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MARY RUZICKA V. STATE OF NEBRASKA.

289 N. W. 852

FILED JANUARY 26, 1940. No. 30579.

1. **Criminal Law.** A conviction may rest on the uncorroborated evidence of an accomplice when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused.
2. ———. A conviction based upon the evidence of an accomplice is insufficient to support a verdict of guilty where it appears that such witness has wilfully sworn falsely in regard to material matters, or otherwise shown that his evidence is unreliable, unless such evidence be corroborated.

ERROR to the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Guy A. Hamilton and *Stanley Bartos*, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Rush C. Clarke, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

The plaintiff in error, Mary Ruzicka, was convicted in the district court for Fillmore county of stealing $2,711 in money from Mike and Jennie Kubicek, and was sentenced to serve three to five years in the reformatory for women. From this conviction and sentence the defendant below prosecutes error and presents to this court a record of her conviction for review.

The record shows that on August 16, 1938, Dorothy LeGrand, an Assyrian woman professing to be a fortune teller and Indian healer, went to the home of Mike and Jennie Kubicek near Milligan, Nebraska, and offered to effect a cure for Mike Kubicek, who was then suffering from a cancer of the throat. As a means of ingratiating herself into the confidence of the Kubiceks, she produced a note purporting to have been signed by the defendant, a

cousin of Mike Kubicek, which stated in substance that Dorothy LeGrand had cured her of gall stones, that she would cure him also if he would follow her instructions and believe in her, and that she was honest. The result was that Dorothy LeGrand started in that afternoon to cure Mike Kubicek of his affliction.

The method employed called for the use of money, a bowl of water, broomstraws and charcoal, which, when accompanied by the prayers of Dorothy LeGrand, was to result in a complete cure of Mike Kubicek. On the first day the sum of $6 was solemnly dipped in the water, blessed by Dorothy LeGrand and ceremoniously pinned on the breast of the patient. On subsequent days in which Dorothy LeGrand attended her patient, the amount of money was increased until the sum of $2,711 was being used; the amount of money used having been determined by the number of knots which Jennie Kubicek could tie in a strip of cloth provided by Dorothy LeGrand, the 27 knots so tied requiring the use of $100 for each knot. The result was that the money was abstracted and these trusting complainants bilked out of the whole $2,711. Law enforcement officers found Dorothy LeGrand in Spokane, Washington, with a newly purchased automobile and a small amount of money in her possession. She was returned to Fillmore county, where she entered her plea of guilty to the crime.

The record further shows that Mary Ruzicka, the defendant, was the wife of Frank Ruzicka, a farmer living near Dorchester, Nebraska. She was fifty-nine years of age at the time Mike and Jennie Kubicek were defrauded of their money. It appears that defendant believed she was endowed with certain faith-healing powers as was evidenced by a certificate issued to her by the State Spiritualists Association of Nebraska, declaring her to be a recognized faith healer. On August 13, 1938, defendant, while attending a picnic at Milligan, Nebraska, went to a concession booth operated by Dorothy LeGrand, and had her fortune told. She was told that she was suffering from gall stones, which in reality was a fact. The ensuing conversation re-

sulted in Dorothy LeGrand agreeing to call upon defendant at her home to cure her of her affliction. Later in the day, defendant took her aged aunt, Josie Novatny, to Dorothy LeGrand to have her fortune told. The interview resulted in a pronouncement that the aunt was suffering from kidney trouble, and also a declaration by Dorothy LeGrand that she could cure her with one treatment. The evidence also shows that defendant later met Jennie Kubicek at the picnic and informed her of her faith in the powers of Dorothy LeGrand and of her belief that Mike Kubicek might be helped by her treatments.

Pursuant to her arrangement with defendant, Dorothy LeGrand called at her home on August 16, 1938, and gave the first treatment. Defendant did not have the required fee of $2, and defendant's husband drove a team and wagon to the home of his daughter and her husband, one-half mile distant, to obtain it. During his absence Dorothy LeGrand insisted that she had to have three or four other articles to hang in her church to effect a cure. By this means she obtained a dresser scarf, a bed spread and a dress which were to be returned after the last treatment. They, of course, were never returned. Defendant then testifies that Dorothy LeGrand inquired about any persons in the neighborhood who were suffering with cancer. The names of Mike Kubicek and a Mrs. Halverson were given to her. Upon request, defendant wrote a note, introductory in character, to each of the two named persons. The written notes were not produced at the trial, and there is much conflicting secondary evidence as to their exact contents. An examination of all the evidence regarding the contents of the notes convinces us that they recited that Dorothy LeGrand had given defendant a treatment for her gall stones, that she had been helped thereby, and that the addressees of the notes should give her a trial. Other claimed differences in the notes are not material to a disposition of the case, although there is substantial evidence that a substituted note was delivered to the Kubiceks. Defendant testifies that Dorothy LeGrand came back on August 19, 1938,

and gave her a second treatment consisting of the use of the Bible and a prayer, accompanied by a rubbing near the afflicted area. Demands were made for other household articles which were refused and, according to defendant, resulted in some ill feeling and distrust. It is the contention of defendant that she never again saw Dorothy LeGrand until she saw her in jail in Geneva, where she was being held for stealing the money of the Kubiceks. Defendant denies that she had anything to do with the larceny, claims she never saw Dorothy LeGrand during the period the fraud was being perpetrated, and positively denies that she ever received any part of the money. It is not contended that any of the stolen currency was found in the possession of the defendant.

The state bases its case almost entirely upon the evidence of Dorothy LeGrand, who, upon her arrest, implicated the defendant as an accessory. The story told by Dorothy LeGrand was substantially as follows: She had spent most of her life traveling over the United States with carnival companies. She had been married three times and was in the habit of using aliases including the names of her former husbands. During the times herein mentioned she was using the name of Mary Starr. There is little dispute in the evidence as to the transactions and conversations between defendant and Dorothy LeGrand at the Milligan picnic. The evidence of Dorothy LeGrand is that the first time she called on defendant at her home, and while defendant's husband was driving over to his daughter's house to borrow $2 to pay her, defendant conspired with her to defraud the Kubiceks. The testimony of Dorothy LeGrand is that she was not a faith healer and knew nothing of the art, that all she knew about it she learned from defendant during the half hour Frank Ruzicka was away, and that defendant instructed her in the use of the bowl of water, broomstraws, charcoal, and the Bible, and taught her to pray in order to gain the complete confidence of her victims. She testifies that defendant instructed her concerning the whole method of procedure and demanded that she

be given half of the ill-gotten gain as her share. Her evidence also is that on her second call on defendant on August 19, 1938, she informed defendant that she was about to take the money and that she would meet her at the crossroads a half mile from the Ruzicka home on the following Friday night, August 26, 1938, at 8 p. m., to divide the $2,700. She testifies that she did meet defendant near the designated crossroads as agreed and delivered $1,300 in currency to her, and that she thereupon took flight to avoid the punishment she so justly deserved.

The positive evidence of Frank Ruzicka, Leona Peterson and Paul Peterson, defendant's husband, daughter and son-in-law, respectively, is to the effect that on the evening of August 26, 1938, from 5 p. m. until the next morning, the defendant was at and near the family home and did not and had no opportunity to meet Dorothy LeGrand at the crossroads as she testified. The defendant also produced the evidence of five reputable residents of the Dorchester community who had known the defendant for many years, who testified that her general reputation as a law-abiding citizen was good. No evidence to the contrary was produced.

The sheriff of Fillmore county testified, among other things, that at the time of the arrest of the defendant, her husband said: "How much money will it take to settle this so she won't have to go to Geneva?" The contention is advanced that this was evidence of guilt. We think the husband satisfactorily explained the statement when he said he was inquiring about giving a bail bond. But in any event the statement of the husband could not be used as an admission of guilt against this defendant. The statement was not admissible for any purpose.

The defendant complains of many alleged errors. Under our view, the case can be decided on the question of the sufficiency of the evidence to sustain the conviction and it will not be necessary to discuss other features of the case.

Under the law of this state, an accessory before the fact of a felony is equally guilty with the principal. Comp. St. 1929, sec. 28-201. The guilt of the principal in this case,

Dorothy LeGrand, is conclusively established by the evidence. Also, it is the settled law of this state that a conviction may rest upon the uncorroborated evidence of an accomplice when sufficient in connection with the other evidence to satisfy the jury beyond a reasonable doubt of the guilt of the accused. *Lamb v. State,* 40 Neb. 312, 58 N. W. 963; *Barnes v. State,* 124 Neb. 826, 248 N. W. 381; *Lovejoy v. State,* 130 Neb. 154, 264 N. W. 417. Likewise, it is ordinarily for the jury to determine the credibility of the accomplice and the weight to be given to his testimony. But even so, the evidence must be sufficient to sustain a finding of guilt beyond a reasonable doubt as a matter of law before the verdict of a jury will be permitted to stand. We think a reasonable doubt was created as a matter of law, which precludes a verdict of guilty under the evidence produced. It will be our purpose in the remainder of this opinion to point out the evidence which creates a reasonable doubt as a matter of law.

The evidence is clear that Dorothy LeGrand was an Assyrian woman whose occupation was fortune telling and Indian faith healing, a person usually spoken of as a Gypsy and having the vagabond habits and traditional occupation of the Gypsy peoples. She denies that she was a healer of any kind and claims that the defendant taught her all she knew about it in a thirty-minute interval in the absence of defendant's husband. That this statement is absolutely false is borne out by her own testimony. The very first time Dorothy LeGrand interviewed the defendant she told her she had gall stones and agreed to come to defendant's home to treat her. She came to the home and, according to her own evidence, administered a treatment and insisted upon and obtained pay therefor before any conversation was had about bilking the Kubiceks. Her admitted inquiries about prospective cancer patients, and her claims that she could cure them, likewise belie her testimony that she was not a faith healer.

The use of the broomstraws, charcoal, bowl of water and other articles employed in healing Mike Kubicek was not

the work of a beginner. The finesse with which Dorothy LeGrand induced the Kubiceks to increase the amounts of money used from $6 to $11 to $111 to $1,411 and finally to $2,711 was not learned in a thirty-minute session with a simple Czech farm woman. The credulity of this court is such that we cannot accept the statement of Dorothy LeGrand to that effect as true when considered in the light of the evidence and circumstances surrounding this case.

It is the testimony of Dorothy LeGrand that she called on defendant the second time on August 19, 1938. At that time she says that she told Mary Ruzicka that she would have $2,700 to divide with her on August 26, 1938, and that she made an appointment to meet Mary Ruzicka at the crossroads near her home at 8 p. m. of said day. In the first place, Dorothy LeGrand, at the time of this conversation, had induced the Kubiceks to put up the sum of $11 only, and she positively had no way of knowing how much she would be able to take. The knot-tying episode did not take place until later, and unless this court is going to concede that Dorothy LeGrand could divine the future, we must necessarily take the view that she deliberately falsified when she made this statement. Her testimony that she did meet the defendant at the crossroads at the designated hour and gave her $1,300 appears very unreliable. In the first place she says she came to the crossroads in a car driven by one Bob Stanley, met Mary Ruzicka where it was light and where she was plainly seen. The evidence of Stanley is that he parked his car while Dorothy LeGrand got out and walked down the road in total darkness and that he at no time saw Mary Ruzicka. The evidence of the husband, daughter and son-in-law of the defendant is that Mary Ruzicka never left their company on the night of August 26, 1938, at the time claimed by Dorothy LeGrand, and that she had no opportunity to do so. It might be expected that these witnesses, being interested, might color their testimony to aid Mary Ruzicka, but it does not appear probable, nor can it be presumed, that they would commit a deliberate perjury and fabricate a story which was much

more plausible than that told by Dorothy LeGrand herself. The evidence shows that Dorothy LeGrand had previously arranged for her traveling companions to depart for the west earlier in the day, with the understanding that she and Stanley would overtake them along the road. With preparations made for flight immediately after the stealing of Kubiceks' money, it requires an elastic imagination to believe that Dorothy LeGrand was so honest and reliable that she would drive out of her way to give $1,300 to this defendant. Certainly, the pursuit would be just as determined, whether she divided the spoils with Mary Ruzicka, or not. It is also noticeable that at the time of the trial of this defendant, Dorothy LeGrand, although she had entered her plea of guilty and had long before confessed her guilt, had not been sentenced. It is not difficult to believe that the fantastic tale unfolded by her was prompted somewhat by the hope of immunity from punishment. All of these evidences of the unreliability of Dorothy LeGrand as a witness, and the established good reputation of this defendant generally as a law-abiding citizen, establish as a matter of law, we think, that there is a reasonable doubt of the guilt of this defendant.

The evidence as a whole shows that Dorothy LeGrand was an admitted felon, a cheat and a fraud. She apparently has no respect whatsoever for truth. The contradictions in her own testimony are sufficient to show her unreliability as a witness. If the discredited testimony of so unreliable a witness is sufficient without corroboration to send a reputable person to prison, then our rule requiring proof of guilt beyond a reasonable doubt becomes a meaningless phrase and a mockery.

The state takes the view that a jury question was presented and that any attempt on the part of this court to arrive at a different conclusion would amount to a usurpation of the duties of the jury. We, of course, take the view that the evidence is insufficient to sustain a conviction as a matter of law, and that we are therefore obliged to direct a reversal of the case. We think, also, that our position is

supported by a decision of this court which is very much in point. In *Jahnke v. State,* 68 Neb. 182, 104 N. W. 154, we said: "The evidence of an accomplice should be closely scrutinized. If it appears that such witness has wilfully sworn falsely in regard to a material matter upon the trial, his evidence cannot be sufficient, if uncorroborated, to support a verdict of guilty."

In *Sykes v. United States,* 204 Fed. 909 (8 C. C. A.), the court disposed of a very similar case in the following language: "It is only when the evidence is sufficient to convince of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a crime. 'It is undoubtedly the better practice,' says the supreme court, 'for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them.' *Holmgren v. United States,* 217 U. S. 509, 523, 524, 30 Sup. Ct. 588, 592 (54 L. Ed. 861, 19 Ann. Cas. 778). And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it. *Jahnke v. State,* 68 Neb. 154, 94 N. W. 158."

A consideration of all the evidence adduced at the trial and the circumstances surrounding the commission of the alleged crime requires us to hold that the state has failed to produce evidence sufficient to sustain a finding of guilt beyond a reasonable doubt.

REVERSED.

PAINE, J., dissenting.

I respectfully dissent from the opinion finally adopted by this court. The case was first argued to the court on September 21, and ordered reargued on November 20, 1939. The reversal of conviction is based on the question of the

sufficiency of the evidence to sustain the verdict of guilty returned by the jury.

The defendant denied her guilt, but the only conclusion to be drawn from the verdict is that the jury did not believe the story she told on the witness-stand.

What were the facts, as shown by the evidence, which the jury did believe?

Dorothy LeGrand testified that she was 60 years of age, born in Cincinnati, Ohio, and was an Assyrian. She had a concession at the Milligan street picnic in August, 1938, and gave advice and mind readings in a trailer. She testified that she charged her customers what they could pay; that some paid 15 cents, some 25 cents, some 50 cents, and some a dollar; that she had been making her headquarters with Robert Stanley and family at Bradshaw; that the car and trailer that she used belonged to Mr. Stanley, who drove her in it.

