having been laid, it may be received, even if it is gruesome. The admission of photographs of a gruesome nature rests largely in the sound discretion of the trial court. State v. Jackson 827

6. In a homicide case, photographs of the victim, upon proper foundation may be received in evidence for the purposes of identification to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent. State v. Jackson 827

Husband and Wife.

1. An antenuptial contract is valid if the formalities of the statute are met and it is fair and fairly made by persons legally qualified to contract. Such contracts are not against public policy and are enforceable if freely and intelligently made. Moss v. Stueven 215
2. In determining whether an antenuptial agreement is valid, the basic issue is fraud or overreaching and not the absence of disclosure. Moss v. Stueven 215
3. An apparently unreasonable provision for a wife, or a disproportion between what she is to receive and the value of the property of the husband does not in and of itself afford a basis for voiding an antenuptial contract. Unless there be fraud or overreaching the contract is valid. Moss v. Stueven 215
4. When each party to an antenuptial contract is chargeable with knowledge of the extent and value of the other's property, a disproportionate allowance for the prospective wife does not shift the burden of proof to the husband or to the representatives of his estate to sustain the contract. Moss v. Stueven 215

Indemnity.

A surety who has been adjudged liable to a creditor of the principal is entitled to a declaration of his right to indemnity in the event of payment to the creditor. First State Bank v. Producers Livestock Marketing Assn. ... 12

Indictments and Informations.

1. Two or more offenses of the same or similar character which were committed 90 days apart may be charged in one information. State v. Walker 273
2. A defendant is not prejudiced by a joinder of two offenses in one information if evidence as to both would be admissible at a trial of either offenses separately. State v. Walker 273
3. Where the information charges murder in the first de-

gree, murder in the second degree and manslaughter are included in the charge, and where different conclusions may be drawn from the evidence, the court does not commit error in submitting different degrees under proper instructions for the jury's determination. State v. Johnson 760
4. Before a county attorney can dismiss an information, it is first necessary that approval of the court to do so be obtained. State v. Adkins 775

Infants.

1. In a proceeding in juvenile court under section 43-202 (1) or (2) and section 43-209, R. S. Supp., 1976, to declare children to be neglected or dependent children, when the jurisdiction of the court to terminate parental rights has been properly invoked and appropriate service of summons has been had, the jurisdiction of the court to terminate parental rights continues until the matter is finally determined. State v. Williams 182
2. A minor is held to the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use. Caradori v. Fitch 186
3. The measure of damages for wrongful death of a minor child includes the loss of society, comfort, and companionship of the child. Caradori v. Fitch 186
4. Children of the parties to a marriage dissolution proceeding are not by that fact alone rendered incompetent as witnesses, but whether it is reversible error to refuse to hear their testimony depends upon the circumstances of the case. Murdoch v. Murdoch 429
5. In a determination of the custody of children of parties whose marriage has been dissolved, the paramount consideration is the best interests and welfare of such children. Mason v. Mason 476
6. The determination of custody and fixing of child support rests in the sound discretion of the trial court, and in the absence of an abuse of discretion will not be disturbed on appeal. Greenfield v. Greenfield 608
7. In a default divorce case where facts, existing at the time of the decree, affecting the custody and best interests of children, have not been called to the attention of the court, the court may, upon a subsequent application for modification, consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody. Cline v. Cline 619
8. 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. Remmers v. Remmers 647
9. In the matter of child support, while the father has the primary responsibility to support his children, the trial court should not ignore the ability of the mother. It has the responsibility of adjusting the equities between the parties. Remmers v. Remmers 647
10. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent. Contreras v. Alsidez 773
11. In a habeas corpus proceeding to determine the custody of a child, the prime consideration is the welfare of the child. Contreras v. Alsidez 773

Injunction.

1. To overturn a city ordinance on the ground that it invades a private right, the evidence of such fact must be clear and satisfactory. A party seeking an injunction must establish by competent evidence every fact necessary to entitle him to relief, and injunction will not lie unless the right is clear, the damage irreparable, and the remedy at law is inadequate to prevent failure of justice. Cather & Sons Constr., Inc. v. City of Lincoln 510
2. It is a well-defined exception to the general rule requiring a showing of actual and substantial injury as a basis for entitlement to injunctive relief, that, where one who has entered into a restrictive covenant as to the use of the land commits a distinct breach thereof, he may be enjoined irrespective of the amount of damage caused by his breach, and even if there appears to be no substantial monetary damage. Wessel v. Hillsdale Estates, Inc. 792
3. In such a case, it is not necessary to prove that the injury will be irreparable, and injunction may lie where there is inadequacy of legal remedy, as where damages would be incalculable because of the loss of quiet enjoyment. A court of equity fastens on the real contract and compels the execution of the very thing covenanted to be done. Wessel v. Hillsdale Estates, Inc. 792
4. Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of the plan of development protected by such covenants. Wessel v. Hillsdale Estates, Inc. 792

Instructions.

1. Error cannot be predicated on a failure to instruct the jury on some particular aspect of the case unless a proper instruction has been requested by the party complaining. Clark Bilt, Inc. v. Wells Dairy Co. 20
2. Where there is evidence of a decedent's negligence, the instruction to the jury that the instinct of self-preservation and the disposition to avoid personal harm may, in the absence of evidence, raise the presumption that the person killed was in the exercise of ordinary care is not prejudicial error if, as part of the same instruction, the jury is told that this presumption of due care arising out of natural instinct of self-preservation is not evidence but a mere rule of law, and obtains only in the absence of direct or circumstantial evidence justifying reasonable inferences one way or another upon the subject and then, when evidence is produced, the presumption disappears and cannot be considered. Caradori v. Fitch 186
3. The instruction that contributory negligence is not a defense to the criminal charge of motor vehicle homicide need not be given in a civil action, in which it is shown that the defendant had been convicted of a motor vehicle homicide charge. Caradori v. Fitch 186
4. Where the question of the voluntariness of an oral or written confession is at issue, the court must properly instruct the jury, whether requested or not, as to what constitutes a voluntary confession and to disregard the alleged confession if it is found to be involuntary. The same rule, however, does not apply to the question of whether the defendant was advised of, and waived, his Miranda rights, before being questioned by police officers. State v. Scott 265
5. It is the duty of the trial court, without request, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence. This principle applies to theories of defense as well as those upon which the plaintiff's cause of action is founded. The failure to so instruct is prejudicial error. Herman v. Midland Ag Service, Inc. 356
6. Where evidence is presented which could, if accepted by the jury, give rise to application of the sudden emergency rule, an instruction on that rule is proper. Bedke v. Kucera 380
7. Where the defendant totally fails to sustain the burden with respect to mitigation of damages the trial court is correct in refusing to submit a tendered instruction. Hurlbut v. Landgren 413

8. An instruction stating that the elements of felonious entry under section 28-533, R. R. S. 1943, are (1) a willful and malicious entry with intent to steal, (2) a subsequent attempt to steal, and (3) the time and place of the offense, is proper. State v. Mackey 549
9. Failure of the trial court to file instructions with the clerk of the court is not, in and of itself, prejudicial. Langenheim v. City of Seward 740
10. Where the information charges murder in the first degree, murder in the second degree and manslaughter are included in the charge, and where different conclusions may be drawn from the evidence, the court does not commit error in submitting different degrees under proper instructions for the jury's determination. State v. Johnson 760
11. In a homicide case the jury should be instructed only as to those degrees of homicide that are supported by the evidence. State v. Simpson 823

Insurance.

1. A misrepresentation by an insured in a proof of loss or deposition may void an insurance policy only if the misrepresentation is material. Omaha Paper Stock Co. v. California Union Ins. Co. 31
2. Existence of fraud or false swearing with respect to a fire loss represented to an insurer to have been sustained is for the trier of facts. Omaha Paper Stock Co. v. California Union Ins. Co. 31
3. In an action where a plaintiff prevails against an insurance company, the court shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings. Omaha Paper Stock Co. v. California Union Ins. Co. 31
4. An insurance policy should be interpreted in accordance with reasonable expectations of the insured at the time of the contract. Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co. 46
5. A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured. Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co. 46
6. In an insurance policy an exclusion is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed. Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co. 46

7. In an automobile insurance policy providing coverage against theft, in which the term is not defined, the term "theft" will be construed broadly to include loss caused by any unlawful or wrongful taking of the insured vehicle with criminal intent. Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co. 46
8. This case is controlled by Hastings v. Fireman's Fund American Ins. Co., 193 Neb. 417, 227 N. W. 2d 418 (1975). Worobec v. State Farm Mut. Auto. Ins. Co. 210
9. The knowledge of an insurance agent, to be considered that of the insurer, must be acquired by the agent in the course of his transaction of its business and the insurer is not chargeable with information acquired by an agent in transactions outside the scope of his agency. Mannschreck v. Connecticut General Life Ins. Co. 434
10. The measure of recovery by an insured for the partial damage of the insured property is the actual cash value of the part damaged, or the cost of repair or replacement thereof with like kind and quality with deduction for depreciation, not exceeding the limit of liability stated in the policy. Such a policy is "open" and not "valued." Clemon v. Occidental Fire & Cas. Co. 469
11. Unless an insurer contracts for the making of repairs to damaged property or exercises possession or control over the insured property, said insurer is not liable for damages for negligence in the making or delaying of such repairs. Clemon v. Occidental Fire & Cas. Co. 469
12. Automobile theft insurance protects only against losses arising from criminal takings of the insured vehicle. There can be no recovery under such a policy for a loss asserted to amount to a theft in the absence of proof of the existence of a criminal intent on the part of the taker. Hubbell v. Farmers Ins. Group 472
13. The fact that a party is indemnified for loss by an insurance company is irrelevant to the issue of negligence and it is reversible error to permit the plaintiff to show the fact of insurance. Motis v. Manning 593
14. An automobile policy, to which sections 44-516 to 44-522, R. R. S. 1943, apply, issued for less than a 6-month period, is to be considered, for all purposes of said sections, as if written for a period of 6 months. Conover v. Dairyland Ins. Co. 715

Intent.

1. Evidence of other crimes similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the

crime charged. State v. Morosin 62
2. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Morosin 62
State v. Walker 273
3. Evidence of other similar offenses may be admissible to show intent where there is, or may be, from the evidence, an inference of mistake, accident, want of guilty knowledge, lawful purpose, or innocent intent. State v. Morosin 62
4. In the construction of wills, the basic rule is that the testator's intent must be determined from the language used in the will, and, when so ascertained, that intent must be given effect, if it is not contrary to law. Hanley v. Craven 81
5. The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. Fangmeyer v. Reinwald 120
6. A contract cannot be said to be ambiguous where the interpretation given appears to represent the true intention of the parties from the instrument itself. Kraski v. Banwell 279
7. Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury, and proof thereof is indispensable to sustain a conviction. State v. Judd 344
8. Because the intent with which an act is done exists only in the mind of the actor, its proof must be inferred from the act itself and from the facts surrounding the act. State v. Judd 344
9. Ordinarily the intent with which the occupier possesses the land can best be determined by his acts and the nature of his possession. Barnes v. Milligan 450
10. The statute of limitations will not run in favor of an occupant of real estate, unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property. Barnes v. Milligan 450
11. Automobile theft insurance protects only against losses arising from criminal takings of the insured vehicle. There can be no recovery under such a policy for a loss asserted to amount to a theft in the absence of proof of the existence of a criminal intent on the part of the taker. Hubbell v. Farmers Ins. Group 472
12. Rights arising out of a contract cannot be transferred if they are coupled with liabilities or if they involve a relation of personal confidence such that the party whose

agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided. Schupack v. McDonald's System, Inc. 485
13. Whether rights and duties under a contract are too personal in character to permit assignment is a question of construction to be resolved from the nature of the contract and the express or presumed intention of the parties. Schupack v. McDonald's System, Inc. 485
14. Whether a duty is personal such that it cannot be delegated is a question of the intention of the parties to be ascertained from the contract, its nature, and attending circumstances. Schupack v. McDonald's System, Inc. 485
15. Essential elements of the crime of murder in the second degree are that the killing be done purposely and maliciously. § 28-402, R. R. S. 1943. State v. Johnson . 760
16. Malice, in its legal sense, denotes that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind. State v. Johnson 760
17. Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the Nebraska Penal and Correctional Complex for a term of not less than 3 years and not more than 50 years. § 28-414, R. R. S. 1943. State v. Adkins 775
18. Malice in a legal sense denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. State v. Jackson 827

Joinder.

1. Two or more offenses of the same or similar character which were committed 90 days apart may be charged in one information. State v. Walker 273
2. A defendant is not prejudiced by a joinder of two offenses in one information if evidence as to both would be admissible at a trial of either offenses separately. State v. Walker 273

Joint Ventures.

1. To constitute a joint venture there must be an agreement to enter into an undertaking in the object of which the parties have a community of interest and a common purpose in performance, and each of the parties

must have equal voice in the manner of its performance and control of the agencies used therein, although one may entrust performance to the other. Fangmeyer v. Reinwald 120
2. The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. Fangmeyer v. Reinwald 120

Judgments.
1. The judgment of the trial court in an action at law, where a jury has been waived, has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong. Omaha Paper Stock Co. v. California Union Ins. Co. 31
Clemens Mobile Homes, Inc. v. Liberty Homes, Inc. 165
2. It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. Kuhlman v. Cargile 150
3. Upon a finding of liability, the jury is required to fix damages in accordance with the instructions so as to reasonably compensate those entitled to recover. Caradori v. Fitch 186
4. A verdict may be set aside as excessive by the trial court or 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, or it is clear that the jury disregarded the evidence or rules of law. Caradori v. Fitch 186
5. Trial courts have the inherent power, independent of any statute or rule of court, to dismiss a case for failure to prosecute with due diligence. The exercise of this power rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion. Schaeffer v. Hunter 221
6. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court on appeal to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. State v. Owen & Sweet 259
7. A finding of fact by a court of law where the jury has been waived has the effect of a verdict by a jury and will not be set aside on appeal unless clearly wrong.

