the element of public declaration or manifestation as a substitute for actual evidence of an agreement to assume the marital relation. They say, for example, that in the absence of other evidence, the law will presume a legal marriage if it is shown that the parties held themselves out to the world as husband and wife and lived and cohabited together as such.[45]

The early Iowa case of *McFarland v. McFarland*[46] provides a good example of the specific types of acts which evidence a sufficient *holding out* or public declaration. In that case it was shown that the putative wife entertained company with the alleged husband, extended invitations in her married name, presided at the husband's table, watched with him beside the sick and dying of their neighbors, followed in funeral processions in the family carriage, made purchases for the household, purchased her wardrobe on his account without his repudiating such purchases, and was treated with the normal marital affections.[47] As illustrated by the *Malli* case, however, mere occasional or casual references to the alleged spouse in terms such as *the Mrs.* or *my wife* are insufficient of themselves to indicate a true marriage. Likewise, the fact that a woman uses the name "Mrs. ——" does not of itself signify an existing marriage.[48]

Although the *Malli* case maintains that a public declaration that the parties are husband and wife *must* be shown, prior case law seems to recognize the existence of an exception to that requirement also. The court in *Love v. Love* averred that an agreement to keep the marriage secret does not invalidate the relationship, although such an agreement might be evidence that no present marriage actually took place.[49]

Even if the cohabitation of the parties was illicit when begun, it may evolve into a valid marriage if the prerequisites are later complied with or the legal impediments are later removed.[50] Cohabitation may be begun, for instance, while one of the parties is impaired from entering the required contract[51] and may be validated by continued cohabitation with present intent to be husband and wife after the impediment has abated.[52]

Once sustained by the parties of course, the status of common-law marriage (like any other marriage) continues during the joint lives of the parties or until divorce or annulment.[53]

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45 State v. Rocker, 130 Iowa 239, 244, 106 N.W. 645, 647 (1906); citing also State v. Sanders, 30 Iowa 582 (1870) and State v. Wilson, 22 Iowa 364 (1867).

46 51 Iowa 565, 2 N.W. 269 (1879).

47 *Id.* at 571, 2 N.W. at 274.

48 *In re* Estate of Clark, 228 Iowa 75, 290 N.W. 13 (1940). The case declares that such use of the appellation "Mrs." does not constitute legal evidence that the woman is married. Apparently the case means that such evidence is not conclusive since such usage is in fact allowed as evidence.

49 185 Iowa 930, 932, 171 N.W. 257, 257-58 (1919), quoting from *In re* Estate of Hulett, 66 Minn. 327, 69 N.W. 31 (1896). *See also* State v. McKay, 122 Iowa 658, 98 N.W. 510 (1904).

50 *In re* Estate of Boyington, 157 Iowa 467, 476, 137 N.W. 949, 952 (1912).

51 This doctrine is applied particularly in cases where one party is incapable of entering the marriage because of another previous marriage, that is, still having a living spouse.

52 Blanchard v. Lambert, 43 Iowa 228 (1876).

53 Smith v. Fuller, 108 N.W. 765 (1906). Also reported at 138 Iowa 91, 115 N.W. 912 (1908).

Several other rules are reiterated by the court in the *Malli* case[54] as being elements of common-law marriage. In reality, those rules seem to be procedural considerations rather than elements of the relationship itself. The court stated for instance, that the burden of proof is on the one asserting the claim.[55] All elements of the relationship as to marriage must be shown to exist. Further, a claim of such marriage will be closely scrutinized since regarded with suspicion. *Coleman v. Graves* was also cited to the effect that when one party is dead the elements must be shown by "clear, consistent, and convincing evidence."[56]

Thus, according to the *Malli* case, a common-law marriage may be established sufficiently in Iowa if there is shown by *clear, consistent, and convincing evidence* the *intent and agreement in praesenti as to marriage on the part of both parties, together with continuous cohabitation and public declaration that they are husband and wife.* This statement is, of course, a general summary of the requirements for recognition of such marital status, and each requirement must be interpreted by the numerous explanations and exceptions or modifications of the prior cases.[57] All the materials taken together constitute a judicial attempt to accord proper status to factually existent relationships regardless of the mode of their creation.