She testified that the defendant came in to have her fortune told on Saturday, and in making the reading she told the defendant she had gall stones. Defendant asked whether she could cure them, and Mrs. LeGrand replied that she did not know. Defendant then invited her to come over to defendant's home and pray for her. Therefore, on the following Tuesday Robert Stanley drove her in his Chevrolet to Mrs. Ruzicka's, but the roads were so muddy that they stopped at a house on the corner and sent word from there to the Ruzicka house, and the defendant's husband came for her in a farm wagon, and this was about noon.

While Mrs. LeGrand was treating her, the defendant sent her husband to the son-in-law's to get $2 to pay Mrs. LeGrand. While he was gone, a period of between half and three-quarters of an hour, the defendant told her to go and see Mike Kubicek, her cousin, who was sick with a cancer, and to heal him, and that the Kubiceks had plenty of money and plenty of property, and for her to get plenty, and "You will have to give me half." Then the defendant told her about a lady at McCool who had a cancer too, but not to take much money from her, for she was poor, and the de-

fendant at once, and voluntarily, wrote a note of introduction to both of these parties and gave them to her.

Mrs. LeGrand took these letters of introduction, but did not tell the defendant that she was illiterate and could not read nor write. She promised the defendant that she would give her half, regardless of what she got from Mike Kubicek, and the defendant's husband took her back to the car in his farm wagon, and she agreed to come back Friday and report what progress she had made.

Mrs. LeGrand went to the Kubiceks, arriving there in the afternoon of the same day. When she arrived the children were at home, but their parents had gone to see a doctor. She showed the children the note, and she told the children that the defendant had sent her there to heal their father. As soon as the Kubiceks returned, both of them read the note.

This very important letter of introduction written by the defendant, which instantly gained entrance into the home and heart of the sick man, was destroyed, but several people had read it, and the version which the jury doubtless accepted, from the several forms as recollected and testified to by witnesses, would read to this effect:

"Dear Cousin Mike.

"This lady cured me of gall stones and she will cure you too if you believe in her and do everything she tells you. She is honest."

Signed "Mary Ruzicka"

Mrs. LeGrand, having gained their confidence through the note of the defendant, wasted no time in starting operations, and told Mrs. Kubicek that if she wanted her husband cured she would have to live up to her request, and that was the use of numbers of money. They gave $6, and Mrs. LeGrand tied it up and pinned it on Mr. Kubicek, and the next time she called she asked for more money, and told them she could not help them without more money, and they added $5 to the $6 that was already pinned on his chest, but she told them he could not be healed without more money.

When she went back a fourth time they had $100, and that was wrapped up in a small package with the $11, and it was all pinned on Mr. Kubicek's chest, and she insisted on more money.

The widow Kubicek testified that, when Mrs. LeGrand demanded much more money to bring about a cure of her husband's cancer, although she went with him to the Geneva State Bank, and signed the note with him and borrowed the first $1,300, and took it home in a package fastened with rubber bands, yet she had become suspicious, and had her daughter Goldie and her son Mike take down a list of the letters and numbers on each bill, with the denomination of each piece of currency, and this list was introduced as state's exhibit No. 7, which gives the serial letters and numbers of the five 100-dollar bills and the forty 20-dollar bills, making the $1,300 brought from the Geneva State Bank, with the rubber bands around it.

Mrs. Kubicek testified that Mrs. LeGrand at the next "treatment" placed the $1,411 in the Bible, wrapped in a cloth, and had Mr. Kubicek sleep on it, and told them they must have more money, and she would come back on Friday, August 26.

Mrs. LeGrand's testimony in regard to the final amount is interesting. She was furnished a piece of cloth, and cut it off to a certain length, and she testified: "Q. How much more did you tell them? A. Thirteen hundred more. Q. That would make $2,711. How did you determine, decide on the amount of money? A. Well, I made her tie twenty-seven knots into a piece of cloth. Q. And each knot was to represent what? A. Hundred dollars." This piece of cloth, in which only 27 knots could possibly be tied, is in evidence as exhibit No. 3.

Several days before the "final treatment," Mrs. LeGrand drove to the defendant's home, where she was cooking dinner, and talked the matter over and told her that she was preparing to take the Kubicek money, and for her to meet her shortly after 8 o'clock Friday night, and told her how much money she would have with her, and the defendant

was willing to accept her share. She did not stay long, as the defendant told her to get out of the house before her husband came.

At the time of this "final treatment," Mrs. LeGrand waited until Mr. and Mrs. Kubicek came back from the bank, and then they all went in the house. The Kubiceks had just secured a second $1,300, which was in a canvas bag, and the five-, ten-, and twenty-dollar bills were loose in the sack. Mrs. LeGrand took them out and tied them up in a cloth with the other money, making a total of $2,711, putting them all together. The first package of $1,300 she put on the inside and the last money was rolled around it, and she tied it all up and put it in a new Bible, which she had required them to buy, and then tied the Bible in a tablecloth, and sent Mr. and Mrs. Kubicek to the river to say their prayers, and they took the Bible with them. When they returned from praying they all went in the dining-room, and Mrs. LeGrand ordered the children to go outside. Then she had Mr. and Mrs. Kubicek get down on their knees and pray, during which time Mrs. LeGrand abstracted the money from the Bible and replaced it with a package of newspapers, which she had already prepared before she came there, and tied it all up in the tablecloth, and instructed them not to open the package until 5 o'clock Monday afternoon. The Bible and the substituted package of newspapers were introduced in evidence. Mrs. LeGrand immediately left with the $2,711 in currency.

She told the Kubiceks when she left that she was going to see Mrs. Ruzicka, the defendant, and she went straight to the defendant's and stopped at the same place where she stopped on the muddy day at the farm corner, and she got out and met Mrs. Ruzicka, and it was after dark, and she gave her the $1,300 as her part, and the defendant said, "You better go on about your business before you are caught."

Mrs. LeGrand testified she had seen the defendant four times altogether, once at the picnic at Milligan, when she gave her a reading, twice at her house, and once on the road at night when she gave her the money.

The defendant's recollection of what she wrote in the letter of introduction to her cousin Mike, when Mrs. LeGrand made the first trip to her farm, differed slightly, but not materially, from the form set out hereinabove. She denied positively that she received the $1,300 from Mrs. LeGrand, and denied that she expected to get any money for writing the note to Mike Kubicek. She admitted that at the third time Mrs. LeGrand called on her, that is, on August 19, she asked whether the Kubiceks had money.

Sheriff Steinacher said he was called to the Kubicek home on Monday, August 29, about 7:30 a. m., when they discovered the bills were gone, and told of the robbery; that he drove at once to defendant's home, who told him at first that she did not know the lady she gave the note to, and claimed that she was forced to write it, but later withdrew such a claim.

The sheriff told how he traced the car through its Indiana license, and found that it was mortgaged, and the payment that was due August 30 was sent in from Post Falls, Idaho, by Stanley, and the sheriff sent wires out there and Mrs. LeGrand and Robert Stanley were arrested, and were in jail when he arrived at Spokane. Mrs. LeGrand finally confessed stealing the $2,700, and the sheriff testified that her confession was about as follows: "Well, she said that—that she made a number of trips to Mrs. Ruzicka's, and 'we planned that at Ruzicka's place while the husband was gone. She didn't want her husband to know anything about it, what was taking place.' As they planned it, she said that Mrs. Ruzicka told her to hit Kubiceks heavy because 'they have plenty of money, and if they can't—if they don't have the ready cash that they can borrow it, they have plenty of property,' that she wants to get hold of this money, that their place is covered with mortgage; she would like to buy a place of business where she could practice divine healing some place out of the state in a city."

The sheriff carefully examined the numbers on all of the bills they had in their possession at Spokane, and also on

$425 in bills they had just paid on a new trailer, and none of the currency examined bore any one of the numbers taken down by Goldie Kubicek from the first package of $1,300, and which Mrs. LeGrand testified were all in the package, still in rubber bands from the bank, when she handed the package to the defendant, Mary Ruzicka, the night before she left.

Paige Hall, county agent of Fillmore county, testified without objection that, after the courthouse offices were closed at 5 o'clock on the evening of September 12, he stepped out of his office and overheard a conversation between the defendant and her husband as they were going down the hall to the county attorney's office: "I heard Mrs. Ruzicka say, 'How did they get the numbers off from *this* money.' * * * He said, 'Goldie probably copied them off.' "

This is a brief summary of the evidence the jury considered in finding the defendant was guilty.

The information in this case charged in brief that the defendant, on or about August 26, 1938, in Fillmore county, did wilfully, intentionally, unlawfully, and feloniously, take, steal, and carry away $2,711, the property of Mike and Jennie Kubicek, against the will of the owners, and with the intent to defraud said owners of said property.

Section 28-201, Comp. St. 1929, reads as follows: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender."

In a Cherry county cattle-stealing case, John Scharman hired two boys to steal cattle from the Metzger ranch near Merriman and deliver them to his place near Nenzel. The boys, having been arrested, pleaded guilty and implicated Scharman, and he was charged as a principal in the same manner in which the defendant was charged in the case at bar. This court held: "That the same rule as to the information, conduct of the case, and punishment, heretofore applicable to a principal, should thereafter govern his aider, abettor, or procurer, and that no additional facts need be alleged in an information against such accessory before the

fact than are required against his principal." *Scharman v. State*, 115 Neb. 109, 211 N. W. 613.

Complaint is made as to the court's instructions on aiding and abetting, and the testimony of accomplices. In our opinion the court gave the approved form, for instruction No. 9 told the jury that Dorothy LeGrand and Robert Stanley are accomplices, and that, while the accused might be convicted upon the testimony of accomplices, yet the jury should act on such testimony with great care and caution.

Again, in instruction No. 11 the court very properly said: "Under the law of Nebraska it is not necessary for the state to prove beyond a reasonable doubt that the defendant actually received or obtained any of the money charged to have been stolen from the Kubiceks. If you find beyond a reasonable doubt that the defendant in this action aided another or procured another to steal the money of the Kubiceks, or to take the same away from them without their consent, and with the intention to defraud the said Kubiceks, or to take the same away from them without their consent, and with the intention to defraud the said Kubiceks of their said property, then the defendant would be, in the eyes of the law, equally guilty as the person who actually took and carried away the money, and it is your duty to so find."

The evidence given the jury was direct, and also circumstantial. "What is meant by circumstantial evidence, in criminal cases, is the proof of such facts or circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged; and if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty." *Cunningham v. State*, 56 Neb. 691, 77 N. W. 60.

It is not necessary that each link in the evidence relied upon should be proved beyond a reasonable doubt. This court has held: "The testimony of one witness, if relevant

and accepted by the jury, may sustain a conviction of burglary, even though the accused positively denies under oath that he committed the offense." *Schultz v. State*, 88 Neb. 613, 130 N. W. 105.

In the brief of the attorney general appears the following summary:

"It is true that the story is both bizarre and fantastic. * * * Nobody but people like Mrs. LeGrand and Mrs. Ruzicka could think of schemes like that which was perpetrated on Kubiceks. It is true that Mrs. LeGrand was a liar and a thief, or she wouldn't have been engaged in the scheme at all. It is true that ordinarily such a person is not worthy of belief and that a conviction on such testimony alone would ordinarily not be obtained. But the question, of course, was not whether she is worthy of belief generally, but whether she told the truth in this case. All these questions as to her credibility were for the jury and not for this court, * * * the jury, of course, saw her on the witness-stand and observed her conduct and demeanor while testifying; saw the defendant and observed her; saw one of her witnesses perjure himself and then resume the stand to brand himself a liar, and decided that Mrs. Ruzicka did have a hand in this shocking theft.

"Mrs. Ruzicka knew that she had been told by Mrs. LeGrand that she lived near Lincoln, yet she withheld that fact from the sheriff when she knew he was looking for Mrs. LeGrand. She told the sheriff she had been forced to write the note to Kubiceks. There is evidence that she received $1,300 of the money. True, she says she didn't, but a witness, whom the jury apparently believed, says she did."

This very concise summary by the attorney general is supported by the evidence, and convincing in its conclusions. We must not forget that, while the defendant denied that Mrs. LeGrand handed her the package containing the $1,300, wrapped in rubber bands, as borrowed from the Geneva State Bank, yet the careful jury considered the fact that not one of the bills from that particular package,

of which all the numbers had been taken down, was ever found in the possession of Mrs. LeGrand, or the Stanleys, with whom she traveled to Spokane. The evidence is undisputed that the defendant told Mrs. LeGrand, who was an entire stranger in that community, that her cousin Mike had a cancer and had plenty of money, or could borrow it, and this valuable information, together with the seductive letter of introduction which the defendant voluntarily gave Mrs. LeGrand, furnished all the groundwork necessary for the successful larceny.

Now, having the evidence before us upon which the jury returned a verdict of guilty, what is the general principle of law governing the matter?

It is well stated in Corpus Juris, as follows: "It is the policy of the law that questions of fact shall be determined solely by the jury under the supervision of the trial court, and that the appellate court shall have nothing to do with the weight of the evidence on which a conviction is based." 17 C. J. 254.

This court has held: "In a criminal prosecution, the determination of the credibility of the witnesses and the weight of the evidence being peculiarly within the province of the jury, a verdict of guilty, based upon sufficient competent evidence, will not be disturbed, even though this court may entertain doubt as to the correctness of the jury's finding." *Burnett v. State,* 88 Neb. 638, 130 N. W. 263. See, also, *Carter v. State,* 98 Neb. 742, 154 N. W. 252; *Gerwick v. State,* 98 Neb. 69, 151 N. W. 982; *Ward v. State,* 58 Neb. 719, 79 N. W. 725.

"The basis of a jury's verdict is sufficient when the evidence affords any fair and reasonable ground upon which it may be sustained." *McCown v. Commonwealth,* 271 Ky. 265, 111 S. W. (2d) 389.

This case was carefully tried by an experienced judge, the jury were properly instructed, there was no prejudicial error in rulings on the evidence, and in my opinion, from an experience of 14 years as a district judge, this evidence amply sustained the verdict of guilty returned by the jury

in Fillmore county. I would, however, have made no objections to a reduction of the sentence to one year in the women's reformatory at York, because of the fact that the defendant is now upwards of 60 years of age.

CHARLES GREEN BRAINARD, APPELLANT, V. WILLIAM B. HALL ET AL., APPELLEES.
289 N. W. 845

FILED JAUNARY 26, 1940. No. 30697.

1. **Limitation of Actions.** Any promise to pay a debt or other existing liability in a cause founded on written contract, to prevent the running of the statute of limitations, must be in writing.
2. ———. Absence from the state will not extend the time in which a real estate mortgage foreclosure may be brought against a nonresident.

APPEAL from the district court for Dixon county: MARK J. RYAN, JUDGE. *Affirmed.*

Kingsbury & Kingsbury, for appellant.