Fisher v. Beebe & Runyan Furniture Co. 349
8. It is an elementary proposition of law that when a judgment is clearly against the weight of the evidence it should be set aside. Fisher v. Beebe & Runyan Furniture Co. 349
9. Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits. Steinberg v. Stahlnecker 466
10. The matter of the vacation of a default judgment rests in the sound discretion of the trial court but this discretion is not an arbitrary one and it must be exercised reasonably. Steinberg v. Stahlnecker 466
11. No judgment is rendered until the pronouncement thereof is entered on the trial docket. State ex rel. Kaipus v. Board of Trustees of S. & I. Dist. No. 113 525
12. A motion for new trial filed prior to the rendition of a judgment is premature and constitutes a nullity. State ex rel. Kaipus v. Board of Trustees of S. & I. Dist. No. 113 525
13. Within 3 days after the rendition of any judgment, except judgments by default rendered in divorce or separate maintenance cases, where proper service has been obtained or an appearance of the defaulting party has been made, the clerk of the court shall send a post card by United States mail to each party who has made an appearance in the action, or to his attorney or attorneys of record, advising that a judgment has been rendered and the date of rendition thereof. Tietsort v. Ranne 651
14. In cases involving child custody determinations, the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Contreras v. Alsidez 773
15. In a case where the jury is waived and there is a conflict in the evidence, the reviewing court will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly erroneous. Mobil Oil Corp. v. Grantham 782

Juries.

A verdict may be set aside as excessive by the trial court

or 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, or it is clear that the jury disregarded the evidence or rules of law. Caradori v. Fitch 186

Jurisdiction.

1. A trial court does not have jurisdiction to adjudicate matters outside the issues submitted by the pleadings. Lauts v. Prokop 218
2. When a court of competent jurisdiction has acquired jurisdiction over the subject of a controversy, no other court may acquire jurisdiction over it. Lauts v. Prokop 218
3. An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. State v. Kelly 276

Labor and Labor Relations.

1. Decisions under the National Labor Relations Act are helpful, but not controlling upon the courts of this state. American Fed. of S., C. & M. Emp. v. State 171
2. A run-off election is a continuation of an original election and is designed to carry out the purposes of the original election. American Fed. of S., C. & M. Emp. v. State 171
3. The determination that a run-off election should be held is appropriate where a majority of workers in a unit desire representation but where a unit fails to get the required majority of votes. American Fed. of S., C. & M. Emp. v. State 171
4. It shall be presumed, in the case of governmental subdivisions such as municipalities, counties, power districts, or utility districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate. American Fed. of S., C. & M. Emp. v. State 171
5. The policy of section 48-838, R. R. S. 1943, is opposition to undue fragmentation of bargaining units. American Fed. of S., C. & M. Emp. v. State 171
6. Review by this court of an order or decision of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Fed. of S., C. & M. Emp. v. State 171

Laches.

Laches does not grow out of the mere passage of time. It is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties. Fleury v. Chrisman 584

Landlord and Tenant.

1. A tenant who plants crops knowing the terms of his lease will expire before they can be harvested loses all his interest in the crops upon the termination of the lease. Goings v. Gerken 247
2. A tenancy from year-to-year can only be terminated by agreement of the parties, express or implied, or by notice given, 6 calendar months ending with the period of the year at which the tenancy commenced. Sempek v. Minarik 532
3. In the absence of an express covenant inconsistent therewith, the ordinary lease of realty raises an implied covenant that the lessee shall have the quiet and peaceable possession and enjoyment of the leased premises, so far as regards the lessor, or anyone lawfully claiming through or under him, or anyone asserting a title to the leased premises superior and paramount to that of the lessor. In the absence of a provision to the contrary, such covenant is implied in every lease, and leases by parol are included within the scope of this rule. Sempek v. Minarik 532
4. The measure of damages for the wrongful eviction of a tenant by his landlord is ordinarily the rental value of the property for the unexpired term, less the amount of rent reserved by the lease. In a proper case special damages in addition may be awarded, where such damages are certain and the natural result of the wrong complained of. Sempek v. Minarik 532
5. A joint award to landlord and tenant, standing alone, affords no basis of allocation of that award between the parties. Langenheim v. City of Seward 740

Leases.

An option to purchase real estate contained in a lease agreement is not terminated by the death of the lessee during the term and before the exercise of the option, in the absence of express limitation. Von Seggern v. Freeland 570

Legislature.

1. Since the recognition and creation of bargaining units

within the executive departments are not prohibited by any Article of the Constitution of Nebraska, the Legislature possesses the authority to grant such powers to the Court of Industrial Relations. American Fed. of S., C. & M. Emp. v. State 171
2. Public policy concerning divorce and its incidents is a matter for the Legislature, not the courts, to decide. Weber v. Weber 659
3. The Legislature has a broad discretion in making classifications for the purpose of excise taxes. Ralston v. County of Dawson 678
4. The matter of the exemptions in the inheritance tax law, to whom they apply and the amount thereof, is a legislative matter and not a judicial prerogative. Ralston v. County of Dawson 678

Lesser-Included Offenses.

A lesser-included offense may not be submitted with a greater charge, if such lesser offense includes any element irrelevant to such greater charge. State v. Mackey 549

Lessor and Lessee.

1. A tenant who plants crops knowing the terms of his lease will expire before they can be harvested loses all his interest in the crops upon the termination of the lease. Goings v. Gerken 247
2. When a lease confers on the lessee an option to purchase the property at any time during the term of the lease, and the lease is thereafter extended in accordance with its terms, the option to purchase is also extended for the period of the extended term. Kraski v. Banwell 279
3. In the absence of an express covenant inconsistent therewith, the ordinary lease of realty raises an implied covenant that the lessee shall have the quiet and peaceable possession and enjoyment of the leased premises, so far as regards the lessor, or anyone lawfully claiming through or under him, or anyone asserting a title to the leased premises superior and paramount to that of the lessor. In the absence of a provision to the contrary, such covenant is implied in every lease, and leases by parol are included within the scope of this rule. Sempek v. Minarik 532
4. The measure of damages for the wrongful eviction of a tenant by his landlord is ordinarily the rental value of the property for the unexpired term, less the amount of rent reserved by the lease. In a proper case special

damages in addition may be awarded, where such damages are certain and the natural result of the wrong complained of. Sempek v. Minarik 532

Limitations, Statute of.

1. The statute of limitations will not run in favor of an occupant of real estate, unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property. Barnes v. Milligan 450
2. The statute of limitations does not begin to run in the case of a resulting or constructive trust growing out of a consensual arrangement until the trustee clearly repudiates the trust. The time when the statute of limitations commences to run must be determined on the facts in each case. Fleury v. Chrisman 584

Livestock.

1. Livestock used or produced in farming operations and in the possession of a debtor engaged in raising, fattening, grazing, or other farming operations are farm products. If goods are farm products they are neither equipment nor inventory. First State Bank v. Producers Livestock Marketing Assn. 12
2. Cattle purchased and held for immediate sale by a cattle trader and speculator are inventory and not farm products. First State Bank v. Producers Livestock Marketing Assn. 12
3. A security agreement between a bank and a farmer and rancher, who is also a cattle trader or speculator, which grants a security interest in livestock used for farming operations, does not cover cattle purchased and held for immediate sale and not intended for use in any farming operation. First State Bank v. Producers Livestock Marketing Assn. 12

Marriage.

1. In awarding compensatory damages for breach of promise to marry, the trier of fact may consider the injury to the plaintiff's health, the effect of the breach on the plaintiff's feelings, mental suffering, wounded pride, humiliation, pain, and mortification. Loss of pecuniary benefits of the promised marriage may be an element of damages, but the wealth of the defendant does not establish the measure of damages. Kuhlman v. Cargile 151
2. In an action for breach of promise to marry, there are no precise rules for measuring damages, and the

amount of recovery should be left to the sound discretion of the trier of fact. Kuhlman v. Cargile 151
3. When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together the marriage is irretrievably broken. Roberts v. Roberts 256

Minors.
1. A minor is held to the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use. Caradori v. Fitch 186
2. The measure of damages for wrongful death of a minor child includes the loss of society, comfort, and companionship of the child. Caradori v. Fitch 186

Mistrial.
A motion for mistrial is ordinarily timely if made at the first reasonable opportunity. Motis v. Manning 593

Motions, Rules, and Orders.
1. It is elementary that in considering a motion for a directed verdict, the truth of all competent evidence submitted on behalf of the party against whom the motion is directed shall be considered as true. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can be reasonably deduced from the evidence. Hurlbut v. Landgren 413
2. No judgment is rendered until the pronouncement thereof is entered on the trial docket. State ex rel. Kaipus v. Board of Trustees of S. & I. Dist. No. 113 525
3. 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. Elgin Mills, Inc. v. Hoffman 598
4. A motion for continuance of trial is addressed to the sound discretion of the court and will stand unless there has been an abuse of discretion. Veik v. The Tilden Bank 705
5. In a criminal case, where a defendant has filed a timely pretrial motion to suppress evidence, and such motion is denied by the District Court after hearing, an objection at trial to the introduction of the evidence, or the renewal of the motion to suppress, is not essential

to preserve the question for review. State v. Van Ackeren 812

Motor Vehicles.

1. A driver having the right-of-way may not, on that account, proceed in disregard of the surrounding circumstances and potential dangers, and is not thereby relieved from the duty of exercising ordinary care to avoid accidents. Although a driver may have the right-of-way, if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way. Clark Bilt, Inc. v. Wells Dairy Co. 20
2. Where two vehicles, traveling in opposite directions, approach a bridge on a public highway, it is the duty of each driver to keep on the right of the center if the bridge is a safe, two-way drive. In approaching a bridge too narrow to permit the vehicles to pass each other, however, a driver should exercise due care to avoid being on the bridge simultaneously with the other vehicle. Clark Bilt, Inc. v. Wells Dairy Co. 20
3. In an automobile insurance policy providing coverage against theft, in which the term is not defined, the term "theft" will be construed broadly to include loss caused by any unlawful or wrongful taking of the insured vehicle with criminal intent. Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co. 46
4. This case is controlled by Hastings v. Fireman's Fund American Ins. Co., 193 Neb. 417, 227 N. W. 2d 418 (1975). Worobec v. State Farm Mut. Auto. Ins. Co. 210
5. The duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of its highways extends to and includes the shoulders of a paved or hard-surfaced state highway. Richardson & Gillispie v. State 225
6. It is the duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of the shoulders of a paved or hard-surfaced highway to keep them reasonably safe for ordinary and reasonably anticipated use by a traveler using the highway while in the exercise of due care. Richardson & Gillispie v. State 225
7. Where a sidewalk is not available, any pedestrian walking along and upon a highway shall walk only on a shoulder, as far as practicable from the edge of the roadway. Where neither a sidewalk nor a shoulder is

available, any pedestrian who walks along and upon a highway shall walk as near as practicable to the edge of the roadway and, if on a two-way roadway, shall walk only on the left side of such roadway. Hurlbut v. Landgren 413

8. No person shall acquire any right, claim, or interest in or to a motor vehicle until he shall have had delivered to him physical possession of such motor vehicle and a certificate of title. Wolfson Car Leasing Co., Inc. v. Weberg 420

9. The purpose of the Nebraska Certificate of Title Act is to provide a means of identifying motor vehicles, ascertaining motor vehicle owners, and preventing theft of motor vehicles and fraud in the transfer of motor vehicles. Wolfson Car Leasing Co., Inc. v. Weberg 420

10. The Nebraska Certificate of Title Act is the exclusive means of transferring title. Wolfson Car Leasing Co., Inc. v. Weberg 420

11. A driver approaching an unprotected intersection, where he knows and can readily observe that his view is obstructed, must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe. Where his view is completely obstructed and his speed is such that he has given himself no opportunity at all to observe and react appropriately he may, where the facts are undisputed, be found negligent as a matter of law. Crink v. Northern Nat. Gas Co. 460

12. Finding that appellee was not negligent in the operation of appellant's vehicle, held supported by competent evidence. Lovell v. City of Kearney 478

13. An automobile policy, to which sections 44-516 to 44-522, R. R. S. 1943, apply, issued for less than a 6-month period, is to be considered, for all purposes of said sections, as if written for a period of 6 months. Conover v. Dairyland Ins. Co. 715

14. Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation. As a general rule, the evidence should be such as to enable the court or jury to determine the injury and the amount of damages with reasonable certainty or accuracy. Hatch v. Heim 735

15. When a damaged automobile can be repaired and restored substantially to its original condition, the reasonable cost of repair is the proper measure of damages. However, the reasonable cost of repair must not

exceed the value of the vehicle immediately prior to the accident. Hatch v. Heim 735

Municipal Corporations.