DAVID L. PHIPPS

Scope of Review—ON APPEAL TO DISTRICT COURT FROM THE SUSPENSION OF A DRIVER'S LICENSE BY THE DEPARTMENT OF PUBLIC SAFETY, THE DISTRICT COURT HEARS THE APPEAL DE NOVO.—*Needles v. Kelly* (Iowa 1968).

Having determined that Wayne Francis Kern committed a "serious violation" of the motor vehicle law of the State of Iowa,[1] the Commissioner of Public Safety[2] suspended Mr. Kern's license to operate a motor vehicle. On appeal from the suspension, the Hamilton County District Court, acting upon a transcript of the proceedings before the Commissioner and additional evidence, vacated the suspension and the Commissioner made application for

54 149 N.W.2d 155, 158 (Iowa 1967).
55 Following Gammelgaard v. Gammelgaard, 247 Iowa 980, 77 N.W.2d 479 (1956).
56 255 Iowa 396, 403, 122 N.W.2d 853, 856 (1963).
57 Several presumptions are also used by the courts in considering alleged common-law marriages. While no attempt is made in this Case Note to discuss the presumptions, they may be helpful to the attorney in presenting cases involving claims of such marriages. Some of the presumptions are discussed in 14 IOWA L. REV. 215, 216 (1929).

1 IOWA CODE § 321.210 (1966): "The department is hereby authorized to suspend the license of an operator or chauffer without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:

. . . .

"7. Has committed a serious violation of the motor vehicle laws of this state."

2 The Commissioner heads the Department of Public Safety, which constitutes the motor vehicle department of the State of Iowa. IOWA CODE § 321.1(34) (1966).

writ of certiorari. *Held*, writ of certiorari is quashed. On appeal from the Commissioner's order of suspension resulting from his determination that a "serious violation" of the motor vehicle law occurred, the district court hears the case as a complete trial de novo. *Needles v. Kelly*, — Iowa —, 156 N.W.2d 276 (1968).

The statute[3] that the Iowa Supreme Court was called upon to interpret is ambiguous as to the district court's scope of review and, as such, certainly "leaves something to be desired in the way of clearness and workability."[4] Is the district court limited in its review to determine the legality of the suspension or revocation by the Commissioner or can it make a new independent judicial determination on the evidence and the law? If the former, the review by the district court is merely to ascertain whether the Commissioner has remained within his statutory powers and whether there is substantial, material and competent evidence to support the Commissioner's findings.[5] However, the Iowa Supreme Court decided the latter, giving an unlimited review, and in so doing expressly overruled language in a prior Iowa case.[6] As a result of allowing such an unlimited review, the Commissioner's position as an expert as well as the normal administrative process is subverted.[7] The exercise of discretion is thus shifted from the administrative agency to the courts during a time when "the trend of authority is to uphold a considerable vesting of discretion in the department for the purpose of promoting the public safety."[8]

In support of its decision, the Iowa Supreme Court cites two cases from other jurisdictions[9] which, according to the court, have statutes substantially similar to the Iowa statute and which require a complete trial de novo in the district court and not merely a review of the action by the administrative body.[10] However, except for minor alterations, the statutes from these foreign

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[3] IOWA CODE § 321.215 (1966) provides:
Any person denied a license or whose license has been canceled, suspended, or revoked by the department except where such cancellation or revocation is mandatory under the provisions of this chapter shall have the right to file a petition within thirty days thereafter for a hearing in the matter in a court of record in the county wherein such person shall reside and such court is hereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon thirty days written notice to the commissioner, and thereupon the court shall hear and determine the matter *as an original proceeding upon a transcript of all the proceedings before the commissioner, and upon additional evidence and other pleadings as the court may require. The decision of the court shall be final.* (Emphasis added.)

[4] Danner v. Hass, 257 Iowa 654, 666, 134 N.W.2d 534, 542 (1965).

[5] *Id.* at 668, 134 N.W.2d at 543; *cf.* Richard v. Holliday, 153 N.W.2d 473, 477 (Iowa 1967); 2 AM. JUR. 2d *Administrative Law* § 612 (1962).