McCarthy & McCarthy, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

FALLOON, District Judge.

On the 19th day of January, 1938, the appellant brought suit to foreclose a mortgage given on certain lands in Dixon county, Nebraska, against the appellees. The note and mortgage securing same were given August 20, 1891, for $2,500, due in one year, with interest at 6 per cent. It was given by William B. Hall and his wife, Jessie R. Hall, two of the appellees, to Charles Green, and duly recorded the next day in the office of the county clerk of Dixon county. The petition further alleges that on October 13, 1897, Charles Green assigned and delivered said note and mortgage to Mary Genevie Brainard, who died June 3, 1932,

and that the appellant is now the owner and holder of said note and mortgage. The petition also alleges that interest was paid on July 11, 1893, and thereafter until March, 1926, when the last interest in sum of $150 was paid. The original petition also alleges in paragraph 7 thereof that, notwithstanding said note by its terms became due and payable one year after date, it was orally, mutually agreed, by and between the appellee, William B. Hall, and Mary Genevie Brainard that said principal note should not be paid until the death of Mary Genevie Brainard, but that the interest should be paid annually.

This paragraph 7 was later amended to read:

"That the mutual oral agreement was arranged, made and entered into by and between the defendants, William B. Hall and Mary Genevie Brainard, assignee of said note and mortgage, with and in the presence of the plaintiff who is a son of the said Mary Genevie Brainard, who during the past thirty years or more of the life of Mary Genevie Brainard conducted her business and handled the business affairs of said Mary Genevie Brainard, and all of the parties well knew and understood said oral agreement, which afterwards at various times and in various ways was ratified by the defendant William B. Hall and that no demand at any time was ever made on the said William B. Hall for the payment of the principal sum of said indebtedness or any part thereof and that the same was not expected, demanded, or required during the life of Mary Genevie Brainard except only the interest payments thereon which became due annually, which facts were understood, arranged and agreed upon with the said William B. Hall."

Later, the appellant filed a substitute amendment to paragraph 7, in which it is alleged:

"That the mutual oral agreement entered into by the said Mary Genevie Brainard and the defendant William B. Hall, was about the year of 1900 or immediately prior thereto. The exact date which is unknown by the plaintiff and said oral agreement arranged, made and entered into by and between said parties in the presence and hearing

of this plaintiff, who is a son of the said Mary Genevie Brainard, and in the town of Waterville, county of Oneida and state of New York.

"Whereby it was agreed that the said principal note set out herein should not be paid until the death of Mary Genevie Brainard but that the interest thereon should and would be paid annually by the said William B. Hall, by reason of said oral agreement. That said principal sum of said note would not become due and payable until the third day of June, 1932, and that no demand was ever made upon the said William B. Hall for the payment of said $2,500, until after the death of the said Mary Genevie Brainard.

"That said oral agreement between the said Mary Genevie Brainard and William B. Hall was never modified, changed or revoked during the lifetime of the said Mary Genevie Brainard, and remained in full force and effect until the death of Mary Genevie Brainard on June 3, 1932."

The appellees then demurred to the petition for the reason that the petition and amendments thereto did not state facts sufficient to constitute a cause of action. The demurrer was sustained, appellant declined to plead further, and the petition was dismissed by the trial court, and its action is here for review.

The pleadings show that action on the mortgage note has long since been barred by the statute of limitations, unless the bar has been removed by the nonresidence of some of the appellees and by the oral agreement extending the due date to the time that Mary Genevie Brainard died. Section 20-202, Comp. St. 1929, provides that an action to foreclose a real estate mortgage can only be brought within ten years after the cause of action has accrued. There are other saving clauses and interpretations by this court, but they have no application to the pleadings in this case. This section above has been construed by this court to be always read in conjunction with section 20-216, Comp. St. 1929, which provides: "In any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing lia-

bility, debt, or claim, or any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise."

A general demurrer admits all facts well pleaded, but does not admit conclusions. The oral promise to pay which the demurrer admits does not comply with the statute above set forth. The petition did not state it was in writing and therefore the petition and amendments were susceptible to the demurrer.

"A debt that is barred will be revived if the debtor in writing unqualifiedly acknowledges an existing liability." *Nelson v. Becker*, 32 Neb. 99, 48 N. W. 962.

"Where the debt is barred by the statute of limitations, no action can be maintained on the mortgage." *Hurley v. Estes*, 6 Neb. 386.

This proceeding is one *in rem*, and absence from the state will not operate to extend the time in which to commence the action. Section 20-213, Comp. St. 1929, provides: "Absence from the state, death or other disability shall not operate to extend the period within which actions *in rem* shall be commenced by and against a nonresident or his representative." This action was brought to subject the property mortgaged to the payment of the debt secured and could have been brought at any time within the limitation period, regardless of residence, and the statutes further provide for constructive service on nonresidents. As *Peters v. Dunnells*, 5 Neb. 460, says: "An action to subject mortgaged property to the payment of the mortgage debt is a proceeding *in rem*," and it goes on to say, "absence from the state, death or other disability of a nonresident, shall not operate to extend the time within which actions *in rem* shall be commenced by, and against, such nonresidents applies, to mortgages."

Hurley v. Estes, supra, lays down the same rule, which still obtains in this state.

The petition and amendments thereto do not allege facts sufficient to state a cause of action against the appellees.

It was proper to raise the bar of the limitation statute, and neither the oral agreement nor the nonresidence of some of the appellees will remove that bar. When a pleading discloses on its face that the action is barred by the statute of limitations, such bar may be raised by objection that the pleading does not state a cause of action. See *Eayrs v. Nason*, 54 Neb. 143, 74 N. W. 408.

The pleadings of the appellant under our statutes did not state a cause of action against the appellees. The district court rightfully sustained the demurrer, and its judgment must be affirmed.

AFFIRMED.

F. L. ALEXANDER, EXECUTOR, APPELLEE, V. ROY OMAN ET AL., APPELLANTS.
289 N. W. 847

FILED FEBRUARY 2, 1940. No. 30710.

1. Mortgages. The filing of a stipulation reducing the amount of the judgment in a decree foreclosing a real estate mortgage does not vacate the decree nor change the date thereof.
2. ———. To be effective, a request for a stay of the order of sale must be filed within twenty days after the rendition of the decree.
3. ———. "A sale will not be set aside for irregularities or errors not prejudicial to the party complaining." *Miller v. Lanham*, 35 Neb. 886, 53 N. W. 1010.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Hoagland, Carr & Hoagland, for appellants.

Jeffrey & Padley, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is an appeal from an order confirming a judicial

sale of land under a decree of foreclosure of a mortgage. The decree was entered April 10, 1937, fixing the amount due on the indebtedness at $6,960.50, and decreeing the foreclosure of the mortgage securing the same. The decree further determined that the defendant Roy Oman was personally liable for any deficiency. The statutory nine months' stay was granted to the defendants pursuant to their request made in open court.

On January 15, 1938, defendant Roy Oman filed an application praying for a modification of the decree as to amount, claiming that he relied upon the plaintiff to fix the proper amount and that the amount fixed was excessive. The application also recites that the note and mortgage were executed in 1934, and that a deficiency judgment was not authorized. No action appears to have been taken on this application, although the bill of exceptions shows that a stipulation was filed February 5, 1938, reciting that the amount of the decree should have been $6,403.85, and authorizing the clerk to correct the decree to show the amount due.

February 5, 1938, a præcipe was filed for an order of sale to satisfy the decree. The order of sale is not shown, but the sheriff's return shows the "amount of principal" due was $6,403.85 and a sale to one Bauman for $4,025. A motion to confirm the sale was filed March 15, 1938. On March 19, 1938, objections to confirmation were filed. There is no showing that any action was taken on either the motion to confirm or the objections to confirmation.

April 13, 1938, a præcipe for an alias order of sale was filed. The order of sale is not shown, but the sheriff's return shows the "amount of principal $6,403.85," principal and interest due $7,010.33, costs $76.62, total due $7,086.95, and a sale to the plaintiff for that amount.

On January 20, 1939, defendant filed lengthy "amended objections to confirmation of sale." On the same day, hearing was had, and the court confirmed the sale and ordered the sheriff to execute and deliver a deed to the purchaser. This appeal has been taken from that order.

Defendants present here, in part, the same objections presented to the trial court.

Defendants contend that they were entitled to a nine months' stay of the order of sale upon the decree beginning after the correction. The filing of the stipulation reducing the amount of the judgment did not vacate the decree nor change the date thereof. See *Hoyt v. Little*, 55 Neb. 71, 75 N. W. 56. The filing of the request for a stay of the order of sale to be effective must be made within twenty days after the rendition of the decree. Comp. St. 1929, sec. 20-1506. *Prudential Ins. Co. v. Nethaway*, 127 Neb. 330, 255 N. W. 26.

Defendants contend that the trial court erred in confirming the second sale, while the application for a modification of the decree was pending and while the return to the first order of sale and objections thereto were pending. It will be noted from the returns that the orders of sale fixed the amount which defendants stipulated was correct as the amount due on the decree, and that the property sold at the second sale for the full amount of the decree, interest and costs. This effectively disposes of the two objections urged against the decree. Prejudice to the right of the defendants is not shown.

This court has held: "A sale will not be set aside for irregularities or errors not prejudicial to the party complaining." *Miller v. Lanham*, 35 Neb. 886, 53 N. W. 1010.

The industry of counsel for defendants has caused them to suggest other errors in the proceedings of the trial court. These have been examined, and error prejudicial to the defendants has not been found.

The decree of the trial court is

AFFIRMED.

VIOLET MCCOWN, APPELLANT, V. ALVIN L. SCHRAM, ADMINISTRATOR, APPELLEE.
289 N. W. 890

FILED FEBRUARY 2, 1940. No. 30657.

1. **Automobiles.** Under the guest law of Kansas, a guest cannot recover damages for injury unless such injury shall have resulted from the gross or wanton negligence of the driver of the motor vehicle. Gen. St. Kan. 1935, sec. 8-122b.
2. ———. To constitute such gross and wanton negligence, the conduct must evince a willingness that harm might result therefrom, or a reckless unconcern as to the safety of the guest.
3. ———. If evidence discloses that the driver had been drinking intoxicating liquor to the extent that the jury might find he was under the influence thereof, and had disconnected the speedometer to conceal his high rate of speed, and failed to drive on the proper side of the road, these facts, with others, were sufficient to take the case to the jury.

APPEAL from the district court for Gage county: CLOYDE B. ELLIS, JUDGE. *Reversed.*

Hubka & Hubka and *R. M. Anderson,* for appellant.

Baylor, Tou Velle & Healey, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an action for personal injuries sustained by a guest passenger in an automobile, which it is alleged was operated in gross and wanton negligence near Marysville, Kansas. It is brought by the mother of the minor guest against the administrator of the estate of the driver, who was killed in this accident. The evidence of the plaintiff included the offer of certain sections of the statutes of Kansas and a number of decisions of its supreme court which had been duly pleaded in the amended petition. When the plaintiff rested, the defendant demurred to the evidence, and the demurrer being sustained the trial court dismissed the action and overruled the plaintiff's motion for a new trial.

The defendant's demurrer to the evidence was based upon the following reasons: (1) The evidence of the plaintiff is insufficient to support a cause of action in favor of the plaintiff and against the defendant; (2) the evidence fails, as a matter of law, to establish that the defendant's decedent was guilty of gross and wanton negligence toward the plaintiff; (3) the evidence is insufficient to establish beyond a point where reasonable minds may differ that the defendant's decedent was guilty of gross and wanton negligence toward the plaintiff; (4) the evidence discloses that the defendant's decedent, as a matter of law, was not guilty of gross and wanton negligence toward the plaintiff; (5) the evidence discloses beyond a point at which reasonable minds may differ that the defendant's decedent was not guilty of gross and wanton negligence toward the plaintiff; (6) the evidence establishes that the defendant's decedent under the laws of Kansas was not guilty of gross and wanton negligence toward the plaintiff; (7) the evidence establishes that the defendant under the law is not liable to the plaintiff; (8) the evidence discloses that the plaintiff assumed the risk of riding with the defendant's decedent.

The plaintiff's case having been dismissed on a demurrer to the evidence, it is necessary to briefly set out the evidence which was before the jury. Violet McCown, the plaintiff, who was about 17 years of age, her cousin, Ruth Day, who was the same age, the deceased driver of the car, Arnold L. Schram, whose nickname was "Speck," an employee of Wilke's bakery in Beatrice, and his friend, Lewis Gaver, who had been his "buddy" and pal for about three years, were the four parties in the Chevrolet sedan at the time of the accident. About 8:30 p. m., June 25, 1937, Gaver went to the bakery to meet "Speck," and soon thereafter the two went to Beck's poolroom, where they each drank five bottles of regular beer in the time they remained there. They then drove to Howe's Barbecue, where each drank two more bottles of beer, and Schram then drove home to change his clothes. About 9:30 to 9:45 he returned

with Ruth Day and Violet McCown as guests in his automobile, and picked up Lew. After driving about Beatrice for a while, Schram said he wanted to see Jimmie Travis, a friend who had recently opened a restaurant at Marysville, Kansas, and leaving Beatrice at about 10:20 they drove to Marysville at about 45 miles an hour, stopping at Wymore, where Schram bought three more bottles of beer, which he drank on the way to Marysville, drinking the last bottle as he drove into Marysville.

When they reached the Travis restaurant, the proprietor was not there, and Schram and Gaver and two friends, Jim Winters and Art Axtell, went behind the restaurant to drink spiked "Coke" so the girls, who were sitting in the car, would not know it. Art Axtell testified that he opened each bottle of "Coke" and poured it out down to about an inch and a half from the top and filled it up with whisky, and each one of the four men drank a bottle of this spiked "Coke." Shortly thereafter they started home. Before leaving, the driver, Schram, disconnected the speedometer so the girls would not see how fast he was going, as he said he was in a hurry to get to Beatrice and finish some work he had to do at the bakery. They started west from Marysville, driving on a graveled road, rough like a washboard, with hardly room enough for two cars to pass. The accident occurred about a half mile west and three miles north of Marysville. Schram drove his car in the center of this graveled road, and some of the time on the west, or wrong, side of the road, and the evidence of some of the witnesses was that he was driving 60 to 70 miles an hour. The plaintiff, Violet McCown, who was sitting with Schram in the front seat, warned him several times to slow down, but he paid no attention to her. When she saw the lights of the other car approaching, Violet said, "My God, Speck, watch out." After the collision the driver endeavored to right his car, but failed, for the car turned completely over and landed on the west side of the road on its wheels. In turning over, the driver was thrown under the car and killed, and the plaintiff suffered many injuries, among which

were five cuts on her forehead and face, leaving scars which, it is explained, will interfere with her work as a beauty parlor operator.