1. The exercise of a city council's discretionary power to vacate streets and alleys is not ordinarily subject to judicial review unless there has been an abuse of discretion, fraud, a glaring informality or illegality in proceedings, or an absence of jurisdiction. Cather & Sons Constr., Inc. v. City of Lincoln 510
2. A property owner whose property does not abut upon a portion of a street which a municipality proposes to vacate or obstruct has no right of action to restrain the vacation or prevent the obstruction unless the access to his property is interfered with and he suffers a special or peculiar damage differing in kind from that of the general public. Cather & Sons Constr., Inc. v. City of Lincoln 510
3. To overturn a city ordinance on the ground that it invades a private right, the evidence of such fact must be clear and satisfactory. A party seeking an injunction must establish by competent evidence every fact necessary to entitle him to relief, and injunction will not lie unless the right is clear, the damage irreparable, and the remedy at law is inadequate to prevent failure of justice. Cather & Sons Constr., Inc. v. City of Lincoln 510
4. In the absence of illegality, fraud, or a clear abuse of discretion on the part of municipal officers in the exercise of their discretionary power to dispose of municipal property, the sale of such property will not be restrained in equity. Cather & Sons Constr., Inc. v. City of Lincoln 510
5. To warrant this court in interfering with a sale of municipal property by municipal officers acting within the scope of their statutory authority, the evidence should be such as to show with reasonable certainty that their action could not be construed as having been taken with a view of the general public welfare. Cather & Sons Constr., Inc. v. City of Lincoln 510
6. A municipality may not make a gift of its property to private persons for purposes other than corporate ones, and may not sell its property for wholly inadequate consideration such that a gift is in fact being made. Cather & Sons Constr., Inc. v. City of Lincoln 510
7. Whenever an area is annexed to a city subsequent to the most recent federal census, the population of that area must be taken into account in any subsequent redistricting, in addition to the population of the city as

determined by the federal census. Pelzer v. City of Bellevue 541
8. Where the most recent federal census does not contain detailed block by block information sufficient to determine the population of a specific portion of a census enumeration district, any material relevant evidence may be admitted to establish that population. Pelzer v. City of Bellevue 541

Negligence.
1. It is the rule in Nebraska that the violation of a safety regulation, established by statute or ordinance, is not negligence as a matter of law, but is evidence of negligence which may be considered in connection with all the other evidence in the case in deciding that issue. Similarly, the violation of a statute is not negligence per se, but only evidence of negligence. Clark Bilt, Inc. v. Wells Dairy Co. 20
2. A driver having the right-of-way may not, on that account, proceed in disregard of the surrounding circumstances and potential dangers, and is not thereby relieved from the duty of exercising ordinary care to avoid accidents. Although a driver may have the right-of-way, if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way. Clark Bilt, Inc. v. Wells Dairy Co. 20
3. Where two vehicles, traveling in opposite directions, approach a bridge on a public highway, it is the duty of each driver to keep on the right of the center if the bridge is a safe, two-way drive. In approaching a bridge too narrow to permit the vehicles to pass each other, however, a driver should exercise due care to avoid being on the bridge simultaneously with the other vehicle. Clark Bilt, Inc. v. Wells Dairy Co. 20
4. Ordinarily the questions of negligence, contributory negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper. Garcia v. Howard 57
5. One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid obvious dangers is negligent or contributorily negligent. Garcia v. Howard 57
6. If a person, knowing and comprehending the danger,

voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury therefrom. Garcia v. Howard 57

7. If the defendant in a negligence case pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to prove that defense. If there is no competent evidence to support a defendant's plea of contributory negligence, it is prejudicial error to submit that issue and the issue of comparative negligence to the jury. Fangmeyer v. Reinwald 120

8. The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence; it is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury. Fangmeyer v. Reinwald 120

9. Where the undisputed physical facts demonstrate that a party was not negligent in the operation of his automobile at the time of a collision, the evidence is not sufficient to support a verdict for the other party; and where contributory negligence is charged against a plaintiff but the physical facts disclose conclusively that he was not guilty, it is error for the court to submit that question as an issue to the jury. The physical facts, however, must indisputably demonstrate that the collision out of which the cause of action arose was not caused by the party charged with negligence or contributory negligence before a verdict should be directed in favor of that party. Fangmeyer v. Reinwald 120

10. A minor is held to the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use. Caradori v. Fitch 186

11. Where there is evidence of a decedent's negligence, the instruction to the jury that the instinct of self-preservation and the disposition to avoid personal harm may, in the absence of evidence, raise the presumption that the person killed was in the exercise of ordinary care is not prejudicial error if, as part of the same instruction, the jury is told that this presumption of due care arising out of natural instinct of self-preservation is not evidence but a mere rule of law, and obtains only in the absence of direct or circumstantial evidence justifying reasonable inferences one way or another upon the subject and then, when evidence is produced, the presump-

tion disappears and cannot be considered. Caradori v. Fitch 186
12. The instruction that contributory negligence is not a defense to the criminal charge of motor vehicle homicide need not be given in a civil action, in which it is shown that the defendant had been convicted of a motor vehicle homicide charge. Caradori v. Fitch 186
13. Upon a finding of liability, the jury is required to fix damages in accordance with the instructions so as to reasonably compensate those entitled to recover. Caradori v. Fitch 186
14. The duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of its highways extends to and includes the shoulders of a paved or hard-surfaced state highway. Richardson & Gillispie v. State 225
15. It is the duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of the shoulders of a paved or hard-surfaced highway to keep them reasonably safe for ordinary and reasonably anticipated use by a traveler using the highway while in the exercise of due care. Richardson & Gillispie v. State 225
16. An irrigation district organized under Chapter 46, R. R. S. 1943, is liable for seepage damage under Article I, section 21, of the Constitution of Nebraska, without regard to negligence. Halstead v. Farmers Irr. Dist. 314
17. A supplier of a dangerous substance owes the highest degree of care to prevent injury from the use of that product. He is not, however, an insurer of one who is aware of the dangerous character of the substance. Herman v. Midland Ag Service, Inc. 356
18. A violation of a statute is not negligence per se but is merely evidence of negligence. Hurlbut v. Landgren 413
19. A driver approaching an unprotected intersection, where he knows and can readily observe that his view is obstructed, must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe. Where his view is completely obstructed and his speed is such that he has given himself no opportunity at all to observe and react appropriately he may, where the facts are undisputed, be found negligent as a matter of law. Crink v. Northern Nat. Gas Co. 460
20. Finding that appellee was not negligent in the operation of appellant's vehicle, held supported by competent evi-

dence. Lovell v. City of Kearney 478
21. The fact that a party is indemnified for loss by an insurance company is irrelevant to the issue of negligence and it is reversible error to permit the plaintiff to show the fact of insurance. Motis v. Manning 593

Negotiable Instruments.

Where a promissory note is made in one state, to be performed in another state, it is, ordinarily, to be regulated and governed by the laws of the place of performance, without regard to the place at which it was written, dated, or signed, unless it clearly appears that the parties intended that the contract should be governed by the law of the place where made. Exchange Bank & Trust Co. v. Tamerius 807

New Trial.

1. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown its determination will not be disturbed on appeal. State v. French 137
2. New cumulative evidence tendered in support of a motion for a new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. French 137
3. A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial. State v. French 137
4. The newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in result. Such evidence must be competent, material, and credible, and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial. State v. French 137
5. A motion for new trial filed prior to the rendition of a judgment is premature and constitutes a nullity. State ex rel. Kaipus v. Board of Trustees of S. & I. Dist. No. 113 525

Notice.

1. Where an individual signs a document which outlines his conditions of parole and which contains a clause stating that violation of the conditions is cause for parole revocation, he is held to have notice of such conditions. State v. Stroud 27

2. A tenancy from year-to-year can only be terminated by agreement of the parties, express or implied, or by notice given, 6 calendar months ending with the period of the year at which the tenancy commenced. Sempek v. Minarik 532

Officers and Directors.

A bylaw which gives a developer control of the board of directors of a homeowners' association, even though valid initially, may be contrary to public policy and become void when used to defeat the quasi-municipal functions of a homeowners' association and in aid of conflicting private purposes of the developer. Each such case will necessarily have to be considered on its own facts. Beaver Lake Assn. v. Beaver Lake Corp. 685

Options.

When a lease confers on the lessee an option to purchase the property at any time during the term of the lease, and the lease is thereafter extended in accordance with its terms, the option to purchase is also extended for the period of the extended term. Kraski v. Banwell ... 279

Ordinances.

To overturn a city ordinance on the ground that it invades a private right, the evidence of such fact must be clear and satisfactory. A party seeking an injunction must establish by competent evidence every fact necessary to entitle him to relief, and injunction will not lie unless the right is clear, the damage irreparable, and the remedy at law is inadequate to prevent failure of justice. Cather & Sons Constr., Inc. v. City of Lincoln 510

Parent and Child.

1. In a proceeding in juvenile court under section 43-202 (1) or (2) and section 43-209, R. S. Supp., 1976, to declare children to be neglected or dependent children, when the jurisdiction of the court to terminate parental rights has been properly invoked and appropriate service of summons has been had, the jurisdiction of the court to terminate parental rights continues until the matter is finally determined. State v. Williams 182
2. The determination of custody and fixing of child support rests in the sound discretion of the trial court, and in the absence of an abuse of discretion will not be disturbed on appeal. Greenfield v. Greenfield 608
3. In a default divorce case where facts, existing at the time of the decree, affecting the custody and best inter-

ests of children, have not been called to the attention of the court, the court may, upon a subsequent application for modification, consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody. Cline v. Cline 619
4. 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. Remmers v. Remmers 647
5. In the matter of child support, while the father has the primary responsibility to support his children, the trial court should not ignore the ability of the mother. It has the responsibility of adjusting the equities between the parties. Remmers v. Remmers 647
6. When a controversy arises as to the custody of a minor child between a parent and a third person, the custody of the child is to be determined by the best interests of the child with due regard for the superior rights, as between the parties, of a fit, proper, and suitable parent. Contreras v. Alsidez 773
7. In a habeas corpus proceeding to determine the custody of a child, the prime consideration is the welfare of the child. Contreras v. Alsidez 773
8. In cases involving child custody determinations, the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed on appeal unless there is a clear abuse of discretion or the decision is against the weight of the evidence. Contreras v. Alsidez 773
9. A statement concerning a mother's attempt to influence the attitude of a child against his father and frustrate his visitation rights is admissible and not too remote where the child's negative attitude toward the father developed a short time thereafter. Young v. Young 787

Parties.

1. When the question is one of a common or general interest to many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. Berkshire & Andersen v. Douglas County Board of Equalization 113
2. In determining whether a class action is properly brought, considerable discretion is vested in the trial court. Berkshire & Andersen v. Douglas County Board of Equalization 113

3. Within 3 days after the rendition of any judgment, except judgments by default rendered in divorce or separate maintenance cases, where proper service has been obtained or an appearance of the defaulting party has been made, the clerk of the court shall send a post card by United States mail to each party who has made an appearance in the action, or to his attorney or attorneys of record, advising that a judgment has been rendered and the date of rendition thereof. Tietsort v. Ranne 651

Paternity.

Only a preponderance of the evidence is necessary to sustain a finding of paternity in Nebraska. Farmer v. Farmer 308

Pedestrians.

Where a sidewalk is not available, any pedestrian walking along and upon a highway shall walk only on a shoulder, as far as practicable from the edge of the roadway. Where neither a sidewalk nor a shoulder is available, any pedestrian who walks along and upon a highway shall walk as near as practicable to the edge of the roadway and, if on a two-way roadway, shall walk only on the left side of such roadway. Hurlbut v. Landgren 413

Plea Bargains.

1. The trial court is afforded a large measure of discretion in deciding whether or not to accept plea bargain arrangements. State v. Adkins 775
2. A trial judge should not enter into any agreement that the defendant will be permitted to withdraw his plea if the judge does not accept the county attorney's recommendation on sentence. State v. Simpson 823

Pleadings.

1. When a cause of action for equitable relief is stated and when the plaintiff prays for equitable relief, a jury trial cannot be demanded as a matter of right by the defendant, even if the defendant pleads legal defenses or files a counterclaim for damages. Kuhlman v. Cargile 150
2. A trial court does not have jurisdiction to adjudicate matters outside the issues submitted by the pleadings. Lauts v. Prokop 218
3. Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof

disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits. Steinberg v. Stahlnecker 466
4. A meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts. Steinberg v. Stahlnecker 466
5. 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 on appeal is the sufficiency of the pleadings to sustain the judgment of the trial court. Hubbell v. Farmers Ins. Group 472
6. Depositions, affidavits, answers to interrogatories, and requests for admissions offered in evidence on a motion for summary judgment must be included in a bill of exceptions to be reviewed in this court on appeal. Hubbell v. Farmers Ins. Group 472
7. When the allegations of the pleadings have been pierced by a movant for summary judgment and resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted. Page v. Andreasen 641
8. An objection to the name in which a suit is brought must be made before trial or it is waived. Professional Collection Service v. Coble 683
9. Robbery may be committed either by force and violence, or by putting in fear. Pleading of these elements may be conjunctive and proof of accomplishment of the robbery by either method is sufficient. State v. Adkins 775

Police Officers and Sheriffs.

1. A warrantless entry is valid if police officers enter under exigent circumstances of hot pursuit. State v. Penas 387
2. When a citizen has knowingly placed himself in a public place, and valid police action is commenced in that public place, the citizen cannot thwart police action by fleeing into a private place. State v. Penas 387

Post Conviction.

1. A defendant who has appealed from a conviction cannot secure a second review of the identical propositions examined in that appeal by resorting to a post conviction procedure. State v. Suggett 693
2. Where the facts and issues which are the grounds of a

motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction, but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review. State v. Suggett 693

3. The requirement that a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post conviction hearing. State v. Ford 779

Premises, View of.

This court on appeal will give consideration to the fact the trial court inspected the premises. Bahm v. Raikes 195

Presentence Reports.