[6] "[T]he court's function is to determine the legality of the administrative proceedings, and whether there is substantial material and competent evidence to support the findings of fact therein made. It may not substitute its judgment on the facts for that of the administrative body." Danner v. Hass, 257 Iowa 654, 668, 134 N.W.2d 534, 543 (1965), *overruled*, Needles v. Kelly, 156 N.W.2d 276 (Iowa 1968).

[7] Needles v. Kelly, 156 N.W.2d 276 (Iowa 1968) (concurring opinion); 2 AM. JUR. 2d *Administrative Law* § 610 (1962).

[8] Richard v. Holliday, 153 N.W.2d 473, 479 (Iowa 1967), quoting from Danner v. Hass, 257 Iowa 654, 662, 134 N.W.2d 534, 540 (1965).

[9] Conaway v. Thompson, 78 N.W.2d 400 (N.D. 1956); Stehle v. Department of Motor Vehicles, 229 Ore. 543, 368 P.2d 386 (1962).

[10] Needles v. Kelly, 156 N.W.2d 276, 280 (Iowa 1968).

jurisdictions[11] are enactments of the Uniform Vehicle Code.[12] The Iowa statute[13] is not a substantial enactment of the uniform code in that the language of the Iowa statute provides that hearings "shall be upon a transcript of the proceedings before the Commissioner, additional evidence and other pleadings" instead of "to take testimony and examine into the facts of the case."[14]

The Iowa statute is more related to the Virginia statute than the uniform code.[15] The Supreme Court of Appeals of Virginia has held, in respect to their statute, that although the district court is vested with broad discretionary powers, the Commissioner's order should not be vacated if his findings are supported by a preponderance of the evidence and he has applied correct principles of law to the proved facts. So long as the Commissioner's order was not arbitrary, capricious or an abuse of discretion and the evidence before him was sufficient to warrant the entry of his order, his order should not be annulled.[16]

However, even in those jurisdictions which have enacted the uniform code with only minor variation, there is by no means a uniform interpretation. Although several jurisdictions have interpreted the language as requiring a complete trial de novo, many jurisdictions have restricted the appeal and do not allow such an unlimited review.[17] New Mexico's appeal statute[18] is the same as were the statutes of North Dakota and Oregon in the cases cited as authority in *Needles v. Kelly*. The Supreme Court of New Mexico has stated the following in construing their statute of appeal:

> [T]he questions to be answered by the court are questions of law and are actually restricted to whether the administrative body acted fraudulently, arbitrarily or capriciously, whether the order was supported by substantial evidence, and generally, whether the action of the administrative head was within the scope of his authority.
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> . . . .
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> . . . [I]t is for the court to determine only whether grounds

11 Ch. 251, § 38, [1955] N.D. Acts; ORE. REV. STAT. § 482.490 (1967). Since Conaway v. Thompson, 78 N.W.2d 400 (N.D. 1956), the North Dakota Legislative Assembly has revised their review statute. Under this revision, the district court is limited to "determine whether there were reasonable grounds under the statutes for the determination of the commissioner." There is, in addition, a de novo review in the supreme court. N.D. CENT. CODE § 39-06-39 (1967).

12 Act II, § 35: It shall be the duty of the reviewing court "to take testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation, or revocation of license . . . ."

13 IOWA CODE § 321.215 (1966).

14 IOWA MOTOR VEHICLE STUDY COMMITTEE, A COMPARATIVE STUDY OF IOWA MOTOR VEHICLE LAWS WITH THE UNIFORM VEHICLE CODE, at 104 (1948).

15 VA. CODE ANN. § 46.1-437(d) (1967): "The court, sitting without a jury, shall hear the appeal on the record transmitted by the Commissioner and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record, and the court shall receive such other evidence as the ends of justice require."