The testimony shows that immediately after the accident the three survivors reached an agreement that they would protect the driver and say nothing at all about his drinking, which tends to account for a statement being signed by Ruth Day on July 8, in which she said that she had the feeling that Schram was driving carefully at the time of the accident, with both hands on the wheel, and paying strict attention to his driving, and that neither Arnold nor Lewis had anything to drink of an alcoholic nature. She testified that the gentleman who got her to sign the statement told her that the purpose of the statement was so that Mr. and Mrs. Schram could get "Speck's" life insurance, and claimed that she did not read the statement, nor was it read to her, but that the gentleman asked her some questions and wrote something down, and she signed it. This statement was identified as defendant's exhibit A, and introduced as part of the cross-examination of Ruth Day. She explained on cross-examination that out there in the road right after the accident Lew told them that the driver had been drinking, and the three of them agreed to say nothing about his drinking.

The plaintiff introduced in evidence several sections of the Kansas law relating to drinking and driving a car. Kansas did not repeal its state prohibition law after the Eighteenth Amendment was set aside, and section 21-2174, Gen. St. Kan. 1935, provides that driving while under the influence of liquor is a felony, and this section reads as follows: "Driver under influence of intoxicating liquor or drug injuring another. That it shall be deemed a felony for any one under the influence of intoxicating liquor, or any exhilarating or stupefying drug, to injure another person by reckless driving of a vehicle upon any public road, highway, street, avenue, driveway or alley within the state of Kansas."

The guest statute of Kansas is section 8-122b, Gen. St.

Kan. 1935, and reads as follows: "Right of guest to collect damages from owner or operator. That no person who is transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or damage, unless such injury, death or damage shall have resulted from the gross and wanton negligence of the operator of such motor vehicle."

In a late Kansas decision, *Donelan v. Wright*, 148 Kan. 287, 81 Pac. (2d) 50, it is held: "The authorities will lead us to the conclusion that to constitute wantonness so as to permit recovery under G. S. 1935, 8-122b, the conduct must be such as to evince a willingness that harm might result therefrom, or as to evince a reckless unconcern that plaintiff might be injured."

"The meaning of this statute has been frequently considered and expounded in motor car accident cases arising since the enactment. The most recent of these are: *Aduddell v. Brighton*, 141 Kan. 617, 42 P. (2d) 555; *Murrell v. Janders*, 141 Kan. 906, 44 P. (2d) 218; and *Anderson v. Anderson*, 142 Kan. 463, 50 P. (2d) 995. In *Koster v. Matson*, 139 Kan. 124, 30 P. (2d) 107, 110, the action was by a guest against the driver of an automobile for injuries sustained in a motor car accident in Nebraska. The pertinent Nebraska 'guest' accident statute (Comp. St. Supp. Neb. 1935, sec. 39-1129) was substantially similar to our own. It was pointed out that wantonness is essentially different from negligence, not merely in degree but in kind of conduct." *Cohee v. Hutson*, 143 Kan. 784, 57 Pac. (2d) 35.

The Kansas court has held: "Independently of any statute it is negligence as a matter of law to drive an automobile along the highway on a dark night at such speed that it cannot be stopped within the distance that objects can be seen ahead of it." *Fisher v. O'Brien*, 99 Kan. 621, 162 Pac. 317, L. R. A. 1917F, 610. See, also, *Watson v. Travelers Mutual Casualty Co.*, 146 Kan. 623, 73 Pac. (2d) 64.

In Nebraska, Iowa, California, and Oregon the guest statutes specify as a distinct ground of liability the fact

that the driver was intoxicated, but such is not the case with the Kansas guest law. It is proper, however, for the jury to consider evidence of intoxication in determining whether the driver was guilty of gross and wanton negligence in attempting to drive at very high speed after he had consumed a large amount of intoxicating liquor. *Hackbart v. Rohrig,* 136 Neb. 825, 287 N. W. 665; *State v. Gloyd,* 148 Kan. 706, 84 Pac. (2d) 966; *Koster v. Matson,* 139 Kan. 124, 30 Pac. (2d) 107; *McGrath v. Nugent,* 133 Neb. 237, 274 N. W. 549.

The jury might also consider the evidence that the driver disconnected the speedometer on the automobile to conceal from plaintiff the excessive speed at which he intended to drive.

The jury might also consider the evidence to the effect that the driver of the car failed to keep proper lookout ahead, and at the time of the collision was either driving in the middle or to the left-hand side of a narrow road, and that after the collision the car landed over to the left of the main-traveled part of the road. *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96; *Larson v. Storm, ante,* p. 420, 289 N. W. 792.

The question of gross and wanton negligence under the guest law of Kansas is for the jury, where the evidence is conflicting, and from which reasonable minds might draw different conclusions.

In our opinion, the evidence of plaintiff was sufficient so that the trial court was not justified in taking the case from the jury and dismissing it.

REVERSED AND REMANDED.

PEONY PARK, INC., APPELLEE, V. SECURITY INSURANCE COMPANY OF NEW HAVEN, APPELLANT.

289 N. W. 848

FILED FEBRUARY 2, 1940. No. 30728.

1. **Insurance.** A fire insurance policy is simply a contract between the parties, and the usual rules for the construction of contracts apply to such policies.
2. ———. Insurance policies are prepared by experts, and it is consistent with both reason and justice that any fair doubt as to the meaning of the words of a policy should be resolved against the one who prepares it.
3. ———. If the provisions of an insurance policy are clear and unambiguous, then the rule of strict construction against the insurance company does not apply.
4. ———. While ordinarily insurance contracts are construed against the company writing them, touching any provision which is ambiguous, this is not true as concerns the location of the property insured, for a policy will not be extended to cover property not clearly within the express terms of the policy.
5. ———. When a fire insurance policy covers the "contents" of a certain dance pavilion "and additions," it is *held* that a refreshment stand built some 42 feet therefrom, connected therewith only by a sidewalk and a small conduit carrying pipes for the cooling system, which refreshment stand is covered by a separate policy of fire insurance, is not "an addition" to the main dance pavilion, although used in connection therewith.
6. ———. The word "contents," when applied to personal property in a building, is a term which should ordinarily have some definite fixed relationship to the building in which it is located, and to be fairly for use within it, or in connection therewith.
7. ———. When personal property, insured as "contents" of a dance pavilion, is removed therefrom and transferred permanently to a new building, which building is covered by a separate policy of fire insurance, such personal property is no longer covered by a fire insurance policy upon the "contents" of the said dance pavilion.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed and dismissed.*

Ramsey & Welpton, for appellant.

James E. Bednar, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

Suit was brought for loss on a fire insurance policy which covered the contents of a dance pavilion. This policy was written June 4, 1934, and the premium was $35 for one year from that date. The amount of the policy was $2,000. A jury was waived, and the court found the value of the property destroyed was $2,684.05, and entered a judgment for the full amount of the policy, $2,000, from which the insurance company appeals, and for reversal claims the judgment is contrary to law and is not sustained by the evidence.

The property destroyed was in an outdoor refreshment stand, located some 42 feet from the main dance pavilion, and connected therewith by a concrete sidewalk and small conduit. The amusement park, of which this was a part, was called the Royal Grove, erected at a cost of $28,000. The main dance pavilion was 168 feet by 124 feet, a story and a half high, with basement, and was surrounded by a hedge. This particular insurance policy covered the "contents" of the dance pavilion in a very broad form, the portions of the paragraph relating thereto involved in this case reading as follows:

"Contents form

"Peony Park, Incorporated

"*$2000.00* On the 'Contents' of the premises occupied by the assured in the *one story, composition roofed, brick, frame and steel* building and basement and additions and known as Nos. *7718½ Dodge Street,* * * * Omaha, Nebraska.

"The word 'Contents' used in this contract is hereby declared to include all property fixed or movable belonging to said Assured, * * * liability being hereby specifically assumed on tools, implements, awnings, signs, * * * all of said property being covered while contained in, on or attached to the building above described and on and under sidewalks, platforms, alleys, streets, yards, areaways and

in and on conveyances and railway cars on tracks and on premises while within 100 feet of said building."

Adolph Musil, a real estate and insurance agent, was the broker who placed all of the insurance for Peony Park, Inc., and was a stockholder therein. He testified that he was at this place at least twice every week; that he was there a couple of days before the fire; that a policy in the "National Liberty" for $2,000 expired June 4, and as Fell & Pinkerton discontinued representing that company they rewrote it in the defendant Security Insurance Company. Mr. Musil told them they wanted the "Contents Form," with the broad coverage. He said he received a commission from the company on this policy. Mr. Baldwin, through whom Mr. Musil placed the insurance in suit, knew about the refreshment stand being erected, for on May 25 he wrote a $500 policy on the building known as the refreshment stand. The fact that the owners took out a distinct and separate policy on the refreshment stand just as soon as it was completed indicates clearly that there was no thought on the part of the owners that this new building, separated from the main dance pavilion by a distance of 42 feet, was to be considered, or was covered, as an "addition" to the main dance pavilion.

An examination of exhibit No. 2, being the statement of the fire loss, made out June 8, shows clearly that there were no chairs nor tables which had been transferred from the main dance pavilion temporarily, and which would doubtless be insured, under the terms of the policy, while out in the premises, under trees, within 100 feet of the main pavilion, but the personal property listed in exhibit No. 2 consisted for the most part of an electric refrigerator, cooling tanks, beer dispensing equipment, soda fountain, and other apparatus for dispensing beer, and soda fountain equipment, the plumbing bill for installing the same amounting to $195, and that the beer-cooling boxes, dispensing cabinets, fountain cabinets, insulation, and installation, including cabinet work, cost $500. These items for labor and material indicate definitely that this personal

property was permanently installed as fixtures in the refreshment stand, which building was insured under a separate policy; that little of this equipment, except several small items, in value about $100, such as a coffee urn, a cash register, toaster, and grill, could be taken into the main dance pavilion and used there.

The defendant insurance company insists that, if there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, it will be enforced. It further argues that the contents of the large dance pavilion were covered while on sidewalks, in or on conveyances, and on the premises while within 100 feet of the building, but that this does not cover such personal property when it has become the contents of a separate frame refreshment stand, and cites in support thereof the case of *Franklin Fire Ins. Co. v. Hellerick & Son,* 20 Ky. Law Rep. 1703, 49 S. W. 1066, in which it was held that a policy which covered additions to a building would not cover another building separate therefrom and located 20 feet away.

The defendant insurance company has also cited the case of *Leavitt v. National Fire Ins. Co.,* 88 Misc. 563, 151 N. Y. Supp. 71, in which it was held that fire insurance policies which covered the varnish and sundries contained in the warehouse, additions, and extensions at a certain street location did not include material in adjacent buildings.

An insurance policy is simply a contract between the parties, and the usual rules of construction of contracts apply to policies. If the provisions of the policy are clear and unambiguous, the rule of strict construction against the company does not apply. On the other hand, for many years it has been held that insurance policies should be very liberally construed to effect the intention of the parties. It has been held that, where there are conflicting clauses, the one which affords the most protection to the insured will control.

Insurance policies are prepared by experts, who anticipate all possible complications arising in every contingency,

and it has been held by many courts that they will adopt that view which will sustain rather than forfeit the contract of insurance. It is consistent with both reason and justice that any fair doubt as to the meaning of the words of a policy should be resolved against the one who prepares it, for if the terms of a policy are capable of two meanings, that is, where the true meaning is doubtful, the law favors such construction as will protect the insured, and not avoid the policy. See *Bone v. Detroit Nat. Fire Ins. Co.*, 261 Pa. St. 554, 104 Atl. 742; *Tischendorf v. Lynn Mutual Fire Ins. Co.*, 190 Wis. 33, 208 N. W. 917, 45 A. L. R. 856; *Queen Ins. Co. v. Patterson Drug Co.*, 73 Fla. 665, 74 So. 807, L. R. A. 1917D, 1091; *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U. S. 167, 44 S. Ct. 90, 31 A. L. R. 102; *New Masonic Temple Ass'n v. Globe Indemnity Co.*, 134 Neb. 731, 279 N. W. 475; *Schultz v. John Hancock Mutual Life Ins. Co.*, 134 Neb. 885, 280 N. W. 165; *Davis v. Aetna Life Ins. Co.*, 128 Neb. 154, 258 N. W. 58; *Omar Baking Co. v. Employers Liability Assurance Corporation*, 130 Neb. 365, 264 N. W. 873; *Marsh v. Concord Mutual Fire Ins. Co.*, 71 N. H. 253, 51 Atl. 898.

There is another established rule which applies to the case at bar, for while it is ordinarily held that insurance contracts are construed against insurance companies touching those provisions that are ambiguous, it has been held that this is not true as concerns the location of the property which is destroyed, and it is the general rule that "the policy will not be extended to property not in the terms of the description in this respect." See 26 C. J. 93; 6 Cooley, Insurance (2d ed.) 4921; 4 Couch, Cyclopedia of Insurance Law, sec. 963; *Jefferson County Bank v. Insurance Co.*, 251 Ky. 502, 65 S. W. (2d) 474.

In the case of *Meriwether v. Phenix Ins. Co.*, 137 Mo. App. 96, 119 S. W. 535, it was held that a $2,000 fire insurance policy on an electric motor and connections, all while contained in a quartz mill building, did not cover a motor of a different size located in a powerhouse some 1,250 feet away from the quartz mill, the only connection being

the electric wiring which transmitted power and light to the mill.

"A policy of fire insurance which is expressly limited to loss occasioned while the insured property is located in a definite * * * place does not impose liability such as will follow the property upon its being removed to and destroyed at another and different place." *Liverpool & London & Globe Ins. Co. v. Georgia Auto & Supply Co.*, 29 Ga. App. 334, 115 S. E. 138. See *Druggists' Mutual Fire Ins. Co. of Iowa v. Shaw*, 170 Okla. 510, 41 Pac. (2d) 69.

The supreme court of Michigan held in the case of *Gersten v. Western Assurance Co.*, 265 Mich. 122, 251 N. W. 310, that, where the facts were undisputed, the question of whether a cottage was an outbuilding was one of law. A summer cottage had been constructed for use apart from the plaintiff's dwelling-house, and was located 50 yards therefrom, and furnished with household goods and personal effects taken in part from the main dwelling-house and placed in this summer cottage. Upon trial, the jury brought in a verdict that the cottage was an outbuilding within the coverage of the policy, but the Michigan court in reversing the judgment said that the household effects burned were not being stored in the cottage to relieve the dwelling-house, or as an aid to the use of it, but were placed therein for the purpose of using the cottage apart from the dwelling-house.

In like manner, in the case at bar the installation of the beer and soft drinks dispensing equipment in the refreshment booth was an entirely independent construction. Some of the equipment may have been taken out of the main dance pavilion, but when it was installed permanently in the newly-constructed refreshment booth it would in our opinion lose its connection with the main dance pavilion, and would no longer be covered as part of the "contents" of such pavilion. This is true because the word "contents" is a term which should have some definite, fixed relationship to the building in which it is to be used. When it is covered as being a part of that building, it must be fairly for use within it.

In our opinion, the district court was in error in entering judgment under the terms of the policy of insurance sued upon in this case. We believe there was no coverage under the policy, and the judgment is hereby reversed and the action dismissed.

REVERSED AND DISMISSED.