1. Whether successive presentence investigations are necessary, before the revocation of an order of probation is entered, rests in the sound discretion of the sentencing judge. State v. Stroud 27
2. A court may order a presentence investigation in any case. State v. Bruns 612
3. A defendant cannot assert error in the failure to inspect a presentence investigation report when no demand was made for such inspection prior to sentence. State v. Saddler 820
4. Presentence investigation report examined and held to be in compliance with section 29-2261 (3), R. R. S. 1943. State v. Saddler 820

Principal and Agent.

1. If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon. Fisher v. Beebe & Runyan Furniture Co. 349
2. A party alleging the existence of the agency relationship has the burden of proving the agent's authority and the agent's acts, for which liability against the principal is sought, are within the scope of the agent's authority. Wolfson Car Leasing Co., Inc. v. Weberg 420
3. A principal is liable to third persons for the torts of his agent when committed in the course of and within the scope of the agency, although the principal never authorized, participated in, or ratified the tort; but he is not liable where the tortious act was committed, not in furtherance of the principal's business, but for a purpose personal to the agent himself. Wolfson Car Leas-

ing Co., Inc. v. Weberg 420
4. Apparent or ostensible authority to act as an agent may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent agency. Wolfson Car Leasing Co., Inc. v. Weberg 420
5. Apparent or ostensible authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declaration, or conduct of an agent. Wolfson Car Leasing Co., Inc. v. Weberg 420
6. The knowledge of an insurance agent, to be considered that of the insurer, must be acquired by the agent in the course of his transaction of its business and the insurer is not chargeable with information acquired by an agent in transactions outside the scope of his agency. Mannschreck v. Connecticut General Life Ins. Co. 434
7. Where one employed to act as agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money. Fleury v. Chrisman 584
8. The rule applicable generally is that where an act is done without authority, under an assumed agency, it is the duty of the principal to disavow and repudiate it in a reasonable time after information of the transaction if he would avoid responsibility therefor. What constitutes a reasonable time must largely, if not wholly, depend upon the circumstances of the particular case. Tedco Development Corp. v. Overland Hills, Inc. 748

Probation and Parole.

1. Where an individual signs a document which outlines his conditions of parole and which contains a clause stating that violation of the conditions is cause for parole revocation, he is held to have notice of such conditions. State v. Stroud 27
2. Whether successive presentence investigations are necessary, before the revocation of an order of probation is entered, rests in the sound discretion of the sentencing judge. State v. Stroud 27

Proof.

1. The person challenging competency of counsel has the burden of proof to establish counsel's incompetence. State v. Auger & Uitts 53
2. In an undue influence case the burden of proof, or the

risk of nonpersuasion on that issue, is on the plaintiff and remains there throughout the trial. Anderson v. Claussen 74

3. In an action based on undue influence, when a confidential relationship exists between the parties, and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence shifts to the defendant. Anderson v. Claussen 74

4. The burden of proof is upon a taxpayer to establish his contention that the determination of a tax situs by the board of equalization is discriminatory, unjust, or unfair. Berkshire & Andersen v. Douglas County Board of Equalization 113

5. If the defendant in a negligence case pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to prove that defense. If there is no competent evidence to support a defendant's plea of contributory negligence, it is prejudicial error to submit that issue and the issue of comparative negligence to the jury. Fangmeyer v. Reinwald 120

6. A party who seeks to compel specific performance of a written contract has the burden of proving the contract. Pribil v. Ruther 161

7. In contempt proceedings, it is necessary to establish guilt beyond a reasonable doubt. Bahm v. Raikes 195

8. When each party to an antenuptial contract is chargeable with knowledge of the extent and value of the other's property, a disproportionate allowance for the prospective wife does not shift the burden of proof to the husband or to the representatives of his estate to sustain the contract. Moss v. Stueven 215

9. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and in so doing we will look to the totality of the circumstances. State v. Owen & Sweet 259

10. The assignee of an account receivable has the burden of proving that the account-debtor received notification of the assignment and that the notification reasonably identified the rights assigned. Progressive Design, Inc. v. Olson Brothers Manuf. Co. 291

11. Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury, and proof thereof is indispensable to sustain a conviction. State v. Judd 344

12. Because the intent with which an act is done exists only in the mind of the actor, its proof must be inferred from the act itself and from the facts surrounding the act. State v. Judd 344
13. Where proof is by circumstantial evidence, the circumstances adduced by proof must render the existence of the inferred facts reasonably probable and proof of mere possibility is insufficient. Herman v. Midland Ag Service, Inc. 356
14. In an action for breach of contract, it is incumbent upon the plaintiff to establish both that he is one of the persons entitled to enforce such contract and that defendant failed to perform one or more provisions thereof to his damage. Rapp v. Wilson & Co., Inc. 383
15. The burden is on the defendant to prove that plaintiff should have taken some action to lessen her damages. Hurlbut v. Landgren 413
16. Where the defendant totally fails to sustain the burden with respect to mitigation of damages the trial court is correct in refusing to submit a tendered instruction. Hurlbut v. Landgren 413
17. A party alleging the existence of the agency relationship has the burden of proving the agent's authority and the agent's acts, for which liability against the principal is sought, are within the scope of the agent's authority. Wolfson Car Leasing Co., Inc. v. Weberg ... 420
18. Automobile theft insurance protects only against losses arising from criminal takings of the insured vehicle. There can be no recovery under such a policy for a loss asserted to amount to a theft in the absence of proof of the existence of a criminal intent on the part of the taker. Hubbell v. Farmers Ins. Group 472
19. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. Fleury v. Chrisman 584
20. Robbery may be committed either by force and violence, or by putting in fear. Pleading of these elements may be conjunctive and proof of accomplishment of the robbery by either method is sufficient. State v. Adkins 775

Property.

1. A possessor of land who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability to preferential users unless the withdrawal causes unreasonable harm through lowering the water table or reducing the artesian pressure in existing wells having a preferential use. Prather v. Eisen-

mann 1
2. Under our preference statute an irrigation appropriation can never obtain a right superior to overlying owners to the use of underground water for domestic purposes. Prather v. Eisenmann 1
3. A corporation's tangible personalty is assessed in the taxing area of the corporation's principal place of business unless otherwise provided by statute or unless it has acquired an actual situs elsewhere. Berkshire & Andersen v. Douglas County Board of Equalization 113
4. Permanency of tangible personal property in a taxing area is determined by the ownership and use for which the property is designed and does not embrace the idea of a forever-fixed location or the thought that the owner bringing personal property into the area has no present intention of ever removing it; but it excludes the idea of mobile personal property which happens to be in the taxing area at the moment of the assessment of property which, for some definite purpose of the owner, has come to rest within the area for a limited time. Berkshire & Andersen v. Douglas County Board of Equalization 113
5. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. The existence of a constructive trust is to be determined on the peculiar facts, circumstances, and conditions presented in each case. Kuhlman v. Cargile 151
6. 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. Phillips v. Phillips 253
7. Alimony may be ordered in addition to a property settlement award. The relevant circumstances in determining whether alimony should be awarded and in what amount will vary from case to case. Wenger v. Wenger 446
8. In the absence of illegality, fraud, or a clear abuse of discretion on the part of municipal officers in the exercise of their discretionary power to dispose of municipal property, the sale of such property will not be restrained in equity. Cather & Sons Constr., Inc. v. City of Lincoln 510
9. To warrant this court in interfering with a sale of municipal property by municipal officers acting within the scope of their statutory authority, the evidence should

be such as to show with reasonable certainty that their action could not be construed as having been taken with a view of the general public welfare. Cather & Sons Constr., Inc. v. City of Lincoln 510

10. A municipality may not make a gift of its property to private persons for purposes other than corporate ones, and may not sell its property for wholly inadequate consideration such that a gift is in fact being made. Cather & Sons Constr., Inc. v. City of Lincoln 510

11. A tenancy from year-to-year can only be terminated by agreement of the parties, express or implied, or by notice given, 6 calendar months ending with the period of the year at which the tenancy commenced. Sempek v. Minarik 532

12. In the absence of an express covenant inconsistent therewith, the ordinary lease of realty raises an implied covenant that the lessee shall have the quiet and peaceable possession and enjoyment of the leased premises, so far as regards the lessor, or anyone lawfully claiming through or under him, or anyone asserting a title to the leased premises superior and paramount to that of the lessor. In the absence of a provision to the contrary, such covenant is implied in every lease, and leases by parol are included within the scope of this rule. Sempek v. Minarik 532

13. On review this court will not disturb a division of property made by the trial court unless it is patently unfair. Marymee v. Marymee 539

14. An option to purchase real estate contained in a lease agreement is not terminated by the death of the lessee during the term and before the exercise of the option, in the absence of express limitation. Von Seggern v. Freeland 570

15. Property owned and used exclusively for religious, educational, or charitable purposes is exempt from taxation when such property is not owned or used for financial gain or profit to either the owner or user. Bethesda Foundation v. County of Saunders 574

16. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. Bethesda Foundation v. County of Saunders 574

17. The statute of frauds embodied in section 36-103, R. R. S. 1943, does not prevent any trust in land arising by operation of law. § 36-104, R. R. S. 1943. Fleury v. Chrisman 584

18. A constructive trust is a relationship with respect to property subjecting the person by whom the title to the

property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property. Fleury v. Chrisman 584

19. A constructive trust may arise by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of the legal title. Fleury v. Chrisman 584

20. Where one employed to act as agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money. Fleury v. Chrisman 584

21. Laches does not grow out of the mere passage of time. It is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties. Fleury v. Chrisman 584

22. A judgment of the trial court fixing the amount of alimony or making distribution of property will not be disturbed on appeal unless it is patently unfair on the record. Remmers v. Remmers 647

23. In determining the question of alimony and division of property, 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 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. Remmers v. Remmers 647

24. Under section 42-366, R. R. S. 1943, a property settlement agreement entered into by the parties to a marriage shall not be binding upon the trial court if, considering the economic circumstances of the parties and any other relevant evidence, the agreement is unconscionable. An agreement is unconscionable when it is manifestly unfair or inequitable. Weber v. Weber 659

25. This court is not inclined to disturb the division of property made by the trial court in a divorce action unless it is patently unfair on the record, or unless good cause is shown. Weber v. Weber 659

26. Presumably a wife joins in a land contract solely to release her inchoate right of inheritance, but the presumption is rebuttable, and is to be accorded effect in the absence of a showing to the contrary. Roberts v. Shriners Hospitals for Crippled Children 672
27. Evidence sufficient to rebut a presumption that a wife has joined with her husband in a land contract solely to release her inchoate right of inheritance must be special language which is inserted in the contract and tends to establish an agreement that the wife is to share in the ownership of payments to be made or evidence dehors the contract tending to prove such an agreement. Roberts v. Shriners Hospitals for Crippled Children 672
28. Where it is sought to enforce specific performance of a contract for the sale of realty executed for a corporation by its officers in their individual names, it must be shown either that the corporation authorized the contract or that the execution of the same had been ratified by it. Tedco Development Corp. v. Overland Hills, Inc. 748
29. Whether there has been a ratification in a particular case is ultimately and ordinarily a question of fact. Tedco Development Corp. v. Overland Hills, Inc. 748

Prosecuting Attorneys.

1. It is not misconduct for a prosecutor in the course of his summation to the jury to draw reasonable inferences from the evidence so long as he does not misstate the evidence or mislead the jury as to the inferences it may draw. State v. Johnson 760
2. Before a county attorney can dismiss an information, it is first necessary that approval of the court to do so be obtained. State v. Adkins 775

Public Policy.

Usury laws are not so distinctive a part of public policy of the forum that courts will, on the ground of public policy, decline to enforce any contract which would be invalid, if tested by them, although valid according to its proper law. Exchange Bank & Trust Co. v. Tamerius 807

Ratification or Repudiation.

1. Whether there has been a ratification in a particular case is ultimately and ordinarily a question of fact. Tedco Development Corp. v. Overland Hills, Inc. 748
2. The rule applicable generally is that where an act is done without authority, under an assumed agency, it is

the duty of the principal to disavow and repudiate it in a reasonable time after information of the transaction if he would avoid responsibility therefor. What constitutes a reasonable time must largely, if not wholly, depend upon the circumstances of the particular case. Tedco Development Corp. v. Overland Hills, Inc. 748

Records.

1. While in the context of the entire closing argument, singular remarks of an attorney may be objectionable, this court cannot determine such remarks, standing alone, to be prejudicial in the absence of a complete record of the argument. Caradori v. Fitch 186
2. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. State v. Ernest 615

Reformation of Instruments.

Absent fraud or overreaching, mistake as a ground for reformation of a contract must be a mutual mistake. Universal Surety Co. v. Jed Constr. Co., Inc. 712

Remaindermen.

1. The law favors the early vesting of estates and a remainder will be declared a vested one unless a contrary intent is apparent from the will. Hanley v. Craven 81
2. It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty of the right of future possession or enjoyment if the remainderman, who is ascertained, lives until the determination of the preceding estate. Where the devise is to the remainderman "from and after" or "after" or "at" or "on" the death of the life tenant, or words of similar import are employed, such expressions are construed as relating to the time of the enjoyment of the estate and not as to its vesting, and such remainder is a vested one. The uncertainty as to whether or not the remainderman will live to come into actual possession or enjoyment of the estate does not make the remainder contingent, for that is an uncertainty which attaches to all remainders. Hanley v. Craven 81
3. If a person, to whom a prior interest in the subject matter of the conveyance has been given, is the sole heir of

the designated ancestor at the death of such ancestor, there is an incongruity in also giving such person all the interest under limitation to "heirs" or "next of kin," or "heirs-at-law by blood relation," and thus to avoid the incongruity, the determination of the class of persons who qualify as such heirs is ordinarily to be made as of the death of the taker of the prior interest. Hanley v. Craven 81

4. While ordinarily such words as "at her death" do not have the effect of postponing the vesting of an estate in remainder, this is not true if, when they are read in context, the intention of the testator would appear to be otherwise. Hanley v. Craven 81

Restitution.