16 Lamb v. Rubin, 198 Va. 628, 96 S.E.2d 80 (1957); Lamb v. Mozingo, 198 Va. 432, 94 S.E.2d 457 (1956).

17 Annot., 97 A.L.R.2d 1371, 1381 (1964).

18 N.M. STAT. ANN. § 64-13-65 (1953).

> for suspension, cancellation or revocation exist. This is the limit of the court's jurisdiction . . . .[19]

Furthermore, the Oregon case[20] cited as authority in *Needles v. Kelly* has been criticized as being an unconventional view and that if the language is taken literally, judges may be required to give driving tests to applicants for driver's licenses![21]

Texas and Kansas have statutes that are the same as the uniform code except that both have added an express provision that the trial on appeal *shall* be a trial de novo.[22] Both of these jurisdictions have held that even though the statute provides for a complete de novo trial on appeal, the court is nevertheless limited in its inquiry to the determination of whether the action of the Commissioner was supported by substantial evidence and that the discretion of the court cannot be substituted for that of the Commissioner.[23]

The reason for the conflicting interpretations apparently originates in the nature and function of the particular administrative body involved—in this case the Department of Public Safety. Generally, if the function of the agency is to exercise judicial powers, judicial review ought to be extensive.[24] But, if the agency's action is legislative or executive, judicial review ought to be limited to a determination that the agency has kept within its statutory powers and has followed statutory procedure.[25] In addition, a standard must be set up by which the agency's acts are to be measured.[26] If the agency is endowed with discretionary power, judicial review ought to be limited to the determination of whether or not the agency is guilty of an abuse or a clearly unwarranted exercise of such discretionary powers.[27] The basis for the foregoing distinction is couched in the theory that it is invalid to impose upon the courts a function which is legislative in character, as this would violate

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19 Johnson v. Sanchez, 67 N.M. 41, 50, 351 P.2d 449, 454 (1960). *Accord*, 7 AM. JUR. 2d *Automobiles and Highway Traffic* § 123 (1963).

20 Stehle v. Department of Motor Vehicles, 229 Ore. 543, 368 P.2d 386 (1962).

21 K. DAVIS, ADMINISTRATIVE LAW § 29.10 (Supp. 1965).

22 KAN. STAT. ANN. § 8-259 (1964); TEX. REV. CIV. STAT. ANN. art. 6687b, § 31 (1967).

23 Beckley v. Motor Vehicle Dep't of the State Highway Comm'n, 197 Kan. 289, 293, 416 P.2d 750, 753 (1966) ("[T]he legislature intended by the *de novo* provision . . . to limit the district court to a judicial determination of the factual basis upon which the action of the Department is predicated."); Lira v. Billings, 196 Kan. 726, 414 P.2d 13 (1966); Garrison v. Smith, 306 S.W.2d 244 (Tex. Civ. App. 1957); Department of Public Safety v. Robertson, 203 S.W.2d 950 (Tex. Civ. App. 1947). In Needles v. Kelly, 156 N.W.2d 276, 287 (Iowa 1968) (concurring opinion), Justice Rawlings stated that the function of the court, on judicial review of the action of administrative agencies, may be limited to judicial questions, even though the statute provides for review on the law and the facts or for a trial de novo. *Accord*, 2 AM. JUR. 2d *Administrative Law* § 612 (1962).

24 2 F. COOPER, STATE ADMINISTRATIVE LAW 668-69 (1965). *Accord*, Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960); Stehle v. Department of Motor Vehicles, 229 Ore. 543, 368 P.2d 386 (1962).

25 *See* note 24 *supra*.

26 In regard to this standard, *see* Danner v. Hass, 257 Iowa 654, 134 N.W.2d 534 (1965).

27 2 F. COOPER, *supra* note 24.

the constitutional safeguard of separation of powers.[28] If the function of the licensing department is legislative rather than judicial and the district court reviews de novo, then that court exercises legislative powers and violates the doctrine of separation of powers. This would be the same as though the legislature provided that application for licenses be made to the courts and that they have the responsibility of determining whether or not such a license should issue.[29]

Therefore, if it is found that the Commissioner operates in a judicial manner when he revokes or suspends an operator's license, appeal to the district court can be a complete trial de novo if the applicable state statute permits. However, if the Commissioner functions legislatively and not judicially, then the district court should be limited in its review to the ascertainment of the legality of the suspension or revocation. It would seem to follow that if the Commissioner acts legislatively and if the applicable statute, in this case section 321.215 of the 1966 Iowa Code, can *only* be interpreted as giving a complete de novo trial on appeal,[30] then the statute must be invalid.