RUTH SPANGLER, GUARDIAN, APPELLEE, V. JERRY A. BROWN, APPELLANT.
289 N. W. 839

FILED FEBRUARY 2, 1940. No. 30758.

1. Appeal. "A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong." *Potach v. Hrauda*, 132 Neb. 288, 271 N. W. 795.
2. Trial. "Where an objection is made in behalf of appellant in respect to an instruction given by the trial court, the judgment will not be reversed, when the instructions, considered in their entirety, are not prejudicial to the lawful rights of appellant." *Lowell v. Buffalo County*, 123 Neb. 194, 247 N. W. 452.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Frederick M. Deutsch and *W. J. Hammond*, for appellant.

J. J. Harrington and *Julius D. Cronin, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

Plaintiff, guardian of Walter Spangler, a minor child, over the age of 14 years, and less than 15 years at the time of trial, brought this action for injuries sustained by her ward, charging defendant with negligence in operating his automobile and striking a horse being ridden by her ward from school on September 7, 1938, at about 4:30 p. m. The jury returned a verdict in favor of the plaintiff in the

sum of $2,000. Motion for a new trial was overruled. The defendant appeals.

On the day in question Walter Spangler, living with his brother, was riding his brother's horse to and from school, as was his custom. The horse was part Arabian, six or seven years old, weighed 950 to 1,000 pounds, and of gentle disposition. The boy would go from his brother's home one-fourth of a mile west on the section highway, then turn southwest onto an angling road, until striking the section-line to the west, and then proceed south. The schoolhouse was located on the southwest corner of the section. The road to the schoolhouse was an angling road. On the day in question the boy returned home on the same road. After talking to a friend in the meadow, he loped the horse until he reached a hill, and walked the horse from that point to a gateway. The hill was between the hay meadow and the angling road which joins the highway. The boy proceeded down the hill to the northeast out onto the highway, walking his horse. After leaving the angling road which crosses the meadow, he then went onto the highway, which runs east and west and is 24 feet from shoulder to shoulder. The road is sandy, has a track in the proximate center thereof, is rough and contains some ruts. The boy proceeded east on the right or south shoulder of the road, walking the horse. He noticed at a distance of about three-quarters of a mile an automobile coming toward him from the east, traveling in or near the middle of the road on the north side of the traveled portion of the highway. The horse continued walking a distance of 11 to 13 feet south of the center of the road until the car drew close, when the horse stopped, as was its habit, to permit the car to pass. The boy estimated the speed of the car at from 50 to 60 miles an hour. One witness testified that the defendant stated he was going 50 miles an hour. This statement the defendant denied, and he testified that his speed was 30 to 35 miles an hour. When the car had proceeded within a distance of 8 or 10 feet, it struck a rut, then turned suddenly in a southwesterly direction, about a 45-degree angle,

striking the left side of the horse and picking up the horse and rider, with the back of the horse toward the radiator, and with the rider's head down close to the front wheel of the automobile, the rider holding onto the horse's mane. The rider and horse were carried for a distance of 105 to 115 feet, and finally were thrown into the ditch on the north side of the road, which would be a distance of 10 to 12 feet.

The opening, sometimes called the gap and referred to as the "trail road," appears to be 12 to 15 steps from post to post, the estimates of the witnesses varying on this point, some placing the distance at as much as 45 feet. Wire has been removed and laid back, to permit the passage of vehicles and animals through this opening. According to the plaintiff's evidence, the accident occurred 150 to 225 feet east of the opening. The horse and rider were carried on the front of the defendant's automobile 105 to 115 feet west. The horse in some manner was caught or thrown onto the automobile, with its head in a forward position. After the accident, the boy stated, he was 60 feet east of the opening. At the time of the accident he was wearing a cap and carrying a dinner bucket which he lost.

About 15 or 20 minutes after the accident, Walter's sister and brother were driving on the same highway, and as they proceeded west the sister saw the horse lying on the north side of the road in the ditch, with its head facing south and its feet to the east. They started to look for Walter, went across the road and looked to see where the horse came out of the opening, then continued along east on the south side of the road for quite a distance, gauging the distance by the length of the courtroom, estimated to be 50 feet, stating it was three or four times its length. Arriving at this point, they found no more hoof tracks, but saw tracks where the horse apparently stopped. The sister observed the hoof marks along the south shoulder of the grade, extending over to the opening into the hay meadow east for a distance of 160 to 235 feet where the hoof marks stopped. The tracks of the automobile were fresh, came from an

easterly direction, "splitting the track;" that is, as if proceeding down the road generally about the middle at a point 10 to 20 feet east of the place where the hoof marks stopped. The tracks of the car then seemed to veer to the southwest over to the hoof marks from a distance of 10 to 20 feet. In this position the car tracks were going toward the southwest; then apparently the car straightened back into the road, and none of the car tracks appeared south of the ditch. The sister saw Walter's cap there, picked it up, and further down in the ditch lay his dinner bucket, with one bail off. She found an ornament, which will be later described, impregnated into the left hip of the horse the length of four or five inches. The horse was lying in the ditch on the north side, with its head facing south and its feet toward the east. This evidence is corroborated by the brother, who pulled the ornament out of the horse's left hip. He testified it had been implanted into the hip for a distance of about three inches. The injuries to the horse consisted of both hind legs broken at about the height of the bumper of the car, its left hip wounded, and the animal had to be killed. The injuries suffered by the boy were: The femur bone on the left leg was broken diagonally; his left hip dislocated, and injuries to his left side, left arm and shoulder.

The defendant, a man 53 years old, engaged in the life insurance and real estate business in Norfolk, and owner of land in the vicinity of the accident, testified, in substance, that the road in question was an average country road, with a grade thrown up and a track down about the middle of the road, which was sandy, with some chuckholes in it. When the defendant's automobile, which was a 1936 Buick coach, weighing 3,200 to 3,300 pounds, approached within 30 to 40 feet east of the opening or gap, Walter came from the hay meadow through the opening at a gallop in front of the car. Defendant stated he immediately applied his brakes, which were in good working condition, and stopped as soon as he could, but he was unable to avoid hitting the boy; that the bumper of his automobile struck the hind

legs of the horse as it was going north; that the horse naturally jumped as the car struck it, and proceeded to the north side of the road, and as it jumped it threw the boy; that his car came to a complete stop in about six feet after striking the boy; that immediately after the accident the boy was lying just north of the car; the horse was lying in the north ditch slightly in front or west of the boy. There is also testimony that a boy's cap was lying four or five feet from the horse, but was not picked up. Defendant stated the boy said to him, in substance, that his mother had told him not to gallop the horse through the opening in the meadow. The boy was taken to the home of defendant's tenant, and from there to a doctor for treatment. Other witnesses testified that the position of the horse in the north ditch after the accident was about the center of the distance between the two posts, constituting the opening or gap.

There is claim made with reference to shrubs and a growth of box elders, and a shelter belt planted in 1936, about 10 rods in width, consisting mostly of cottonwoods, along the road, as shown by the exhibits, which would have a tendency to obscure the vision of a driver proceeding west on this road and approaching the opening to the angling road into the meadow. However, this evidence is in direct conflict. In the event that plaintiff's theory of the accident is to be believed, such evidence is not material.

The evidence further shows that shortly after the accident, in the presence of two uncles, his mother and sister, the boy made a certain written statement to the defendant's counsel, which is in evidence; and that the statement is at variance with the testimony of the boy at the trial. In any event, his evidence, in its entirety, is for the jury, and they are the judges of its credibility.

The defendant first complains of error in that the verdict and judgment are contrary to the indisputable physical facts. In this connection, the evidence shows that the height from the surface of the road to the top of the bumper of the car is approximately 16 inches, the bumper extending

out from the right and left fenders three to four inches, and is about eight inches in front of the radiator grill. The distance from the radiator, as distinguished from the grill, out to the bumper is 16 inches; the radiator sets back of the grill in a radiator shell, a distance of eight inches; the bumper extends out eight inches in front of the grill. The grill is perpendicular.

The damage to the car after the accident consisted of the following: The radiator grill was broken, the bumper had been damaged, bent at a distance of one and a half feet from its left (and south) end, shoved in, pushing holes in the radiator; that shoved the radiator back; the radiator in turn was shoved back against the fan. The left front lamp, located between the radiator and the left front fender, was broken, and there was a slight dent in the left front fender. The automobile would not operate under its own power, due to damage to the radiator, causing it to leak, making the motor too hot. The top of the radiator was 49 inches above the traveled surface; the hood was not damaged. One of the lights between the radiator and shell was damaged. The distance from the ground to the radiator is four feet, one inch. The emblem, heretofore referred to, is molded into part of the grill and sets back from the front of the grill. The contention is that, before the contact with the ornament could be had, the horse would have to hit against the radiator shell and the grill and be shoved backward.

We have detailed the pertinent facts, including the physical facts, relating to this accident. From a consideration thereof, we cannot say that the physical facts are so conclusive as to bar submission of the plaintiff's case to the jury. The decisions cited by the defendant under this assignment of error are applicable if the facts so warrant, but such is not this case.

Defendant complains of certain instructions of the trial court as being prejudicial. The court gave an instruction, defining the duty of Walter Spangler in approaching and entering upon the highway from the trail road, stating that

his failure to abide by such duty would constitute negligence. The objection is that this instruction assumes a fact as established which is material to the case, when the evidence with reference thereto is in conflict; citing *Howe v. Provident Loan & Investment Co.*, 130 Neb. 469, 265 N. W. 255. In the instant case, the jury, by agreement of the parties and at the direction of the court, had the opportunity to view the premises. Such observation partakes of the nature of evidence. They saw the road in question, which was referred to in the instruction.

"Where an objection is made in behalf of appellant in respect to an instruction given by the trial court, the judgment will not be reversed, when the instructions, considered in their entirety, are not prejudicial to the lawful rights of appellant." *Lowell v. Buffalo County*, 123 Neb. 194, 247 N. W. 452.

We have carefully examined the instructions and conclude that, when considered as a whole, they properly and adequately state the law, and, under all the circumstances as developed by the record, are not prejudicial. The charged negligence of the respective parties in the instant case were questions for the jury's determination. See *Frish v. Swift & Co.*, 97 Neb. 707, 151 N. W. 165.

"A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong." *Potach v. Hrauda*, 132 Neb. 288, 271 N. W. 795.

The judgment of the district court is right and is

AFFIRMED.

ARCHIE STEWARD, APPELLANT, V. DEUEL COUNTY, APPELLEE.
289 N. W. 877

FILED FEBRUARY 2, 1940. NO. 30837.

1. **Workmen's Compensation.** The facts and circumstances in the instant case are sufficient to determine that Deuel county was the employer of the claimant, within the meaning of the workmen's compensation law of Nebraska. Comp. St. 1929, secs. 48-114; 48-115, as amended (Laws 1933, ch. 90); 48-116.

2. ———. The evidence in the instant case is insufficient to determine the extent of the disability, if any, suffered by the claimant due to injuries received in the course of his employment, and, in such event, as contemplated by section 48-167, Comp. St. Supp. 1937, the cause is remanded for the purpose of procuring competent evidence, to permit the court to determine the extent of disability and the award of compensation to be made to the claimant, if any.
3. ———. Where a reasonable controversy exists, as between an alleged employer and an employee, as to the former's liability under the workmen's compensation law, such employer is not liable for penalty for waiting time, within the contemplation of section 48-125, Comp. St. Supp. 1935, during the time the cause is pending in the courts for final determination.

APPEAL from the district court for Deuel county: J. LEONARD TEWELL, JUDGE. *Affirmed in part and remanded for further proceedings.*

W. I. Tillinghast, for appellant.

Dallas A. Clouse and *Harry R. Ankeny, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

This is a compensation case, originally tried to one judge of the compensation court, later to the compensation court sitting *en banc* on rehearing.

Archie Steward, the appellant, was awarded compensation at the rate of $10 a week for 300 weeks from September 20, 1933, less $2,124, paid by Deuel county, and in addition thereto the sum of $6.75 a week for the remainder of his life, on account of total permanent disability. From this award Deuel county appealed to the district court, where on September 5, 1939, the court entered judgment, finding that Archie Steward was an employee of Deuel county and entitled to compensation from the county, under the provisions of the workmen's compensation act, at the rate of $10 a week for 300 weeks, less $2,124 which had been paid by the county and less any sums paid since May 16, 1939. Archie Steward cross-appealed to the district court, alleg-

ing that the court erred in not awarding a penalty of 50 per cent. for waiting time at the rate of $5 a week for 293 weeks, in the amount of $1,465, and in not awarding needed and necessary medical attention and hospitalization, and in attaching costs to appellant. The district court declined to award penalty money as prayed for. From the judgment of the district court Archie Steward appeals, and Deuel county is cross-appellant.

The first question for determination is whether or not Archie Steward, at the time of receiving his injuries, was an employee of Deuel county, Nebraska. Deuel county is divided into three commissioner districts. By agreement, each commissioner is responsible for the upkeep and improvement of the roads and highways in his district. In this instance, two of the commissioners orally agreed with the mayor of Big Springs, Nebraska, that, in the event the village would employ and pay a foreman, the county would pay for the labor incident to some work to be done with reference to a highway. Dick Brown was recommended as foreman by the commissioner of the district which includes Big Springs. The foreman was to have charge of, direct and oversee, and employ such help as he might require. The work consisted of removing dirt which apparently was within the incorporated limits of Big Springs, to haul the dirt northeast of the village to fill in a low grade, to raise the grade on a highway running south out of the village and maintained by the county up to the village, and to fill in the highway out to the end of a bridge which crossed the South Platte river.

Archie Steward met Dick Brown on the street; Brown told him of the job and employed him at the rate of $2.50 a day for six days a week. While there is evidence that the needy were to be employed, in so far as Steward was concerned he was not employed for such reason. Steward was to shovel dirt into a wagon. He started work on September 19, 1933, and in the evening of the second day, while standing between the dirt bank and a wagon he was helping to load, he suffered an injury as the result of a cave-in which

buried him. He was subsequently removed to a doctor's office. Steward testified that at the time the county commissioner representing the district, in the absence of the foreman, directed the men to clean out the dirt. This evidence is in conflict, but the fact that the commissioner, who lived in close proximity, watched the progress of the work is not denied. It is noted by the record that the right to discharge workmen was not granted to or exercised by the foreman. He accepted suggestions from the commissioner as to who should be employed, where the parties were required to furnish teams. The rate of pay was evidently fixed by the county, and the workmen were paid from county funds, notably from the bridge and road-dragging fund. The record is void of any official action taken by the board of trustees of the village or by the county commissioners with reference to the oral agreement, and no contractual relation between the village and the county existed sufficient to create liability of one to the other, to compel enforcement of the agreement.