The law of restitution and unjust enrichment deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly suffer loss. Wolfson Car Leasing Co., Inc. v. Weberg 420

Restraint of Trade.

1. The purchase of business property is a sufficient consideration for a contract by the seller that, for a reasonable time in a limited territory, he will not engage in the buyer's business. D. W. Trowbridge Ford, Inc. v. Galyen 103
2. Partial restraints are not unreasonable if they are ancillary to a purchase of property made in good faith and are necessary to afford protection to the purchaser. What is a reasonable restraint depends largely upon the facts of the particular case. D. W. Trowbridge Ford, Inc. v. Galyen 103
3. While the measure of damages in an action for the breach of an agreement by the seller not to reenter business in competition with the buyer is usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact. D. W. Trowbridge Ford, Inc. v. Galyen 103
4. In order to recover substantial damages, the plaintiff must furnish sufficient data to enable the court, with a reasonable degree of certainty and exactness, to estimate the actual damages. D. W. Trowbridge Ford, Inc. v. Galyen 103
5. The amount recoverable for breach of an agreement by the seller of a business not to engage in competition with the buyer is the loss which the latter has sustained, naturally resulting from the breach. D. W. Trowbridge Ford, Inc. v. Galyen 103

Robbery.

1. Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the Nebraska Penal and Correctional Complex for a term of not less than 3 years and not more than 50 years. § 28-414, R. R. S. 1943. State v. Adkins 775
2. Robbery may be committed either by force and violence, or by putting in fear. Pleading of these elements may be conjunctive and proof of accomplishment of the robbery by either method is sufficient. State v. Adkins 775

Rules of Court.

1. Trial courts have the inherent power, independent of any statute or rule of court, to dismiss a case for failure to prosecute with due diligence. The exercise of this power rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion. Schaeffer v. Hunter 221
2. The Supreme Court will take judicial notice of all rules of District, Separate Juvenile, County, Municipal, and Workmen's Compensation Courts on file with the Clerk of the Supreme Court. State v. Barrett 553

Sales.

1. An oral contract for the sale of goods for the price of $500 or more, ordinarily unenforceable under section 2-201 (1), U. C. C., is enforceable with respect to goods which have been received and accepted, or if the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract for sale was made. Wilke v. Holdrege Coop. Equity Exchange 803
2. Estoppel may not be utilized to defeat the defense of the statute of frauds in an action by a buyer on an oral contract where the seller does nothing more than fail to deliver goods. Wilke v. Holdrege Coop. Equity Exchange 803

Schools and School Districts.

1. At a hearing before a board of education to terminate the contract of a tenured teacher under section 79-1254, R. R. S. 1943, the evidence at the hearing must be sufficient to establish just cause for termination. Sanders v. Board of Education 282

2. Under section 79-1254, R. R. S. 1943, the term "just cause" means incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duty. Sanders v. Board of Education 282
3. In order to overturn rules for the expulsion of participants from interscholastic athletics on the ground that such rules are unreasonable or arbitrary, or that they invade private rights, the evidence of such facts must be clear and satisfactory. Braesch v. DePasquale 726
4. Where a board of education has provided effective, reasonable, and prompt procedures for notice, hearing, and review of an order of expulsion from participation in interscholastic athletics, and the athlete neglects or refuses to follow or comply with such procedures and exhaust such remedies, such neglect or refusal ordinarily constitutes a waiver of any right to subsequent injunctive relief. Braesch v. DePasquale 726

Searches and Seizures.

1. A warrantless entry is valid if police officers enter under exigent circumstances of hot pursuit. State v. Penas 387
2. Where an affidavit in application of a search warrant to search a residence for controlled substances is based on information supplied by an informant, the court must be informed of some of the underlying circumstances from which the informant concluded that the contraband was where he claimed it to be, and some of the underlying circumstances from which the applicant concluded that the informant was credible or his information reliable. State v. Britt 601
3. An affidavit for a search warrant based on information concerning an event occurring 7 months previously is not insufficient where the evidence sought was in the nature of mementos or keepsakes. State v. Ernest 615
4. An affidavit for a search warrant which lists three possible locations where the evidence might be found is not insufficient where the person believed to be in possession of the evidence has no permanent address but is known to stay at each of the locations and keep personal belongings at each place. State v. Ernest 615
5. A warrantless search of a house may be justified when the police have obtained the consent to search from a party who possessed common authority over, or other sufficient relationship to, the premises sought to be inspected. State v. Van Ackeren 812

Security Agreements.

1. A security agreement between a bank and a farmer and rancher, who is also a cattle trader or speculator, which grants a security interest in livestock used for farming operations, does not cover cattle purchased and held for immediate sale and not intended for use in any farming operation. First State Bank v. Producers Livestock Marketing Assn. 12
2. A financing statement which has been properly recorded is binding on a marketing agency. First State Bank v. Producers Livestock Marketing Assn. 12

Sentences.

1. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Stroud 27
   State v. Davis 557
2. In the absence of statute, when a valid sentence has been put into execution by commitment of a prisoner, the court has no authority to set aside, modify, amend, or revise the sentence, either during or after the term or session of court at which the sentence was imposed. State v. McDermott 337
3. Where a portion of a sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence. State v. McDermott 337
4. It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively, as opposed to concurrently. State v. Davis 557
5. In passing sentence, it is proper for the trial court to take into consideration other offenses that have been committed by an accused. State v. Bruns 612
6. A sentence of imprisonment ought not exceed the minimum period consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. State v. Suggett 693
7. Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the Nebraska Penal and Correctional Complex for a term

of not less than 3 years and not more than 50 years. § 28-414, R. R. S. 1943. State v. Adkins 775
8. A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. State v. Jackson 827

Specific Performance.

1. A party who seeks to compel specific performance of a written contract has the burden of proving the contract. Pribil v. Ruther 161
2. The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust and may be denied where the party seeking it has failed to perform. Tedco Development Corp. v. Overland Hills, Inc. 748
3. The burden is primarily on the party seeking specific performance to show his right in equity and good conscience to the relief sought. Tedco Development Corp. v. Overland Hills, Inc. 748
4. The evidence which entitles a party to specific performance must be clear, satisfactory, and unequivocal. Tedco Development Corp. v. Overland Hills, Inc. 748
5. A party who seeks specific performance must show not only that he has a valid, legally enforceable contract, but also that he has substantially complied with its terms by performing, or offering to perform on his part, the acts which formed the consideration of the undertaking on the part of the defendant or that he is ready, able, and willing to perform his obligations under the contract. Tedco Development Corp. v. Overland Hills, Inc. 748
6. Where it is sought to enforce specific performance of a contract for the sale of realty executed for a corporation by its officers in their individual names, it must be shown either that the corporation authorized the contract or that the execution of the same had been ratified by it. Tedco Development Corp. v. Overland Hills, Inc. 748

States.

1. The area of domestic relations is virtually the exclusive province of the states, which have the right to prescribe the conditions upon which the marriage relation between their own citizens shall be created and dissolved,

and which have an interest in the continuation and dissolution of the marital relation. Weber v. Weber 659

2. Where a promissory note is made in one state, to be performed in another state, it is, ordinarily, to be regulated and governed by the laws of the place of performance, without regard to the place at which it was written, dated, or signed, unless it clearly appears that the parties intended that the contract should be governed by the law of the place where made. Exchange Bank & Trust Co. v. Tamerius 807

Statutes.

1. Preference in the use of underground water shall be given to those using the water for domestic purposes. They shall have preference over those claiming it for any other purpose. Those using the water for agricultural purposes shall have the preference over those using the same for manufacturing or industrial purposes. Prather v. Eisenmann 1
2. Domestic use of ground water shall mean all uses of ground water required for human needs as it relates to health, fire control, and sanitation and shall include the use of ground water for domestic livestock as related to normal farm and ranch operations. Prather v. Eisenmann 1
3. As between domestic users of ground water there is no preference or priority. Every overlying owner has an equal right to a fair share of the underground water for domestic purposes. Prather v. Eisenmann 1
4. Under our preference statute an irrigation appropriation can never obtain a right superior to overlying owners to the use of underground water for domestic purposes. Prather v. Eisenmann 1
5. The so-called "presumption of undue influence" is not a presumption within the ambit and meaning of section 27-301, R. R. S. 1943. Anderson v. Claussen 74
6. The policy of section 48-838, R. R. S. 1943, is opposition to undue fragmentation of bargaining units. American Fed. of S., C. & M. Emp. v. State 171
7. Section 48-838, R. R. S. 1943, is not limited in applicability only to those governmental subdivisions enumerated. American Fed. of S., C. & M. Emp. v. State 171
8. In a proceeding in juvenile court under section 43-202 (1) or (2) and section 43-209, R. S. Supp., 1976, to declare children to be neglected or dependent children, when the jurisdiction of the court to terminate parental rights has been properly invoked and appropriate service of summons has been had, the jurisdiction of the

court to terminate parental rights continues until the matter is finally determined. State v. Williams 182
9. At a hearing before a board of education to terminate the contract of a tenured teacher under section 79-1254, R. R. S. 1943, the evidence at the hearing must be sufficient to establish just cause for termination. Sanders v. Board of Education 282
10. Under section 79-1254, R. R. S. 1943, the term "just cause" means incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duty. Sanders v. Board of Education 282
11. Repeals by implication are not favored. American Fed. S., C. & M. Emp. v. County of Lancaster 301
12. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. American Fed. S., C. & M. Emp. v. County of Lancaster 301
13. A legislative act which is complete in itself, and is repugnant to or in conflict with a prior law, repeals the prior law by implication but only to the extent of the repugnancy or conflict. American Fed. S., C. & M. Emp. v. County of Lancaster 301
14. Sections 23-2517 to 23-2533, R. R. S. 1943, relating to personnel administration in counties having a population of 150,000 to 300,000 inhabitants, did not repeal the Court of Industrial Relations Act except to the extent the acts are in conflict. American Fed. S., C. & M. Emp. v. County of Lancaster 301
15. The board of county commissioners in such counties is required to bargain with its employees on all matters relating to employment except those which are covered by specific provisions of sections 23-2517 to 23-2533, R. R. S. 1943. American Fed. S., C. & M. Emp. v. County of Lancaster 301
16. An irrigation district organized under Chapter 46, R. R. S. 1943, is liable for seepage damage under Article I, section 21, of the Constitution of Nebraska, without regard to negligence. Halstead v. Farmers Irr. Dist. 314
17. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. § 27-401, R. R. S. 1943. Herman v. Midland Ag Service, Inc. 356
18. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger

of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. § 27-403, R. R. S. 1943. Herman v. Midland Ag Service, Inc. 356

19. A managing agent of a foreign corporation upon whom service of summons may be made under section 25-511, R. R. S. 1943, is an agent who has charge of the business activities of the corporation, or some branch, department, or division thereof; and in respect to matters entrusted to him, he exercises judgment and discretion in the conduct of the corporation affairs within this state; and who, under the circumstances here, is of sufficient position and rank to make it reasonably certain the defendant will be apprised of the service of summons. Keriakedes v. J. C. Penney Co., Inc. 399

20. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. § 27-801 (3), R. R. S. 1943. Murdoch v. Murdoch 429

21. Declarations of an existing state of mind, if material, are admissible as exceptions to the hearsay rule. § 27-803 (2), R. R. S. 1943. Barnes v. Milligan 450

22. An instruction stating that the elements of felonious entry under section 28-533, R. R. S. 1943, are (1) a willful and malicious entry with intent to steal, (2) a subsequent attempt to steal, and (3) the time and place of the offense, is proper. State v. Mackey 549

23. Section 25-1410, R. R. S. 1943, provides that upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representative, the revivor shall be in his name; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names. Spradlin v. Myers 559

24. A nursing home owned and operated by a nonprofit corporation is exempt from taxation under section 77-202, R. R. S. 1943, when it is not owned or used for financial gain or profit to either the owner or user. Bethesda Foundation v. County of Saunders 574

25. Section 25-2001, R. R. S. 1943, specifically grants the power to the District Court to vacate or modify its own judgments after term time for the reasons stated therein. Tietsort v. Ranne 651

26. Under section 42-341, R. R. S. 1943, a divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state if both parties

to the marriage were domiciled in this state at the time the proceeding for divorce was commenced. Weber v. Weber 659
27. Under section 42-366, R. R. S. 1943, a property settlement agreement entered into by the parties to a marriage shall not be binding upon the trial court if, considering the economic circumstances of the parties and any other relevant evidence, the agreement is unconscionable. An agreement is unconscionable when it is manifestly unfair or inequitable. Weber v. Weber 659
28. An automobile policy, to which sections 44-516 to 44-522, R. R. S. 1943, apply, issued for less than a 6-month period, is to be considered, for all purposes of said sections, as if written for a period of 6 months. Conover v. Dairyland Ins. Co. 715
29. Under the provisions of section 27-103, R. R. S. 1943, error may not be predicated upon a ruling admitting evidence unless the specific ground of objection has been stated, if such ground is not apparent from the context. Langenheim v. City of Seward 740
30. Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the Nebraska Penal and Correctional Complex for a term of not less than 3 years and not more than 50 years. § 28-414, R. R. S. 1943. State v. Adkins 775
31. Presentence investigation report examined and held to be in compliance with section 29-2261 (3), R. R. S. 1943. State v. Saddler 820

Streets and Alleys.