Whether the particular agency involved performs quasi-judicial or judicial functions is a matter to be determined by the courts, as some agencies function legislatively, some judicially and some may function in still yet another manner. Those jurisdictions that have found the licensing of automobile operators to be a quasi-judicial or judicial function have usually predicated such a determination on the idea that historically (meaning prior to the creation of the administrative body), it has been the courts that have been charged with the responsibility of license revocation and suspension.[31] A further rationale is that the courts could have been charged with the function in the first place.[32]

On the other hand, those jurisdictions which have found the licensing of automobile operators to be a legislative function assert that the courts' duty is to protect fundamental rights of property under the federal and state constitutions. Thus, the function of license revocation and suspension is not a judicial act because a license to operate an automobile is a privilege and not a property right.[33] Furthermore, there is no deprivation of due process of law because there is an opportunity under the statutes for a hearing before the Commissioner after suspension plus an appeal to the courts on the legality of the administrative proceedings.[34]

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28 Stehle v. Department of Motor Vehicles, 229 Ore. 543, 368 P.2d 386 (1962).

29 Household Finance Corp. v. State, 40 Wash. 2d 451, 244 P.2d 260 (1952) (held that the Supervisor of Banking operates legislatively). In a later case, the same court held that the licensing of automobile operators is a quasi-judicial or judicial operation. Ledgering v. State, 63 Wash. 2d 94, 385 P.2d 522 (1963).

30 Needles v. Kelly, 156 N.W.2d 276 (Iowa 1968) (concurring opinion).

31 Ledgering v. State, 63 Wash. 2d 94, 385 P.2d 522 (1963).

32 *Id.*

33 Hadden v. Aitken, 156 Neb. 215, 55 N.W.2d 620 (1952); Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960); Commonwealth v. Cronin, 336 Pa. 469, 9 A.2d 408 (1939).

34 IOWA CODE § 321.211 (1966) (Notice and Hearing); IOWA CODE § 321.215 (1966) (Appeal). That there is no deprivation of due process under the Iowa statute, *see* Needles v. Kelly, 156 N.W.2d 276, 282 (Iowa 1968).

The Iowa Supreme Court has stated that a driver's license is not a right, but a privilege.[35] It has also stated that the revocation or suspension function vested in the Commissioner[36] is a proper delegation of *legislative* power.[37] These holdings would seem to indicate that the Commissioner of Public Safety of the State of Iowa acts in a legislative manner and not in a judicial manner when he suspends the license of an automobile operator under an applicable state statute. Therefore, if Iowa desires to follow the majority of those jurisdictions which have found that their Commissioners operate legislatively, the scope of review by the district court, under section 321.215 of the 1966 Iowa Code, should be limited to a determination of the legality of the suspension. In any event, before the Commissioner's actions were negated by an unlimited review, the Iowa Supreme Court should have at least investigated more fully into the character and nature of the Department's statutory function.[38]

STEVEN J. SEILER

Workmen's Compensation—Death Benefits—RECOVERY OF DEATH BENEFIT BY A CHILD ADOPTED BY ANOTHER BEFORE THE DEATH OF HIS NATURAL PARENT. —*Patton v. Shamburger* (Tex. Civ. App. 1967).

Patton and the present Mrs. Shamburger were divorced and the two minor sons of that union were adopted by Charles Shamburger, their stepfather. Subsequently Patton was killed in the course of his employment. His employer's insurer paid into court the correct amount of the death benefit and asked the court to determine who was entitled thereto. The benefits were claimed adversely by the parents of the deceased who were dependent upon him and by his two sons who had received no support from him since their adoption by Shamburger. The trial court held that the children were entitled to the benefits. On appeal to the Court of Civil Appeals of Texas, *Held*, affirmed. Deceased employee's natural children are entitled to the death benefit under the Texas Workmen's Compensation Act[1] to the exclusion of employee's surviving dependent parents although the children were adopted by another prior to the employee's death. *Patton v. Shamburger*, 413 S.W.2d 155 (Tex. Civ. App. 1967).