Subsequent to the injuries received by Steward, he entered into an agreement with Deuel county, under which he was paid the sum of $2,124 for hospitalization and medicine. This agreement was never approved, as provided by law, is unenforceable and void. However, it is evidence which gives a strong inference that the county stood in the relation of an employer to Steward. The following sections of the workmen's compensation law govern:

Section 48-114, Comp. St. 1929, in describing an employer, includes the state and every governmental agency created by it. Section 48-115, Comp. St. 1929, as amended (Laws 1933, ch. 90), using the terms "employee" and "workman" interchangeably, includes "every person in the service of the state or of any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written." Section 48-116, Comp. St. 1929, in construing the word "employer," provides: "Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to

execute work without being responsible to the workmen for the provisions of this article, shall be included in the term 'employer' * * * and be subject to all the provisions of this article."

The court was not in error in finding that Steward was an employee of Deuel county.

The second question for our determination is whether or not the appellant received injuries that totally and permanently disabled him; whether solely because of such injuries he is unable to perform and obtain any substantial amount of labor, either in his particular line of work, or any other for which he would be fitted except for the injury, within the meaning of the workmen's compensation law. *Wingate v. Evans Model Laundry*, 123 Neb. 844, 244 N. W. 635; *Flesch v. Phillips Petroleum Co.*, 124 Neb. 1, 244 N. W. 925.

A careful reading of the medical testimony discloses the following: Dr. C. H. Smith, a resident of Big Springs since 1907, practicing medicine in that community since 1916, had been acquainted with Archie Steward since 1907. On September 20, 1933, he treated Steward professionally at his office at 6 o'clock in the evening. Steward at that time had a broken pelvis, was bruised and crushed otherwise. He was taken to the Redfield and Dent Hospital at North Platte. After returning from the hospital Steward was given electric treatments, physiotherapy, by Doctor Smith, "to get that joint so he could move it." Steward at that time was physically able to do only very light work. He required medicines which were furnished to relieve pain and, from a knowledge of Steward's condition, the doctor testified that he would not be able to do normal physical labor again; that Steward developed neuritis as the result of the accident.

Steward testified that he had worked in a café in Colorado for a month or two; that he drove a car; further, that since the time of his injury he was not able to do work that he had ordinarily done; that his work consisted mostly of farming and manual labor, and that his health previous to

the accident was good; also that he was not educated to do light work; that he was, at this time, able to walk and get around.

The foregoing evidence is substantially all the competent evidence with reference to the disability suffered by Steward. The trial court made a finding that such evidence was wholly insufficient to sustain the finding of the compensation court, to the effect that the appellant suffered total and permanent disability from such injuries; further, that such evidence does not show Steward to have suffered total disability for a period of 300 weeks, but fails to show what portion of 300 weeks such disability was only partial, and that he now suffers only partial disability, if any, from such injuries. The court then proceeded to fix the disability as provided for by subdivision 2, sec. 48-121, Comp. St. 1929, finding that the appellant's wages were at the rate of $15 a week, and that 66 2/3 *per centum* thereof should be paid him, or the amount of $10 a week for 300 weeks; determined that even though the agreement made by the appellant and Deuel county was nonenforceable and void Deuel county had paid the sum of $2,124, which should be deducted from the amount found due on the basis hereinbefore stated, and the balance to be paid in a lump sum.

The evidence is insufficient to disclose to this court the degree of disability suffered by Steward by virtue of his injuries, or enable the court to intelligently determine the amount of compensation due him. We have determined that any amount paid by the county, as stated in the judgment of the trial court, should be deducted from any compensation which should be finally awarded Steward.

Section 48-167, Comp. St. Supp. 1937, provides, in substance, that the Nebraska workmen's compensation court may make rules to carry out the intent and purpose of the act and laws amendatory thereof, with the exception of such as are committed to the courts of appellate jurisdiction. The act provides that the compensation court, or any judge thereof, or any appellate court may, upon the motion of either party, or on its own motion, require the produc-

tion of medical reports, X-rays, or, in fact, all matter that may be necessary in the determination of the rights of either party in any matter pending before any appellate court.

The penalty award which Steward seeks in his cross-appeal, as provided for in section 48-125, Comp. St. Supp. 1935, is not allowable. A reasonable controversy exists between Duel county and Steward as to the county's liability under the workmen's compensation act. Under such circumstances, the county is not liable for penalty for waiting time during the time the cause is pending in the courts for final determination. *Claus v. DeVere*, 120 Neb. 812, 235 N. W. 450; *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254.

The cause is remanded to the district court in order that evidence may be obtained, showing the extent of disability, if any, suffered by the appellant by virtue of the injuries received in the course of his employment.

AFFIRMED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.

LAURA H. MARTINDALE ET AL., APPELLANTS, V. SAMUEL G. PANTER ET AL., APPELLEES.
289 N. W. 869

FILED FEBRUARY 2, 1940. No. 30670.

1. **Pleading.** "The failure to demur or the subsequent filing of an answer does not waive the right to object to a petition on the ground that it does not state facts sufficient to constitute a cause of action." *Sallander v. Prairie Life Ins. Co.*, 112 Neb. 629, 200 N. W. 344.
2. **Contracts.** In a transaction between a father and his adult children, they may deal with each other in reference to the property of either as with strangers and no confidential or fiduciary relationship will be presumed to exist between them as a result thereof.
3. **Judgment: VACATION.** In an action to vacate or modify a judgment or decree on the ground that it was obtained by fraud, the

plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to plead his defense and to secure a just decision thereon was not attributable to his own fault or negligence.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Reversed.*

Harvey W. Hess and *Peterson & Devoe*, for appellants.

Frank A. Peterson and *Michael T. McLaughlin, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER and MESSMORE, JJ., and ELLIS and WENKE, District Judges.

WENKE, District Judge.

This appeal is from an order of the district court for Lancaster county modifying its decree of foreclosure entered at a prior term upon a petition of the defendants therein, who are appellees in this court; the plaintiffs in the lower court being the appellants here.

The appellants, Laura H. Martindale and S. G. Panter, Jr., the plaintiffs in the lower court, and who will be herein referred to as appellants, on September 10, 1935, filed their foreclosure action in the district court for Lancaster county making the appellees Samuel G. Panter and Catherine H. Panter, husband and wife, defendants, who will be referred to herein as appellees, and had summons issued and personally served upon each of the appellees. This petition, among other allegations, set forth that all items due under the note and mortgage therein being foreclosed drew and were drawing interest at 10 per cent. under the provisions of said note and mortgage. The appellees defaulted, and on November 20, 1935, a decree was entered finding the sum of $6,691.12 due, with interest at 10 per cent., which decree was approved by the attorney for the appellees. On October 14, 1937, in the same action, but at a subsequent term, the appellees filed their petition to modify the decree as to the amount therein found due and the interest due thereon, upon which petition summons was issued and

served upon the appellants. In their petition the appellees allege that on August 11, 1925, they executed and delivered to the Conservative Mortgage Company their note for $3,500 with interest at 5½ per cent. per annum, due September 15, 1930, on which they had paid all interest to and including interest due September 15, 1929; that shortly before the note came due the appellee Samuel G. Panter took up the matter of refinancing the loan with the appellant S. G. Panter, Jr., and that S. G. Panter, Jr., agreed to refinance the loan for the appellee at the same rate, and that pursuant thereto did on or about September 10, 1930, obtain an assignment thereof, and that S. G. Panter, Jr., never made any demand thereafter upon appellees for the payment of any interest, but suggested the note could run without such payment; that on September 10, 1935, the appellants filed their petition demanding 10 per cent. upon the coupon due September 15, 1930, upon the principal amount and taxes paid, and decree was entered allowing the 10 per cent. contrary to said agreement; that the appellant S. G. Panter, Jr., is a son of the appellee Samuel G. Panter and for many years father and son were engaged together in the practice of medicine at Ohiowa, Nebraska; that at all times the relationship of trust and confidence existed between father and son; that the father is now 85 years of age and retired from the practice of medicine and was so retired at the time of the transaction with his son in September, 1930; that because of the relationship between the father and son appellee relied upon the good faith of his son and believed he would carry out his agreement, and because thereof did not scrutinize as carefully as he otherwise might have done the foreclosure proceeding filed herein, but supposed that his son would relate all of the facts to his attorney and to the court and not take a decree for more than the agreement; that the son fraudulently concealed said facts from his attorney and the court. There are further allegations as to an attempted settlement between the parties but which are immaterial in this action.

To this petition the appellants demurred, which demurrer

was overruled, and they subsequently answered. Hearing was had on June 16, 1938, at a subsequent term to that at which the decree was originally entered, and an order was entered modifying the former decree herein entered as to the amount due, and the interest rate, finding for the appellees as to said agreement, and this appeal is from said order.

The first proposition of law relied upon by the appellees to sustain the findings of the lower court is: "Where a party answers over after an adverse ruling on his motion or demurrer and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in such ruling."

This court has, however, laid down a different rule in a case where the petition does not state facts sufficient to constitute a cause of action. In the case of *Sallander v. Prairie Life Ins. Co.*, 112 Neb. 629, 200 N. W. 344, the court held: "The failure to demur or the subsequent filing of an answer does not waive the right to object to a petition on the ground that it does not state facts sufficient to constitute a cause of action." And in *Markel v. Glassmeyer, ante,* p. 243, 288 N. W. 821, the court held: "By pleading to the merits, the defect that the petition does not state a cause of action is not waived."

For their second proposition of law the appellees cite the rule that, "In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received support from the evidence and that such issue was correctly determined."

However, in the case *In re Estate of Raymond,* 128 Neb. 568, 259 N. W. 522, cited by appellees under this proposition, the court lays down the further rule that, "Where a cause is brought to the supreme court on appeal without a bill of exceptions or special findings, the only question that can be considered by the court is the sufficiency of the pleadings to sustain the judgment of the lower court."

This appeal is here on the transcript and without a bill of exceptions, and will be considered by this court only with reference to the sufficiency of the appellees' petition

as alleging facts sufficient to constitute a cause of action upon which the order of the lower court can be based.

Appellees' fourth and fifth propositions have no application to the facts as alleged in their petition. They refer to the duties and rights of persons standing in a fiduciary or confidential relationship to each other. The facts as pleaded by the appellees show that appellant was an adult son of the appellees, and that their practice of medicine in Ohiowa, Nebraska, had terminated prior to the transaction involved in this action, and that this note and mortgage was the only transaction between them. As was said by the court in the case of *Dick v. Albers*, 243 Ill. 231, 90 N. E. 683, which is cited under appellees' fourth proposition: "It cannot be said, as a matter of law, that because Henry Albers was a son of John Albers he thereby assumed a fiduciary relation to the latter in this transaction. The relationship existing between father and son where the son is an adult and doing business for himself is not necessarily a fiduciary relation to which the equitable doctrine of constructive trusts is applicable. In such case the son would have the same right to purchase the outstanding notes or mortgages against his father that any other person would, and while a fiduciary relation might be established in such case by less evidence than would be required where the parties were entire strangers, still there must be some evidence, outside of the mere blood relationship between the parties, to justify a court of equity in impressing a trust upon the transaction." And in the case of *Gregory v. Bowlsby*, 115 Ia. 327, 88 N. W. 822, quoting from the opinion: "A father bears no such confidential or fiduciary relations to his adult children as to bring transactions between them relating to the land of either under suspicion. He may deal with them as with strangers, and no presumption of fraud or undue influence obtains."

Thus, the purchase by the appellant, an adult son, of the note and mortgage of his father, the appellee, and their agreement as to the interest it was to draw created no confidential or fiduciary relationship between them, nor does

the fact that the relationship of appellant to his attorney is a confidential one create a confidential or fiduciary relationship between appellees and appellant.

From the allegations of appellees' petition, which have been hereinbefore fully set forth, it clearly appears that this defense existed and was known and available to the appellees at the time of the foreclosure action, and that the appellants, in the foreclosure action, clearly and definitely set forth their claim to the 10 per cent. as was provided by the terms of the note and mortgage, and that no confidential or fiduciary relationship existed between the parties; that had a careful examination of the pleadings been made they would have disclosed that the appellants were claiming 10 per cent., and the petition fails to set forth anything that was done by the appellants, or any duty imposed upon them which they failed to do, which in any way prevented the appellees from examining such pleadings, and it was through appellees' own fault and neglect that they failed to do so.

As was held in the case of *Secord v. Powers*, 61 Neb. 615, 85 N. W. 846: "In an action to vacate a judgment on the ground that it was obtained by fraud the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision was not attributable to his own fault or negligence." And in the case of *Miller v. Estate of Miller*, 69 Neb. 441, 95 N. W. 1010, the court has said: "But it is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary, but he must go farther and show that the failure to obtain a just decision is not attributable to his own fault or negligence."

Under their third proposition of law the appellees cite the case of *Young v. Morgan*, 9 Neb. 169, 2 N. W. 237, which is in accordance with the above authorities and holds as follows: "To authorize the interference of a court of equity in such a case, it must appear that it is against conscience to permit the judgment to be enforced, and also that the plaintiff was prevented from making her defense by acci-

dent, mistake, surprise, or by fraud of the adverse party, and that she has not been guilty of neglect in not making her defense."

While it seems rather unfortunate in this case that a son should attempt to burden his father with the maximum of interest upon this obligation contrary to an agreement, as admitted by the demurrer, to charge less, yet it appears from the petition to modify the decree that such defense was available and known to the appellees in the original action, and that it was through their own neglect to carefully scrutinize the pleadings and discover that the appellants were claiming 10 per cent. interest that they find themselves in the present situation, and not because of any act of the appellants. "It is not the policy of the law to encourage actions of this kind. There must be an end to litigation." *Secord v. Powers, supra.* "It is in the highest degree essential to the welfare of the community, and to the respect which should be given to and the confidence which ought to exist in the judgments of a court, that they should not be set aside unless upon the strongest and most convincing grounds" *Scudder v. Evans*, 105 Neb. 292, 180 N. W. 254.

It thus appearing that the appellees have alleged no facts in their petition to modify the decree to show that any act of the appellants prevented them from pleading and having a trial of their defense, or that they exercised due diligence to obtain their rights in the original foreclosure action, or that their failure to carefully scrutinize the pleadings and find out the claim of the appellants, as it was clearly set forth in the foreclosure petition, and to set forth their defense in an answer thereto and to secure a just decision thereon was not attributable to their own fault or negligence, such petition fails to allege sufficient facts to constitute a cause of action upon which to base the decree of the lower court modifying its original decree of foreclosure entered on a prior term, and the demurrer of appellants thereto should have been sustained because of such insufficiency.

The case is therefore reversed and remanded, with directions to enter an order in compliance herewith.

REVERSED.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. ELLA MAY POPHAM ET AL., APPELLANTS.
290 N. W. 423

FILED FEBRUARY 9, 1940. NO. 30739.

Mortgages. Upon an appeal from an order confirming a judicial sale of real estate, this court, hearing the matter *de novo*, must be satisfied either that the property was sold for fair value, under the circumstances and conditions of the sale, or that a subsequent sale would not realize a greater amount. Unless so satisfied, the action of the trial court confirming the sale will be reversed, the sale set aside, and the cause remanded for further proceedings.

APPEAL from the district court for McPherson county: ISAAC J. NISLEY, JUDGE. *Reversed.*

Hoagland, Carr & Hoagland, for appellants.