1. The exercise of a city council's discretionary power to vacate streets and alleys is not ordinarily subject to judicial review unless there has been an abuse of discretion, fraud, a glaring informality or illegality in proceedings, or an absence of jurisdiction. Cather & Sons Constr. Inc. v. City of Lincoln 510
2. A property owner whose property does not abut upon a portion of a street which a municipality proposes to vacate or obstruct has no right of action to restrain the vacation or prevent the obstruction unless the access to his property is interfered with and he suffers a special or peculiar damage differing in kind from that of the general public. Cather & Sons Constr., Inc. v. City of Lincoln 510

Summary Judgments.

1. In reviewing the correctness of the granting of a motion for summary judgment, the evidence will be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom. Mannschreck v. Connecticut General Life Ins. Co. 434
2. A moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where under the facts he is entitled to judgment as a matter of law. Mannschreck v. Connecticut General Life Ins. Co. 434
3. The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law. The trial court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. Hubbell v. Farmers Ins. Group 472
4. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. Blome v. Hottell 528
5. In considering a motion for summary judgment, the court should take that view of the evidence 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 from the evidence. Blome v. Hottell 528
6. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity of expense and delay of trial, those cases where there is no genuine claim or defense. Page v. Andreasen 641
7. When the allegations of the pleadings have been pierced by a movant for summary judgment and resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted. Page v. Andreasen 641
8. On a motion for summary judgment the trial court is to examine the evidence and pleadings only to discover if any real issue of fact exists, and to decide whether the moving party is entitled to judgment as a matter of law. The court must view the evidence in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn there-

from. Wilke v. Holdrege Coop. Equity Exchange 803
9. A motion for summary judgment should be granted only where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Exchange Bank & Trust Co. v. Tamerius 807

Summons.

A managing agent of a foreign corporation upon whom service of summons may be made under section 25-511, R. R. S. 1943, is an agent who has charge of the business activities of the corporation, or some branch, department, or division thereof; and in respect to matters entrusted to him, he exercises judgment and discretion in the conduct of the corporation affairs within this state; and who, under the circumstances here, is of sufficient position and rank to make it reasonably certain the defendant will be apprised of the service of summons. Keriakedes v. J. C. Penney Co., Inc. 399

Suretyship.

A surety who has been adjudged liable to a creditor of the principal is entitled to a declaration of his right to indemnity in the event of payment to the creditor. First State Bank v. Producers Livestock Marketing Assn. 12

Taxation.

1. A corporation's tangible personalty is assessed in the taxing area of the corporation's principal place of business unless otherwise provided by statute or unless it has acquired an actual situs elsewhere. Berkshire & Andersen v. Douglas County Board of Equalization 113
2. Permanency of tangible personal property in a taxing area is determined by the ownership and use for which the property is designed and does not embrace the idea of a forever-fixed location or the thought that the owner bringing personal property into the area has no present intention of ever removing it; but it excludes the idea of mobile personal property which happens to be in the taxing area at the moment of the assessment of property which, for some definite purpose of the owner, has come to rest within the area for a limited time. Berkshire & Andersen v. Douglas County Board of Equalization 113
3. The burden of proof is upon a taxpayer to establish his contention that the determination of a tax situs by the board of equalization is discriminatory, unjust, or unfair. Berkshire & Andersen v. Douglas County Board

of Equalization 113
4. The determinations of both the county board of equalization and the State Board of Equalization and Assessment are clothed with a presumption of validity. Berkshire & Andersen v. Douglas County Board of Equalization 113
5. A decision of the county board of equalization will not be disturbed on appeal unless clearly wrong. Berkshire & Andersen v. Douglas County Board of Equalization 113
6. Property owned and used exclusively for religious, educational, or charitable purposes is exempt from taxation when such property is not owned or used for financial gain or profit to either the owner or user. Bethesda Foundation v. County of Saunders 574
7. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. Bethesda Foundation v. County of Saunders 574
8. The concept of charity is broad enough to include practical enterprises for the good of humanity operated at a modest cost to those who receive benefits. Bethesda Foundation v. County of Saunders 574
9. A nursing home owned and operated by a nonprofit corporation is exempt from taxation under section 77-202, R. R. S. 1943, when it is not owned or used for financial gain or profit to either the owner or user. Bethesda Foundation v. County of Saunders 574
10. The Legislature has a broad discretion in making classifications for the purpose of excise taxes. Ralston v. County of Dawson 678
11. A tax classification, although discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. Ralston v. County of Dawson 678
12. The matter of the exemptions in the inheritance tax law, to whom they apply and the amount thereof, is a legislative matter and not a judicial prerogative. Ralston v. County of Dawson 678
13. Previous inheritance tax law which distinguished between nephews related by blood and nephews related by marriage is constitutional. Ralston v. County of Dawson 678
14. It is generally held that if the form of a return calls for answers that the taxpayer is privileged from making he may raise the objection in the return but cannot on that account refuse to make any return at all. State v.

Spurgeon 719
15. While the income tax consequences of the deductibility of certain payments and the claiming of exemptions are factors to be considered by the court in determining the amounts of alimony or support, the decision of the Internal Revenue Service as to their deductibility is not binding or persuasive in determining whether payments not denominated specifically as alimony or child support are in reality one or the other, or partly some of each. Young v. Young 787

Time.

1. An insurance policy should be interpreted in accordance with reasonable expectations of the insured at the time of the contract. Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co. 46
2. The primary burden is upon the State to bring an accused person to trial within the time provided by law. State v. Hankins 69
3. Upon a motion for discharge, the burden is upon the State to prove by a substantial preponderance of the evidence that one or more of the excluded periods is applicable, if the trial is not commenced within 6 months after the filing of the information. The trial court is required to make specific findings as to the cause of any extension and the period of extension attributable to such cause. State v. Hankins 69
4. A claim in Workmen's Compensation Court must be filed within 1 year of the date in which the last statement for services or compensation was paid. McGahan v. St. Francis Hospital 406
5. The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness, and probable compensable character of his injury or disease. McGahan v. St. Francis Hospital 406
6. A motion for new trial filed prior to the rendition of a judgment is premature and constitutes a nullity. State ex rel. Kaipus v. Board of Trustees of S. & I. Dist. No. 113 525
7. A claim that a statute is unconstitutional must be raised at or before the time of trial, or it will be considered waived. Such a claim, first made in the motion for new trial, does not satisfy the requirement. State v. Mackey 549
8. The statute of limitations does not begin to run in the case of a resulting or constructive trust growing out of a consensual arrangement until the trustee clearly

repudiates the trust. The time when the statute of limitations commences to run must be determined on the facts in each case. Fleury v. Chrisman 584

9. Section 25-2001, R. R. S. 1943, specifically grants the power to the District Court to vacate or modify its own judgments after term time for the reasons stated therein. Tietsort v. Ranne 651

10. Within 3 days after the rendition of any judgment, except judgments by default rendered in divorce or separate maintenance cases, where proper service has been obtained or an appearance of the defaulting party has been made, the clerk of the court shall send a post card by United States mail to each party who has made an appearance in the action, or to his attorney or attorneys of record, advising that a judgment has been rendered and the date of rendition thereof. Tietsort v. Ranne 651

11. In an eminent domain proceeding the date of valuation for property taken and for severance damages suffered is the date condemner files its petition in condemnation in the county court. Langenheim v. City of Seward ... 740

12. The rule applicable generally is that where an act is done without authority, under an assumed agency, it is the duty of the principal to disavow and repudiate it in a reasonable time after information of the transaction if he would avoid responsibility therefor. What constitutes a reasonable time must largely, if not wholly, depend upon the circumstances of the particular case. Tedco Development Corp. v. Overland Hills, Inc. 748

Torts.

1. The measure of recovery in all civil cases is compensation for the injuries sustained. Prather v. Eisenmann 1

2. A principal is liable to third persons for the torts of his agent when committed in the course of and within the scope of the agency, although the principal never authorized, participated in, or ratified the tort; but he is not liable where the tortious act was committed, not in furtherance of the principal's business, but for a purpose personal to the agent himself. Wolfson Car Leasing Co., Inc. v. Weberg 420

Trial.

1. In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the party against whom the motion is directed. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable in-

ference which may be drawn therefrom. Clark Bilt, Inc. v. Wells Dairy Co. 20
2. Error cannot be predicated on a failure to instruct the jury on some particular aspect of the case unless a proper instruction has been requested by the party complaining. Clark Bilt, Inc. v. Wells Dairy Co. 20
3. Existence of fraud or false swearing with respect to a fire loss represented to an insurer to have been sustained is for the trier of facts. Omaha Paper Stock Co. v. California Union Ins. Co. 31
4. The judgment of the trial court in an action at law, where a jury has been waived, has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong. Omaha Paper Stock Co. v. California Union Ins. Co. 31
Clemens Mobile Homes, Inc. v. Liberty Homes, Inc. 165
5. It is not within the province of the Supreme Court to resolve conflicts in or to weigh evidence and it will be presumed that controverted facts were decided by the trial court in favor of the successful party. Omaha Paper Stock Co. v. California Union Ins. Co. 31
6. When it has been proven that damage has resulted and the only uncertainty is the exact amount, it is sufficient if there is evidence from which the amount of the damages can be ascertained with reasonable certainty. Omaha Paper Stock Co. v. California Union Ins. Co. 31
7. The rule concerning ascertainment of damages with reasonable certainty is not peculiar to cases against insurance companies. In all cases the law requires, not mathematical certainty, but merely the best evidence obtainable under the condition existing, and some reliance must be placed upon the integrity and good faith of witnesses and the discretion of the jury. Omaha Paper Stock Co. v. California Union Ins. Co. 31
8. In an action where a plaintiff prevails against an insurance company, the court shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings. Omaha Paper Stock Co. v. California Union Ins. Co. 31
9. The amount of an award of an attorney's fee is largely within the discretion of the trial court. While trial courts and appellate courts equally are regarded as experts on the value of legal services, a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will interfer

only to correct a patent injustice where the allowance is clearly excessive, or insufficient. Omaha Paper Stock Co. v. California Union Ins. Co. 31

10. The party against whom a motion for a directed verdict is directed 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. Garcia v. Howard 57

11. Ordinarily the questions of negligence, contributory negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper. Garcia v. Howard 57

12. As a general rule evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. State v. Morosin 62

13. Evidence of other crimes similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. State v. Morosin 62

14. Evidence of similar offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Morosin 62
State v. Walker 273

15. Evidence of other similar offenses may be admissible to show intent where there is, or may be, from the evidence, an inference of mistake, accident, want of guilty knowledge, lawful purpose, or innocent intent. State v. Morosin 62

16. The primary burden is upon the State to bring an accused person to trial within the time provided by law. State v. Hankins 69

17. Upon a motion for discharge, the burden is upon the State to prove by a substantial preponderance of the evidence that one or more of the excluded periods is applicable, if the trial is not commenced within 6 months after the filing of the information. The trial court is required to make specific findings as to the cause of any extension and the period of extension attributable to such cause. State v. Hankins 69

18. In an undue influence case the burden of proof, or the risk of nonpersuasion on that issue, is on the plaintiff and remains there throughout the trial. Anderson v. Claussen 74

19. In an action based on undue influence, when a confidential relationship exists between the parties, and a prima facie case is established, the burden of proof re-

mains on the plaintiff, but the burden of going forward with the evidence shifts to the defendant. Anderson v. Claussen 74

20. When the question is one of a common or general interest to many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. Berkshire & Andersen v. Douglas County Board of Equalization 113

21. In determining whether a class action is properly brought, considerable discretion is vested in the trial court. Berkshire & Andersen v. Douglas County Board of Equalization 113

22. If the defendant in a negligence case pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to prove that defense. If there is no competent evidence to support a defendant's plea of contributory negligence, it is prejudicial error to submit that issue and the issue of comparative negligence to the jury. Fangmeyer v. Reinwald 120

23. The question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence; it is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury. Fangmeyer v. Reinwald 120

24. A motion for a directed verdict 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. 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. Fangmeyer v. Reinwald 120
Elgin Mills, Inc. v. Hoffman 598