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35 Spurbeck v. Statton, 252 Iowa 279, 289, 106 N.W.2d 660, 666 (1960).

36 IOWA CODE § 321.210 (1966).

37 Spurbeck v. Statton, 252 Iowa 279, 289, 106 N.W.2d 660, 666 (1960).

38 Both the Oregon and the North Dakota courts, in the cases cited as authority in Needles v. Kelly, examined the function of their respective administrative agency. In Stehle v. Department of Motor Vehicles, 229 Ore. 543, 552, 368 P.2d 386, 390 (1962), the court stated that the function their department performed under the Oregon statute "might well be assigned to the judiciary rather than to an administrative department." The court in Conaway v. Thompson, 78 N.W.2d 400 (N.D. 1956), indicated that their administrative officer acts in a quasi-judicial capacity.

1 TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (1967).

The Texas Workmen's Compensation Act provides for the payment of death benefits if death should result from injuries sustained by the employee in the course of his employment.[2] Decedent's surviving spouse, minor children, parents and stepmother may receive the death benefit without proving actual dependency upon the deceased employee.[3] It further provides that although said benefit does not pass to the estate of the deceased, it is distributed to the beneficiaries according to the laws of descent and distribution;[4] if there is no surviving spouse, the children receive the benefit to the exclusion of the surviving parents.[5] For the purposes of inheritance under the Texas laws of descent and distribution, adopted children lose no right to inheritance from their natural father by reason of being adopted by another.[6]

The only issue presented in *Patton*[7] is whether the adopted children are deprived of their right to the benefits due upon the death of their natural father as a result of being adopted by another before his death. This issue had not previously been decided in Texas but had been decided in New York,[8] Oklahoma,[9] and Georgia.[10] New York and Oklahoma held that the child was entitled to receive death benefits, but Georgia did not permit recovery. At the time that *Shulman v. New York Bd. of Fire Underwriters*[11] was decided, the adoption law in New York[12] provided that an adopted child could inherit from his natural parents. The Texas court adopted the reasoning of the New York court that it was not the intent of the legislature to exclude the offspring of natural parents in the definition of "child" as used in the Workmen's Compensation Law.[13] The court in *Shulman*[14] stated that "[h]ad the purpose been to destroy the consanguineous connection between a father and his natural child adopted by another as the basis for an award of death benefits, the statutory definition certainly would have been so precisely written as to leave no doubt that such was its intent."[15] The Texas court concluded that it is evident the Texas Legislature intended the law of descent and distribution to provide that an adopted child should recover death benefits and inherit from his natural parent.[16]

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2 *Id.* 8306, § 8 (1967).
3 *Id.* art. 8306, § 8a (1967).
4 *Id.*
5 TEX. PROB. CODE ANN. § 38 (1956).
6 *Id.* § 40 (1956) provides in part: "The natural parent or parents of such child and their kin shall not inherit from or through said child, but said child shall inherit from and through its natural parent or parents."
7 Patton v. Shamburger, 413 S.W.2d 155 (Tex. Civ. App. 1967).
8 Shulman v. New York Bd. of Fire Underwriters, 15 App. Div. 2d 700, 223 N.Y.S.2d 312 (1962).
9 Stark v. Watson, 359 P.2d 191 (Okla. 1961).
10 New Amsterdam Casualty Co. v. Freeland, 216 Ga. 491, 117 S.E.2d 538 (1960), *rev'g* 101 Ga. App. 754, 115 S.E.2d 443 (1960).
11 115 App. Div. 2d 700, 223 N.Y.S.2d 312 (1962).
12 N.Y. DOM. REL. § 117 (McKinney 1961); *but see* N.Y. DOM. REL. § 117 (McKinney 1964).
13 N.Y. WORKMEN'S COMP. § 2(11) (McKinney 1965).
14 Shulman v. New York Bd. of Fire Underwriters, 15 App. Div. 2d 700, 223 N.Y.S.2d 312 (1962).
15 *Id.*
16 Patton v. Shamburger, 413 S.W.2d 155, 157 (Tex. Civ. App. 1967).