Schaper & Runyan, Franklin L. Pierce and *Philip M. Wellman, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is an appeal from the confirmation of sale pursuant to a decree of foreclosure of a mortgage executed by husband and wife. This action is against the widow and heirs.

The land involved is a well-improved ranch of 3,204 acres. There is a first mortgage upon the premises to the Federal Land Bank of Omaha, upon which it was stipulated that there was due $10,800.74 at the time of the hearing of objections to confirmation on September 29, 1938. Subject to the above mortgage, plaintiff held a mortgage which it foreclosed in this proceeding. A decree for $4,965.61, bearing interest at 5 per cent., was entered September 27, 1937. The items included in the decree are not shown.

The total amount of delinquent taxes are not shown. The evidence shows the Federal Land Bank paid the taxes for 1933 to 1937, inclusive, and we assume that those taxes are included in the amount stipulated to be due the Federal Land Bank.

At the time of the sale on August 8, 1938, there was due on the decree, including costs, $5,264.81. This makes an indebtedness against the property at that time of over $16,000, or an indebtedness of $5 per acre. Plaintiff's bid at the sale was $2,264.81.

At the hearing on objections to confirmation, all evidence was furnished by defendants' witnesses, among whom there were interested and disinterested parties. When asked their opinion of the "fair and reasonable market value," they replied in substance that the land ought to sell for from $7 to $8 per acre. (At $7 per acre this would show a value for the land of $22,428.) However, defendants' witnesses knew of no one who would buy the land sold under the decree for the encumbrances against it, nor of any one who would bid a greater amount than that bid if it were offered for resale, nor of any sales in that community in recent years where land sold for more than $3 per acre. At the close of defendants' testimony, plaintiff's attorney stated: "The plaintiff wishes to waive a deficiency judgment against all defendants. We waive a deficiency of $3,000 in this case." Plaintiff states in its brief: "Plaintiff offered no evidence other than to raise its bid $3,000 over bid previously made at the sheriff's sale and to waive deficiency against all defendants." We accept the plaintiff's interpretation of its act.

This matter is before this court for trial *de novo*. *Federal Farm Mtg. Corporation v. Bostrom,* 136 Neb. 180, 285 N. W. 490.

We have the following elements to consider in determining whether or not to affirm the confirmation of this sale:

(1) Evidence by the defendants that the land is worth not less than $6,000 more than the sale price plus encumbrances.

(2) No positive evidence as to its value offered by the plaintiff contrary thereto.

Under these circumstances, we are not satisfied that the land "was sold for fair value, under the circumstances and conditions of the sale," nor "that a subsequent sale would not realize a greater amount." Comp. St. Supp. 1937, sec. 20-1531. See *Filley v. Mancuso*, 133 Neb. 538, 276 N. W. 157; *Redfield v. Collopy*, 133 Neb. 546, 276 N. W. 158.

The order confirming the sale is therefore reversed, and the cause remanded for further proceedings.

REVERSED.

L. A. RICKETTS, TRUSTEE, APPELLEE, V. FARRA MAE GEIL ET AL., APPELLANTS.
290 N. W. 254

FILED FEBRUARY 9, 1940. No. 30747.

Bills and Notes. Where mortgagors accept the services of an investment company in securing the extension of a mortgage debt, receive the benefits of said services, and give a promissory note in consideration of and in payment therefor, a sufficient consideration for the note is established.

APPEAL from the district court for Scotts Bluff county: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Howarth N. Olsen, for appellants.

James H. Anderson, Frank Barrett and *Elmer M. Scheele, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is an action to recover judgment for the amount due on a promissory note. The defense plead was lack of consideration. Trial was to a jury. After both parties had rested, the trial court sustained a motion by the plaintiff for an instructed verdict. Judgment was entered for the plaintiff. The defendants appeal.

There is no serious dispute about the facts. The Lincoln Trust Company and the Lincoln Safe Deposit Company were separate corporations. The Deposit Company was owned entirely by the Trust Company. The two companies had the same officers and personnel, occupied the same quarters, and were "run as one company." On April 8, 1925, the defendants borrowed from the Deposit Company the sum of $16,000 and secured the same by a real estate mortgage. Said $16,000 was represented by 20 bonds in $500 and $1,000 amounts. These bonds were sold to investors. At the time of their execution and delivery in 1925, the defendants also executed and delivered to the Deposit Company a note for $800 which was the customary 5 per cent. commission charge. This $800 note was paid. The $16,000 principal debt was not paid.

The bonds for the $16,000 were payable to the Deposit Company, or order, at the office of the Deposit Company for the benefit of the holders thereof, and it was provided that, if any interest was not paid when due, or upon any default in the performance of the covenants of the mortgage, the bonds became due and payable at the option of the Deposit Company, and that, "If any default occurs in this bond, or in any of said bonds or in said mortgage, then the Lincoln Trust Company may, as trustee for the holder of this bond and of all of said bonds, without notice to, or hindrance from any one, declare this bond and all said bonds matured, due and payable."

The mortgage contained the following provision:

"In case of any of the bonds or coupons secured hereby are held by other parties than the mortgagee, the parties hereto hereby constitute and authorize the Lincoln Trust Company, of Lincoln, Nebraska, as trustee under this mortgage, for the use and benefit of the holders of the debts secured hereby, with full power and authority upon maturity of this mortgage or the debts secured thereby, either by the lapse of time or by failure to perform any of the terms or conditions hereof, to foreclose or enforce collection or payment of this mortgage and the debts secured thereby, or in

case of loss or damage to collect and receipt for insurance thereon; to satisfy and release of record or otherwise this mortgage or said debts; to make distribution of the proceeds thereof to the holders or owners of said bonds or coupons after payment of the costs and expenses thereof, and to do all things necessary or suitable to the performance of said duties and the exercise of said powers."

On March 26, 1930, the defendants executed an extension agreement reciting that the legal owners and holders of the bonds had extended the time of payment for a term of five years from April 8, 1930. This agreement recites the execution of 201 interest notes for the extended term and provided that the original mortgage should remain in full force as security for the full payment of the principal and interest. At the same time, the defendants executed separate agreements (one for each bond of the $16,000 loan), reciting that the Deposit Company had extended the time of payment of the bond for 5 years, and providing for the payment of interest during the term of the extension, at the office of the Trust Company. To these agreements were attached the interest notes referred to in the extension agreement. At the same time, the defendants executed and delivered to the Deposit Company the promissory note for $800 which is here in suit. Like the prior note, for the same amount, it was a commission note given for "services in extending the loan." These services include the placing of the bonds with new purchasers or persuading the then holders to retain them for the extended period.

The Trust Company and Deposit Company were adjudged bankrupt. The First Trust Company of Lincoln, Nebraska, as successor trustee to their trusts (because of the failure of the defendants to pay interest under the extension agreement beginning with that due in October, 1930, and the failure of the defendants to pay taxes for the years 1930, 1931, and 1932) declared the entire debt due and foreclosed the same.

The plaintiff as trustee for the Deposit Company brings this action to recover judgment on the second $800 note.

Have the defendants established a want of consideration for the note in suit? Defendants state their position as follows: "The note, then, was given because the loan was extended and for no other reason and if this extension was void the consideration was lacking and the note sued on cannot be enforced against the defendants." The defendants' contention that the extension agreement is void is based upon these propositions: (1) Because of the clause in the mortgage hereinbefore quoted, the Trust Company became the holder of the obligation and the only party authorized to grant an extension; (2) the Deposit Company did not have authority to extend the agreement; (3) it was not binding upon the Trust Company and therefore was void.

These contentions fail upon an examination of the record. The defendant, Charles A. Geil, testified that "this $16,000 mortgage" "was extended for a five-year term." That the extension was made by the Deposit Company and was agreeable to and accepted by the Trust Company, and that the rights and liabilities of all the parties were adjudicated upon the basis of the original instruments as altered by the extension agreements is established, without contradiction, by the record.

These contentions of the defendants go to the question of consideration, obligations assumed, and rights secured by the extension agreements. The question here presented is whether or not there was a consideration for the commission note.

"The presumption is that a promissory note is a valid obligation based upon a good and legal consideration, and the burden of showing that there was a want of consideration rests upon the defendant." *Farmers & Merchants State Bank v. Kuhn*, 125 Neb. 457, 250 N. W. 652. See Comp. St. 1929, secs. 62-201, 62-205.

"Value is any consideration sufficient to support a simple contract." Comp. St. 1929, sec. 62-202.

Services are a sufficient consideration for a promissory note if performed under an express or implied contract to

pay therefor or rendered in expectation of payment without regard to the value as compared with the amount of the note, and it is immaterial that the services were rendered without any express request or promise to pay therefor, where the maker received and accepted the services. 8 C. J. 228; 10 C. J. S. 615, sec. 151.

The consideration for the note in suit was the commission earned by the Deposit Company for services rendered in the extension of the $16,000 loan. The defendants received the benefit of that service. It was a sufficient consideration to support the promise to pay contained in the instrument in suit. *Mohr v. Rickgauer*, 82 Neb. 398, 117 N. W. 950; *United States Fidelity & Guaranty Co. v. Curry*, 126 Neb. 705, 254 N. W. 430; *Stebbings v. Klein*, 222 Mich. 503, 193 N. W. 232.

The judgment of the trial court is

AFFIRMED.

NEBRASKA STATE BUILDING CORPORATION, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

290 N. W. 421

FILED FEBRUARY 9, 1940. No. 30737.

1. **Taxation.** All nonexempt property in Nebraska is subject to taxation and for that purpose must be valued at its "actual value," which means "its value in the market in the ordinary course of trade." Comp. St. 1929, sec. 77-201.
2. ———. The valuation of nonexempt property as ultimately fixed by the board of equalization is final unless shown by clear and convincing proof to be erroneous.
3. ———. An erroneous and excessive valuation of property for the purpose of taxation, as fixed by the board of equalization upon complaint of the owner, may be corrected in a proceeding in error.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed.*

Field, Ricketts & Ricketts, for appellant.

Clarence G. Miles, Frederick H. Wagener and *Ralph P. Wilson, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This is a proceeding in error to review the action of the board of equalization of Lincoln in determining the value of lots 11 and 12, block 60, original plat of the city, for the purpose of taxation. The real estate described is situated at the southeast corner of O and Fifteenth streets and fronts on O street. There is a five-story brick office building on lot 12 which is 25 feet wide. Lot 11 is east of lot 12 and is also 25 feet wide. On lot 11 there is a two-story brick building, the first floor of which is leased for business purposes and there are living-rooms on the second floor.

Both lots, encumbered by mortgage and tax liens, are owned by Nebraska State Building Corporation, plaintiff. Defendants are the city of Lincoln and members of the city council sitting as a board of equalization.

The assessor fixed the value of the two lots as a unit at $59,500 for the purpose of taxation. Upon complaint by plaintiff that the assessment was excessive and that the actual value of the property did not exceed $30,000, the board reduced it to $52,500. To procure a further reduction, plaintiff took its complaint to the district court by a proceeding in error. The district court affirmed the decision of the board of equalization and plaintiff filed in the office of the clerk of the supreme court a transcript of the proceedings before the board of equalization and also the evidence adduced before that tribunal.

In a formidable argument on values in connection with an analysis of the evidence from the standpoint of plaintiff, counsel insist that no value of lots 11 and 12 in excess of $33,000 can be justified. On the contrary, defendants contend that no reduction can be made because the transcript of the proceedings does not contain a copy of the assessment showing the value fixed by the board of equalization and

that consequently there is no basis for any reduction. This position of defendants does not seem to be well taken. The record shows that plaintiff made a formal demand upon the board for a complete transcript, "including the assessment as made." The record discloses further that the complaint stated the property was valued by the assessor at $59,500 and that the board made a reduction therefrom of $7,000, thus fixing the value of the two lots and the improvements at $52,500. The record for review was so considered at the hearing in the district court and the parties on both sides in the supreme court discuss actual value for the purpose of the assessment. Under the circumstances the immaterial defect in the transcript, attributable as it is to defendants, is not sufficient to require an additional transcript at this stage of the litigation or to prevent a review of the proceedings before the board of equalization.

Is the maximum value of these lots and the improvements thereon $33,000 as argued by plaintiff? Values for the purpose of taxation must be tested by the rules of the statute:

"All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade." Comp. St. 1929, sec. 77-201.

The valuation ultimately fixed by the board of equalization is final unless shown by clear and convincing proof to be erroneous. *First Nat. Bank of Blue Hill v. Webster County*, 77 Neb. 813, 815, 110 N. W. 535. According to this standard of measure, the value of the two lots and the buildings thereon as fixed by the assessor and the board is far in excess of actual value and uncontradicted evidence so proves. The building on lot 12 is 50 years old. It has deteriorated in value annually since 1928. It is out of date for an office building or for any other current purpose. It does not produce any net income, but creates an annual deficit to be met by the owners. The assessor himself testified it was "100 per cent. obsolete." The evidence shows conclusively that the lot would be more valuable without

the building. The building, therefore, is an encumbrance on the lot and is a liability instead of an asset. It would cost $7,500, and the materials in the building, to wreck it and clear lot 12. A purchaser for "value in the market in the ordinary course of trade" would contemplate an income from his investment instead of a deficit. The wrecking of the building would therefore become necessary in determining actual value "in the market in the ordinary course of trade." There is convincing evidence that the value of the lot alone, encumbered as it is by the building, has an actual value of $24,000. Deduction of $7,500 therefrom for the cost of clearing lot 12 leaves $16,500, the value of both lot and building for the purpose of taxation.

The building on lot 11 is perhaps 30 years old, but the lot and the building thereon still yield the owners a net income and the building is not a burden or encumbrance on the land. The bill of exceptions contains proper evidence that the lot has a value of $13,000 and the building a value of $7,500 for the purpose of taxation. The sum of the three items, $16,500, $13,000 and $7,500, or $37,000, is therefore the value of both lots and buildings thereon, as they now stand, for the purpose of assessment by the board of equalization. Evidence of greater values has not been found in the record. It follows that the action of the board in reducing the valuation on complaint of plaintiff from $59,500 to $52,500 only, was erroneous. On this review it is reduced on lots 11 and 12 and buildings to $37,000 and the assessment likewise reduced.

JUDGMENT ACCORDINGLY.

MILLIE A. CHRISTENSON, ADMINISTRATRIX, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.
290 N. W. 246

FILED FEBRUARY 9, 1940. No. 30720.

1. **Master and Servant.** The liability imposed by the federal employers' liability act is one for the negligence of any of the

officers, agents or employees of the carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. 45 U. S. C. A. sec. 51.