25. Where the undisputed physical facts demonstrate that a party was not negligent in the operation of his automobile at the time of a collision, the evidence is not sufficient to support a verdict for the other party; and where contributory negligence is charged against a plaintiff but the physical facts disclose conclusively that he was not guilty, it is error for the court to submit that question as an issue to the jury. The physical facts, however, must indisputably demonstrate that the collision out of which the cause of action arose was not caused by the party charged with negligence or con-

tributory negligence before a verdict should be directed in favor of that party. Fangmeyer v. Reinwald 120
26. The newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in result. Such evidence must be competent, material, and credible, and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial. State v. French 137
27. When a cause of action for equitable relief is stated and when the plaintiff prays for equitable relief, a jury trial cannot be demanded as a matter of right by the defendant, even if the defendant pleads legal defenses or files a counterclaim for damages. Kuhlman v. Cargile 150
28. It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. Kuhlman v. Cargile 150
29. Actions to declare a resulting or constructive trust are equitable actions. Kuhlman v. Cargile 150
30. While in the context of the entire closing argument, singular remarks of an attorney may be objectionable, this court cannot determine such remarks, standing alone, to be prejudicial in the absence of a complete record of the argument. Caradori v. Fitch 186
31. This court on appeal will consider the fact the trial court saw and heard the witnesses and observed their demeanor, and will give great weight to the trial court's judgment as to credibility. Bahm v. Raikes ... 195
32. The responsibility rests on the plaintiff to prosecute his case with reasonable diligence. Schaeffer v. Hunter 221
33. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and in so doing we will look to the totality of the circumstances. State v. Owen & Sweet 259
34. When there are outbursts of emotion in the courtroom, it is within the sound discretion of the trial court to deal with them in such a manner as to best preserve the judicial atmosphere and insure a fair and impartial trial for the defendant. State v. Scott 265
35. Evidence which tends to show a course of conduct, scheme, or design is admissible to prove identity although such evidence relates to other offenses. State

v. Walker 273
36. In a divorce action, the case is to be tried de novo upon the issues presented on appeal. The court in reaching its own finding, however, 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. Farmer v. Farmer 308
37. A court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Olson 341
38. A finding of fact by a court of law where the jury has been waived has the effect of a verdict by a jury and will not be set aside on appeal unless clearly wrong. Fisher v. Beebe & Runyan Furniture Co. 349
39. It is the duty of the trial court, without request, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence. This principle applies to theories of defense as well as those upon which the plaintiff's cause of action is founded. The failure to so instruct is prejudicial error. Herman v. Midland Ag Service, Inc. 356
40. Where proof is by circumstantial evidence, the circumstances adduced by proof must render the existence of the inferred facts reasonably probable and proof of mere possibility is insufficient. Herman v. Midland Ag Service, Inc. 356
41. In a proper case where sufficient foundation is laid, the results of scientific experiments may be admissible as substantive evidence to prove the existence of a condition as well as for the purpose of proving that the condition was the proximate cause of a result. Herman v. Midland Ag Service, Inc. 356
42. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. § 27-401, R. R. S. 1943. Herman v. Midland Ag Service, Inc. 356
43. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. § 27-403, R. R. S. 1943. Herman v. Midland Ag Service, Inc. 356
44. Where evidence is presented which could, if accepted

by the jury, give rise to application of the sudden emergency rule, an instruction on that rule is proper. Bedke v. Kucera 380

45. In order for an error of law occurring at trial to be considered by the Supreme Court on appeal, the alleged error must be properly presented to the trial court and properly preserved. State v. Penas 387

46. It is elementary that in considering a motion for a directed verdict, the truth of all competent evidence submitted on behalf of the party against whom the motion is directed shall be considered as true. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can be reasonably deduced from the evidence. Hurlbut v. Landgren 413

47. Where the defendant totally fails to sustain the burden with respect to mitigation of damages the trial court is correct in refusing to submit a tendered instruction. Hurlbut v. Landgren 413

48. A presumption arises that the trial court, trying a case without a jury, in arriving at a decision, will consider such evidence only as it is competent and relevant and the Supreme Court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence admitted sufficient to sustain the trial court's judgment. Murdoch v. Murdoch 429

49. Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits. Steinberg v. Stahlnecker 466

50. Finding that appellee was not negligent in the operation of appellant's vehicle, held supported by competent evidence. Lovell v. City of Kearney 478

51. A claim that a statute is unconstitutional must be raised at or before the time of trial, or it will be considered waived. Such a claim, first made in the motion for new trial, does not satisfy the requirement. State v. Mackey 549

52. Defense counsel has discretion to formulate trial tactics whether or not to make objections to evidence and whether or not to call certain witnesses; the adequacy of his conduct of the defense will be measured according to a comparison with that of a lawyer with ordinary training and skill in the criminal law in his area. State

v. Mackey 549
53. The fact that a party is indemnified for loss by an insurance company is irrelevant to the issue of negligence and it is reversible error to permit the plaintiff to show the fact of insurance. Motis v. Manning 593
54. A motion for mistrial is ordinarily timely if made at the first reasonable opportunity. Motis v. Manning 593
55. The asking of improper questions of a witness to which objections are sustained by the court do not constitute prejudical error in the absence of a showing that defendant was thereby deprived of a fair and impartial trial. State v. Bruns 612
56. Fraud is never presumed but must be established by the party alleging it by clear and satisfactory evidence. Page v. Andreasen 641
57. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity of expense and delay of trial, those cases where there is no genuine claim or defense. Page v. Andreasen 641
58. When the allegations of the pleadings have been pierced by a movant for summary judgment and resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted. Page v. Andreasen 641
59. Where evidence upon an issue is undisputed, the question is one for decision by the court as a matter of law. Veik v. The Tilden Bank 705
60. A trial judge may, in his discretion, question witnesses during trial. A party may object thereto at the time or at the next available opportunity when the jury is not present. § 27-614, R. R. S. 1943. Veik v. The Tilden Bank 705
61. A trial court, in its sound discretion, may permit a party to withdraw his rest and offer additional evidence. Such action will stand unless there has been an abuse of discretion. Veik v. The Tilden Bank 705
62. The submission of special findings to a jury is discretionary with the trial court and there is no error unless there has been an abuse of discretion. Langenheim v. City of Seward 740
63. Under the provisions of section 27-103, R. R. S. 1943, error may not be predicated upon a ruling admitting evidence unless the specific ground of objection has been stated, if such ground is not apparent from the context. Langenheim v. City of Seward 740
64. Failure of the trial court to file instructions with the clerk of the court is not, in and of itself, prejudical.

Langenheim v. City of Seward 740
65. A party cannot complain of error when, by his own action, he has acquiesced therein. Langenheim v. City of Seward 740
66. Whether, in the course of laying foundation for impeachment of a witness, the inclusion of extraneous material containing a reference to the accused having been previously incarcerated, introduced as part of a question calling for the admission by the witness of a previous contradictory statement on a relevant or material matter, constitutes reversible error depends upon all the facts and circumstances of the case. State v. Johnson 760
67. It is not misconduct for a prosecutor in the course of his summation to the jury to draw reasonable inferences from the evidence so long as he does not misstate the evidence or mislead the jury as to the inferences it may draw. State v. Johnson 760
68. In a case where the jury is waived and there is a conflict in the evidence, the reviewing court will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly erroneous. Mobil Oil Corp. v. Grantham 782
69. Where plaintiff's action is dismissed at the close of his evidence, on appeal plaintiff is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that reasonably could be deduced from the evidence. Young v. Young 787
70. On a motion for summary judgment the trial court is to examine the evidence and pleadings only to discover if any real issue of fact exists, and to decide whether the moving party is entitled to judgment as a matter of law. The court must view the evidence in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn therefrom. Wilke v. Holdrege Coop. Equity Exchange 803
71. A motion for a change of venue is directed to the sound discretion of the trial court. In the absence of an abuse of discretion the ruling will not be disturbed. State v. Simpson 823
72. A trial judge should not enter into any agreement that the defendant will be permitted to withdraw his plea if the judge does not accept the county attorney's recommendation on sentence. State v. Simpson 823

Trusts.

1. Actions to declare a resulting or constructive trust are equitable actions. Kuhlman v. Cargile 150
2. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. The existence of a constructive trust is to be determined on the peculiar facts, circumstances, and conditions presented in each case. Kuhlman v. Cargile 150
3. The statute of frauds embodied in section 36-103, R. R. S. 1943, does not prevent any trust in land arising by operation of law. § 36-104, R. R. S. 1943. Fleury v. Chrisman 584
4. A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property. Fleury v. Chrisman 584
5. A constructive trust may arise by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of the legal title. Fleury v. Chrisman 584
6. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. Fleury v. Chrisman 584
7. Where one employed to act as agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money. Fleury v. Chrisman 584
8. The statute of limitations does not begin to run in the case of a resulting or constructive trust growing out of a consensual arrangement until the trustee clearly repudiates the trust. The time when the statute of limitations commences to run must be determined on the facts in each case. Fleury v. Chrisman 584

Undue Influence.

1. To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that she could not understand and comprehend the purport and effect of what she was then doing. Anderson v. Claussen 74
2. A prima facie case of undue influence is made out in case of a deed where it is shown by clear and satisfactory evidence (1) that the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. Anderson v. Claussen 74
3. The so-called "presumption of undue influence" is not a presumption within the ambit and meaning of section 27-301, R. R. S. 1943. Anderson v. Claussen 74
4. In an undue influence case the burden of proof, or the risk of nonpersuasion on that issue, is on the plaintiff and remains there throughout the trial. Anderson v. Claussen 74
5. In an action based on undue influence, when a confidential relationship exists between the parties, and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence shifts to the defendant. Anderson v. Claussen 74

Uniform Commercial Code.

1. Under the Uniform Commercial Code, goods are classified as consumer goods, equipment, farm products, or inventory. First State Bank v. Producers Livestock Marketing Assn. 12
2. Livestock used or produced in farming operations and in the possession of a debtor engaged in raising, fattening, grazing, or other farming operations are farm products. If goods are farm products they are neither equipment nor inventory. First State Bank v. Producers Livestock Marketing Assn. 12
3. Goods which are held for sale or lease are classified as inventory. The principal test to determine whether goods are inventory is whether they are held for immediate or ultimate sale. First State Bank v. Producers Livestock Marketing Assn. 12
4. Cattle purchased and held for immediate sale by a cattle trader and speculator are inventory and not farm products. First State Bank v. Producers Livestock

Marketing Assn. 12
5. A security agreement between a bank and a farmer and rancher, who is also a cattle trader or speculator, which grants a security interest in livestock used for farming operations, does not cover cattle purchased and held for immediate sale and not intended for use in any farming operation. First State Bank v. Producers Livestock Marketing Assn. 12
6. A financing statement which has been properly recorded is binding on a marketing agency. First State Bank v. Producers Livestock Marketing Assn. 12
7. Receipt of a written confirmation of an oral contract more than 6 months after the oral contract was made was not a receipt "within a reasonable time" as required by subsection (2) of section 2-201, U. C. C. Kimball County Grain Coop v. Yung 233
8. The assignee of an account receivable has the burden of proving that the account-debtor received notification of the assignment and the notification reasonably identified the rights assigned. Progressive Design, Inc. v. Olson Brothers Manuf. Co. 291
9. A writing is sufficient to avoid the bar of section 2-201, U. C. C., if it evidences a contract for the sale of goods, is authenticated in any manner by the party to be charged and identifies such party, and specifies the quantity of goods involved, notwithstanding other terms of the contract need be shown by parol evidence. Veik v. The Tilden Bank 705
10. An oral contract for the sale of goods for the price of $500 or more, ordinarily unenforceable under section 2-201 (1), U. C. C., is enforceable with respect to goods which have been received and accepted, or if the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract for sale was made. Wilke v. Holdrege Coop. Equity Exchange 803

Usury.

Usury laws are not so distinctive a part of public policy of the forum that courts will, on the ground of public policy, decline to enforce any contract which would be invalid, if tested by them, although valid according to its proper law. Exchange Bank & Trust Co. v. Tamerius 807

Venue.

A motion for a change of venue is directed to the sound discretion of the trial court. In the absence of an abuse

of discretion the ruling will not be disturbed. State v. Simpson 823

Verdicts.

1. In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the party against whom the motion is directed. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference which may be drawn therefrom. Clark Bilt, Inc. v. Wells Dairy Co. 20
2. The party against whom a motion for a directed verdict is directed 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. Garcia v. Howard 57
3. Ordinarily the questions of negligence, contributory negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper. Garcia v. Howard 57
4. In a criminal case where there is sufficient evidence to justify the verdict, the verdict will not be set aside unless clearly wrong. State v. Morosin 62
5. A motion for a directed verdict 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. 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. Fangmeyer v. Reinwald 120
6. Where the undisputed physical facts demonstrate that a party was not negligent in the operation of his automobile at the time of a collision, the evidence is not sufficient to support a verdict for the other party; and where contributory negligence is charged against a plaintiff but the physical facts disclose conclusively that he was not guilty, it is error for the court to submit that question as an issue to the jury. The physical facts, however, must indisputably demonstrate that the collision out of which the cause of action arose was not caused by the party charged with negligence or contributory negligence before a verdict should be directed in favor of that party. Fangmeyer v. Reinwald 120
7. The judgment of the trial court in an action at law, where a jury has been waived, has the effect of a ver-

dict of a jury and it will not be set aside on appeal unless clearly wrong. Clemens Mobile Homes, Inc. v. Liberty Homes, Inc. 165
8. A verdict may be set aside as excessive by the trial court or 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, or it is clear that the jury disregarded the evidence or rules of law. Caradori v. Fitch 186
9. A court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Olson 341
10. When the evidence is insufficient to establish plaintiff's right to sue, or the breach of any contractual provisions, the trial court has a duty to direct a verdict in favor of the defendant. Rapp v. Wilson & Co., Inc. 383
11. It is elementary that in considering a motion for a directed verdict, the truth of all competent evidence submitted on behalf of the party against whom the motion is directed shall be considered as true. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can be reasonably deduced from the evidence. Hurlbut v. Landgren 413

Waiver.

1. This case is controlled by Hastings v. Fireman's Fund American Ins. Co., 193 Neb. 417, 227 N. W. 2d 418 (1975). Worobec v. State Farm Mut. Auto. Ins. Co. 210
2. Where the subject matter of an action is personal property, the action may and should, after the death of plaintiff, be revived in the names of his personal representatives, and not in the names of his heirs, devisees or legatees, but if defendant consents or fails to object properly to a revival or continuance of the action in the name of the heir or heirs-at-law, instead of the personal representative, he waives the right to complaint. Spradlin v. Myers 559
3. An objection to the name in which a suit is brought must be made before trial or it is waived. Professional Collection Service v. Coble 683
4. Where a board of education has provided effective, reasonable, and prompt procedures for notice, hearing, and review of an order of expulsion from participation in interscholastic athletics, and the athlete neglects or refuses to follow or comply with such procedures and

exhaust such remedies, such neglect or refusal ordinarily constitutes a waiver of any right to subsequent injunctive relief. Braesch v. DePasquale 726
5. Where the rules stated in Miranda v. Arizona, 384 U. S. 436, have been complied with and the prisoner has waived the right to assistance of counsel, an officer may interrogate the prisoner without making inquiry concerning whether counsel had been appointed for the prisoner on an unrelated charge. State v. Simpson 823

Warranty.
1. If a breach of an implied warranty of fitness is not the proximate cause of an injury and consequential damages, there can be no recovery for the breach. Herman v. Midland Ag Service, Inc. 356
2. A contract of bailment of a chattel for consideration may give rise to an implied warranty of fitness of the chattel for the purpose for which it was bailed. Herman v. Midland Ag Service, Inc. 356

Waters.
1. Preference in the use of underground water shall be given to those using the water for domestic purposes. They shall have preference over those claiming it for any other purpose. Those using the water for agricultural purposes shall have the preference over those using the same for manufacturing or industrial purposes. Prather v. Eisenmann 1
2. Domestic use of ground water shall mean all uses of ground water required for human needs as it relates to health, fire control, and sanitation and shall include the use of ground water for domestic livestock as related to normal farm and ranch operations. Prather v. Eisenmann 1
3. As between domestic users of ground water there is no preference or priority. Every overlying owner has an equal right to a fair share of the underground water for domestic purposes. Prather v. Eisenmann 1
4. A possessor of land who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability to preferential users unless the withdrawal causes unreasonable harm through lowering the water table or reducing the artesian pressure in existing wells having a preferential use. Prather v. Eisenmann 1
5. Under our preference statute an irrigation appropriation can never obtain a right superior to overlying owners to the use of underground water for domestic pur-

poses. Prather v. Eisenmann 1
6. An irrigation district organized under Chapter 46, R. R. S. 1943, is liable for seepage damage under Article I, section 21, of the Constitution of Nebraska, without regard to negligence. Halstead v. Farmers Irr. Dist. ... 314
7. Spurrier v. Mitchell Irr. Dist., 119 Neb. 401, 229 N. W. 273, overruled. Halstead v. Farmers Irr. Dist. 314

Weapons and Firearms.

1. Under the statutory exception in section 28-1001, R. R. S. 1943, one may carry a weapon concealed on or about his person when engaged in a lawful business, calling, or employment, and when the circumstances are such as to justify a prudent person in carrying a weapon for defense of his person, property, or family. State v. Britt 601
2. Carrying a weapon in a bag held in the hand or placed under the arm constitutes concealment of a weapon on or about one's person. State v. Britt 601

Wills.

1. The law favors the early vesting of estates and a remainder will be declared a vested one unless a contrary intent is apparent from the will. Hanley v. Craven 81
2. It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty of the right of future possession or enjoyment if the remainderman, who is ascertained, lives until the determination of the preceding estate. Where the devise is to the remainderman "from and after" or "after" or "at" or "on" the death of the life tenant, or words of similar import are employed, such expressions are construed as relating to the time of the enjoyment of the estate and not as to its vesting, and such remainder is a vested one. The uncertainty as to whether or not the remainderman will live to come into actual possession or enjoyment of the estate does not make the remainder contingent, for that is an uncertainty which attaches to all remainders. Hanley v. Craven 81
3. In the construction of wills, the basic rule is that the testator's intent must be determined from the language used in the will, and, when so ascertained, that intent must be given effect, if it is not contrary to law. Hanley v. Craven 81
4. Testators are ordinarily and primarily concerned in the commencement, continuance, and termination of the enjoyment of property by them devised and be-

queathed. Apart from statute, the weight of authority recognizes this fact, and, when a contrary intent is not clearly expressed, construes such expressions as "upon the death of" as, in effect, relating to and affecting the enjoyment of property, rather than establishing and vesting technical estates and involved titles. Hanley v. Craven 81

5. If a person, to whom a prior interest in the subject matter of the conveyance has been given, is the sole heir of the designated ancestor at the death of such ancestor, there is an incongruity in also giving such person all the interest under limitation to "heirs" or "next of kin," or "heirs-at-law by blood relation," and thus to avoid the incongruity, the determination of the class of persons who qualify as such heirs is ordinarily to be made as of the death of the taker of the prior interest. Hanley v. Craven 81
6. While ordinarily such words as "at her death" do not have the effect of postponing the vesting of an estate in remainder, this is not true if, when they are read in context, the intention of the testator would appear to be otherwise. Hanley v. Craven 81

Witnesses.

1. The rule concerning ascertainment of damages with reasonable certainty is not peculiar to cases against insurance companies. In all cases the law requires, not mathematical certainty, but merely the best evidence obtainable under the condition existing, and some reliance must be placed upon the integrity and good faith of witnesses and the discretion of the jury. Omaha Paper Stock Co. v. California Union Ins. Co. 31
2. An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures. State v. Auger & Uitts 53
3. A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant in circumstances free from taint. State v. Auger & Uitts 53
4. A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial. State v. French 137
5. The newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference

in result. Such evidence must be competent, material, and credible, and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial. State v. French 137
6. This court on appeal will consider the fact the trial court saw and heard the witnesses and observed their demeanor, and will give great weight to the trial court's judgment as to credibility. Bahm v. Raikes ... 195
7. Children of the parties to a marriage dissolution proceeding are not by that fact alone rendered incompetent as witnesses, but whether it is reversible error to refuse to hear their testimony depends upon the circumstances of the case. Murdoch v. Murdoch 429
8. The asking of improper questions of a witness to which objections are sustained by the court do not constitute prejudicial error in the absence of a showing that defendant was thereby deprived of a fair and impartial trial. State v. Bruns 612
9. A trial judge may, in his discretion, question witnesses during trial. A party may object thereto at the time or at the next available opportunity when the jury is not present. § 27-614, R. R. S. 1943. Veik v. The Tilden Bank 705
10. When evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Tedco Development Corp. v. Overland Hills, Inc. 748
11. Whether, in the course of laying foundation for impeachment of a witness, the inclusion of extraneous material containing a reference to the accused having been previously incarcerated, introduced as part of a question calling for the admission by the witness of a previous contradictory statement on a relevant or material matter, constitutes reversible error depends upon all the facts and circumstances of the case. State v. Johnson 760
12. 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 credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. State v. Jackson 827

Words and Phrases.

1. Under the Uniform Commercial Code, goods are classi-

fied as consumer goods, equipment, farm products, or inventory. First State Bank v. Producers Livestock Marketing Assn. 12

2. Livestock used or produced in farming operations and in the possession of a debtor engaged in raising, fattening, grazing, or other farming operations are farm products. If goods are farm products they are neither equipment nor inventory. First State Bank v. Producers Livestock Marketing Assn. 12

3. Goods which are held for sale or lease are classified as inventory. The principal test to determine whether goods are inventory is whether they are held for immediate or ultimate sale. First State Bank v. Producers Livestock Marketing Assn. 12

4. Cattle purchased and held for immediate sale by a cattle trader and speculator are inventory and not farm products. First State Bank v. Producers Livestock Marketing Assn. 12

5. The essential elements of equitable estoppel are: As to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. Omaha Paper Stock Co. v. California Union Ins. Co. 31

6. In an automobile insurance policy providing coverage against theft, in which the term is not defined, the term "theft" will be construed broadly to include loss caused by any unlawful or wrongful taking of the insured vehicle with criminal intent. Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co. 46

7. The so-called "presumption of undue influence" is not a presumption within the ambit and meaning of section 27-301, R. R. S. 1943. Anderson v. Claussen 74

8. It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty of the right of future possession or enjoyment if the re-

mainderman, who is ascertained, lives until the determination of the preceding estate. Where the devise is to the remainderman "from and after" or "after" or "at" or "on" the death of the life tenant, or words of similar import are employed, such expressions are construed as relating to the time of the enjoyment of the estate and not as to its vesting, and such remainder is a vested one. The uncertainty as to whether or not the remainderman will live to come into actual possession or enjoyment of the estate does not make the remainder contingent, for that is an uncertainty which attaches to all remainders. Hanley v. Craven 81

9. Testators are ordinarily and primarily concerned in the commencement, continuance, and termination of the enjoyment of property by them devised and bequeathed. Apart from statute, the weight of authority recognizes this fact, and, when a contrary intent is not clearly expressed, construes such expressions as "upon the death of" as, in effect, relating to and affecting the enjoyment of property, rather than establishing and vesting technical estates and involved titles. Hanley v. Craven 81

10. If a person, to whom a prior interest in the subject matter of the conveyance has been given, is the sole heir of the designated ancestor at the death of such ancestor, there is an incongruity in also giving such person all the interest under limitation to "heirs" or "next of kin," or "heirs-at-law by blood relation," and thus to avoid the incongruity, the determination of the class of persons who qualify as such heirs is ordinarily to be made as of the death of the taker of the prior interest. Hanley v. Craven 81

11. While ordinarily such words as "at her death" do not have the effect of postponing the vesting of an estate in remainder, this is not true if, when they are read in context, the intention of the testator would appear to be otherwise. Hanley v. Craven 81

12. To constitute a joint venture there must be an agreement to enter into an undertaking in the object of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, although one may entrust performance to the other. Fangmeyer v. Reinwald 120

13. Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a

civil contempt. Bahm v. Raikes 195
14. In civil contempt proceedings, willfulness is an essential element. Bahm v. Raikes 195
15. Receipt of a written confirmation of an oral contract more than 6 months after the oral contract was made was not a receipt "within a reasonable time" as required by subsection (2) of section 2-201, U. C. C. Kimball County Grain Coop v. Yung 233
16. When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together the marriage is irretrievably broken. Roberts v. Roberts 256
17. Under section 79-1254, R. R. S. 1943, the term "just cause" means incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duty. Sanders v. Board of Education 282
18. A managing agent of a foreign corporation upon whom service of summons may be made under section 25-511, R. R. S. 1943, is an agent who has charge of the business activities of the corporation, or some branch, department, or division thereof; and in respect to matters entrusted to him, he exercises judgment and discretion in the conduct of the corporation affairs within this state; and who, under the circumstances here, is of sufficient position and rank to make it reasonably certain the defendant will be apprised of the service of summons. Keriakedes v. J. C. Penney Co., Inc. 399
19. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. § 27-801 (3), R. R. S. 1943. Murdoch v. Murdoch 429
20. Claim of right or of ownership mean hostile and these terms describe the same element of adverse possession. Barnes v. Milligan 450
21. A meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts. Steinberg v. Stahlnecker 466
22. The term "willful" means that the act so described was done knowingly and of stubborn purpose; the use of the term does not amount to an allegation of illegality, malice, or fraud. Clemon v. Occidental Fire & Cas. Co. 469
23. The measure of recovery by an insured for the partial damage of the insured property is the actual cash value of the part damaged, or the cost of repair or replace-

ment thereof with like kind and quality with deduction for depreciation, not exceeding the limit of liability stated in the policy. Such a policy is "open" and not "valued." Clemon v. Occidental Fire & Cas. Co. 469
24. Neither a compromise and settlement nor an accord and satisfaction may take place unless the parties have agreed that some payment or performance shall be paid and accepted in full satisfaction of a disputed claim. Lovell v. City of Kearney 478
25. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. Bethesda Foundation v. County of Saunders 574
26. The concept of charity is broad enough to include practical enterprises for the good of humanity operated at a modest cost to those who receive benefits. Bethesda Foundation v. County of Saunders 574
27. Malice, in its legal sense, denotes that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind. State v. Johnson 760
28. Malice in a legal sense denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. State v. Jackson 827

Workmen's Compensation.

1. Generally, permanent total disability can only be held to exist where the workman is unable to get, hold, or do any substantial amount of remunerative work, either in his previous occupation or in any other established field of employment for which he is fitted. Boults v. Church 319
2. Whether or not the plaintiff is totally and permanently disabled, and is entitled to receive the maximum allowable benefits, is a question of fact. Boults v. Church 319
3. The findings of fact made by the Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. Boults v. Church 319
4. The findings of fact made by the Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong. Boults v. Church 319
5. In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that

can reasonably be drawn therefrom. Boults v. Church 319
6. A claim in Workmen's Compensation Court must be filed within 1 year of the date in which the last statement for services or compensation was paid. McGahan v. St. Francis Hospital 406
7. The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness, and probable compensable character of his injury or disease. McGahan v. St. Francis Hospital 406
8. A decision of the Workmen's Compensation Court is entitled to the same force and effect as a verdict of a jury in a civil case and will not be upset where there is evidence in the record to sustain its findings. McGahan v. St. Francis Hospital 406
9. Where a claim for workmen's compensation is involved, the mere fact that the plaintiff did not know the full extent of his injury from a medical standpoint does not make it latent, particularly when the medical facts were reasonably discoverable. The plaintiff's knowledge that there is a compensable disability and not the full extent thereof is the thing that controls. McGahan v. St. Francis Hospital 406

Wrongful Death.

1. The instruction that contributory negligence is not a defense to the criminal charge of motor vehicle homicide need not be given in a civil action, in which it is shown that the defendant had been convicted of a motor vehicle homicide charge. Caradori v. Fitch 186
2. The measure of damages for wrongful death of a minor child includes the loss of society, comfort, and companionship of the child. Caradori v. Fitch 186