2. ———: ASSUMPTION OF RISK. In an action brought under the federal employers' liability act for damages for personal injuries sustained prior to its amendment on August 11, 1939 (53 U. S. St. at Large, 1404, ch. 685, sec. 1), assumption of risk is a complete defense where there is no violation of a statute enacted for the safety of employees contributing to the injury or death of the injured or deceased employee. 45 U. S. C. A. sec. 54.
3. ———: ———. An employee of mature years will be held to assume the risk of such dangers as are normally and necessarily incident to the occupation in which he is engaged, whether he is aware of them or not.
4. ———: ———. If an employee knows or ought to have known of unusual and extraordinary risks connected with his employment, he must be held to have assumed them when he goes ahead with the work.
5. ———: ———. Directions of a superintendent to an employee to hurry does not avoid the defense of assumption of risk.
6. ———. The rule requiring an employer to provide reasonably safe places and structures for his employee to work upon does not extend to structures being constructed or demolished, where the successive temporary conditions through which they must pass during such operations are from their very nature dangerous.
7. ———: NEGLIGENCE. The failure of an employer to use the safer of two recognized methods of construction is not of itself negligence.
8. **Evidence** examined and *held* that the defense of assumption of risk was established and bars recovery.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed and dismissed.*

Thomas F. Hamer, George C. Holdrege and *William J. Schall,* for appellant.

Gross & Crawford, Gordon A. Nicholson and *P. C. Rasmussen, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

This is an action against the Union Pacific Railroad Company to recover damages for the death of one Tom G. Christenson under the provisions of the federal employers' liability act. From a judgment for plaintiff in the amount of $15,000 the defendant appeals.

In the latter part of February, 1937, the deceased entered the employ of the defendant at Bennett, Colorado, as a structural steel worker in the construction of a railroad bridge at that point. The deceased was a journeyman steel worker of many years actual experience at the trade. The bridge under construction was a new six-span steel girder bridge and was being constructed in sections in conjunction with the removal of the old bridge in such a way as not to interfere with railroad traffic schedules. At the time involved herein, five spans of the bridge had been completed and the bridge gang was engaged in the construction of the west and last span.

A general description of the construction of the bridge is as follows: The piling for the new bridge were driven and capped. Heavy steel girders were then put in place on the piling lengthwise of the bridge. Thereafter sections of the old wooden bridge were removed and replaced with the floor beams, stringers, ties and rails of the new bridge. The two steel girders were each approximately seven feet in height and had a three-plate steel flange, 18 inches in width, on the top and bottom. The web of the girder was attached to the flange by angle irons riveted to the web and flange on each side of the web at both the top and bottom. At approximately every twelve feet a vertical angle iron was riveted to the web of the girder to which the floor beams were to be swung in and attached by bolting a second angle iron to the web of the girder and through the web of the floor beam. The floor beams were about 40 inches high, 16½ feet long, with a flange on both top and bottom. The structure also required lateral bracing to guard against side sway and vibrations caused by wind and the speed and braking of trains. This bracing was obtained by running

angle iron braces from the juncture of the girder and floor beam to a similar point on the next floor beam on the opposite girder. To tie the girder, floor beam and lateral brace together, a gusset plate was provided, which was eventually to be bolted to the top of the inside lower flange of the girder, the under side of the lower flange of the floor beam and to the under side of the lateral brace. It must be noted, however, that the floor beam, when properly installed, is connected to the web of the girder and does not rest upon the lower flange of the girder. Likewise, the gusset plate is patterned so that it fits around the angle irons attaching the floor beam to the web of the girder. The result is that the floor beam does not rest upon the gusset plate. The gusset plates come into the structure loosely bolted to the lower inside flange of the girder, with the result that they take a sloping position until they are bolted up tight. It was the general practice on this job to swing in the floor beam, temporarily bolt it in place, put in the stringers, ties and rails, and then return and bolt up sufficiently to carry railroad traffic. During this last operation the gusset plate is bolted to the top of the lower flange of the girder and bolted up to the lower flange of the floor beam. The deceased was engaged in performing this operation when he slipped and fell to his death.

The gusset plate is approximately 25 inches wide and 22 inches long. When in place it extends 6½ inches beyond the lower flange of the floor beam on each side of it and 15 inches beyond the lower flange of the girder on each side of the floor beam. The evidence is that the deceased, in tightening or drawing up the gusset plate had his left knee on the lower flange of the girder and the ball of his right foot on the corner of the gusset plate. The record shows also that the gusset plate was wet from moisture which had fallen during the morning. The lower end of the gusset plate was estimated to be from one and three-fourth inches to three inches lower than level. The evidence shows that deceased's right foot slipped off the inclined gusset plate, resulting in the accident.

It is contended by plaintiff that the accident and the resulting damage were due to the negligence of the defendant. The answer of the defendant denies that it was negligent, and asserts that the risks and dangers of the employment and particularly those resulting in the accident itself were open, obvious and known to the deceased and were assumed by him.

It is not disputed that the case falls within the provisions of the federal employers' liability act and that the liability imposed thereunder is for negligence. 45 U. S. C. A. sec. 51. Neither is it questioned that the rights and obligations of the parties under the act depend upon it and applicable principles of common law, as interpreted and applied by the federal courts. And, likewise, it is not questioned that contributory negligence will not defeat a recovery but will result only in a reduction of the damages in proportion to the amount of negligence attributable to the employee. 45 U. S. C. A. sec. 53. And, further, that the doctrine of assumption of risk applies in an action based on the negligence of the defendant unless exceptions within the act, having no application to the case at bar, control. 45 U. S. C. A. sec. 54. *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062.

The deceased was doing the work of a lead man; in other words, he was the farthest out on the newly constructed bridge skeleton. Consequently, he was in the most dangerous position of any of the workmen. He had to do his work of temporary bolting up by clinging to the partially constructed bridge as best he could. He knew this, as he was a steel worker of many years experience. No repairman, inspector or scaffold builder preceded him, for he was the lead steel man on the job. He also knew that the gusset plate was loosely bolted to the girder because all the others had been attached the same way. Also, he had previously been down on the girder, floor beam and gusset plate to put in the temporary bolts when the floor beam was swung into position by the hoist. He knew the condition of the weather and undoubtedly of the effect of moisture upon

the painted gusset plate. He knew, or ought to have known, that the gusset plate was loosely bolted and in a sloping position because he was the only workman who had an opportunity to put it in any different position, and, in the second place, he was engaged in the very act of drawing up the gusset plate, which in itself charges him with knowledge that it was neither tight nor level. There is evidence in the record that the gusset plate was not tightened up until the floor beam was set, in order to leave the necessary slack to permit the insertion of all the bolts tying it to the girder and floor beam. To relate all the details of the evidence would unduly add to the length of this opinion. From a consideration of all the evidence, however, we conclude that Christenson's use of the gusset plate in the condition shown by the evidence was one of the usual and ordinary risks of his employment. There is evidence that the gusset plate was bent downward and that it was defective in this respect. This can make no difference in the result. Deceased knew or ought to have observed the condition of the gusset plate. We think that the applicable rule is that, when the risks were the usual and ordinary risks of the employment, knowledge of the condition, or a want thereof, by the deceased would be immaterial. He will be presumed to have assumed such risks, whether he knew of them or not. On the other hand, if the deceased knew or ought to have known the condition, he must be held to have assumed the risk, even though the risk may have been unusual and extraordinary. *Toledo, St. L. & W. R. Co. v. Allen*, 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513; *Boldt v. Pennsylvania R. Co.*, 245 U. S. 441, 38 S. Ct. 139, 62 L. Ed. 385; *Campbell v. Chicago, R. I. & P. R. Co.*, 120 Neb. 499, 234 N. W. 395.

It is contended that the defendant was negligent in not putting in the lateral bracing prior to swinging in the floor beam, thereby providing a better place for the workmen to work. There is evidence in the record that it was a proper practice to place the floor beam first. There is also evidence to the contrary. Comparative merits as to safety or utility are most difficult to determine. Ofttimes two methods for

doing a certain piece of work exist, each having meritorious points as to safety and expediency. It is clearly the rule that, if an employer chooses one of two recognized methods of doing a piece of work, the fact that he may have selected the one which did not prove to be the safer does not constitute negligence by the employer towards an employee subsequently injured. Such a choice of plans breaches no duty owed to the employee. *Baltimore & Ohio R. Co. v. Groeger,* 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419; *Southern Pacific Co. v. Seley,* 152 U. S. 145, 14 S. Ct. 530, 38 L. Ed. 391; *Louisville & N. R. Co. v. Davis,* 75 Fed. (2d) 849.

It is contended that the work in question was being done under emergent conditions for the reason that train schedules over the bridge had to be maintained. There is evidence in the record indicating that a general "hurry up" order had been given by the foreman in charge. This does not change the rule nor affect the result. *Chesapeake & Ohio R. Co. v. Kuhn,* 284 U. S. 44, 52 S. Ct. 45, 76 L. Ed. 157.

It is likewise contended that the defendant was required to provide a reasonably safe place to work. The rule ordinarily applied has no application when the employee is engaged in the construction or demolition of structures where the successive temporary conditions through which such structures must pass are in their very nature hazardous. *Armour v. Hahn,* 111 U. S. 313, 4 S. Ct. 433, 28 L. Ed. 440; *Kuptz v. Ralph Sollitt & Sons Construction Co.,* 88 Fed. (2d) 532.

Plaintiff contends that a reasonable inspection would have revealed the danger to the deceased, and the direction of the foreman for deceased to bolt up was a negligent act under the circumstances. The questions are ably answered in *Kuptz v. Ralph Sollitt & Sons Construction Co., supra,* wherein the court said: "If the insecure condition of the form could have been ascertained by a reasonably prudent inspection, plaintiff was as much bound in duty to himself to exercise the prudence of making that inspection as was the defendant, and could have as easily discovered the danger. * * * Plaintiff being an adult experienced workman,

and the danger complained of being open and patent, defendant was under no obligation to exercise for plaintiff's safety any greater degree of care than plaintiff was willing to exercise for his own safety. Defendant did not direct plaintiff to go upon these forms, nor represent that these forms were safe. Defendant's superintendent in effect simply told the plaintiff the roof was ready for electrical work and to proceed with it. This was not a warranty that the forms were safe, nor an implied invitation to enter upon them as a safe place to work. Though it was customary for workmen to walk on these forms, plaintiff could have supported himself upon the steel girders which were in place. Choice of methods was entirely with plaintiff."

We necessarily come to the conclusion that the defendant was building the bridge in question by recognized engineering methods. There may have been, it is true, other methods which were safer, but the failure to use the best method is not in itself negligence. In any event, the deceased was an experienced structural steel worker and bridge builder who was familiar with the methods being used. He was in a dangerous place when he fell to his death. He knew it was a dangerous place, the nature of his trade required him to do dangerous work. He was familiar with the situation as it existed. We must necessarily hold that he assumed all the risks which the evidence shows he knew existed at that time. They were risks attendant upon a vocation in its nature very hazardous. We fail to find that the defendant violated any duty which it owed to this unfortunate employee. No negligent act of the defendant added to the risk of the employment, unless we should hold that the construction of a structure, temporarily dangerous by necessity, is of itself negligence, which, of course, is not the law. In any event, if any of the acts of the defendant could be construed to be negligent acts, the deceased assumed the risk and no recovery therefore can be had.

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

OTTO H. SCHMIDT, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

290 N. W. 250

FILED FEBRUARY 9, 1940. No. 30652.

1. **Workmen's Compensation.** Where it appears that the plaintiff in a workmen's compensation case may have sustained a partial loss of use of his leg, while the testimony in the record is directed to the question of general industrial disability only, the cause may be remanded to have it determined whether any impairment of the physiological functions of the leg exists, and, if so, the extent thereof, or whether the purported loss of use is wholly affected and cultivated.
2. ———. A demand for payment of medical expenses under the workmen's compensation law is a claim for compensation within the meaning of section 48-133, Comp. St. Supp. 1939.
3. ———. A demand for payment of medical expenses, made within six months after the occurrence of an injury and under such circumstances as to manifest the intention to claim the benefits of the workmen's compensation law, is sufficient to support the employee's right to institute proceedings within a year to recover every benefit which has then accrued under the law.
4. ———. Where any finding of fact, upon which the award of the district court in a workmen's compensation case depends, is not conclusively supported by the evidence, it is our duty on appeal to consider the entire cause *de novo* upon the record. Comp. St. Supp. 1939, sec. 48-174.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed.*

Clifford L. Rein, for appellant.

Clarence G. Miles and *Frederick H. Wagener, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

This is a proceeding under the workmen's compensation law, which was dismissed by the district court and is here on an appeal by plaintiff.

Plaintiff claims to have been injured on August 29, 1936, while employed by defendant as a city fireman. He says

that he fell on his right hip and buttock, while carrying a hose line into the basement at a fire. No one saw the accident, and the record seems to imply a doubt in the minds of some of the other firemen whether it ever occurred. He was on a twenty-four hour shift at the time and remained on duty all day and night following, apparently without making any report of it to his officers. In the afternoon of the next day, however, which was his day of rest, he called his family physician, and the latter telephoned the captain of his company that he would not be on duty the following morning, because of his leg. The personal records of the fire department contain conflicting entries, there being at one place a notation, "O. Schmidt, off sick," and, at another, an entry, "O. Schmidt off—alleged injury." Six days later plaintiff was released by his doctor and was given a certificate that he was able to resume his duties. At that time a notation was made, "O. Schmidt in from sick leave."

Defendant contends that the evidence does not satisfactorily establish that plaintiff ever sustained an accident, but this contention we shall answer with the simple statement that the facts above detailed, when considered with the findings and diagnosis of plaintiff's doctor on the day after the fire, are sufficiently convincing that an accident occurred. Some of the evidence by which it is sought to establish the other necessary elements of plaintiff's case is not so convincing, however.

Plaintiff says that he has been disabled ever since the date of the accident, although he claims also that his condition became progressively worse after he was discharged from the fire department some months later. He testified that, from the time of the accident, he never was able to do his previous work, was given lighter duties, was relieved from drills, and was assisted in his tasks by other firemen. This statement, however, is disproved by his officers and fellow firemen. The evidence clearly establishes that he performed all of his previous duties, without any manifestation of disability or handicap, from the time he returned to work on September 6, 1936, until his discharge on January

3, 1937. He was discharged because the officers regarded him as an agitator and a troublemaker. Among other things, he had previously cursed an officer when he was requested to perform a certain task, and, on the occasion of the fire involved in this proceeding, he had officiously attempted to give orders, without actual authority to do so. He knew that he was in disfavor and sensed that it was only a question of time until he lost his job. At one time he declared to another fireman, "They don't give me no raw deal; I'm going to the hospital and go in a cast, and I know I'll beat them." This statement is not without significance, in the light of subsequent developments.

From September 6, 1936, until after his discharge, plaintiff had neither sought nor apparently needed further medical attention. Following his discharge, he began to walk with a limp and to use a cane. He claims that he limped while he was still employed at the fire station, but the testimony of thirteen other firemen disproves this assertion. On July 30, 1937, just before the present proceeding was commenced, he again consulted Dr. George Lewis, his family physician, for the first time since September 5, 1936. About thirty days later, and after compensation proceedings had been instituted, Dr. Lewis began to administer diathermy treatments. In due season, he was sent to the office of Dr. Arthur L. Smith, and still later to that of Dr. Czar Johnson, for examination, report, and expert testimony. Drs. Lewis, Smith and Johnson all gave him blue ribbons for total and permanent disability. The cause of the disability was declared to be traumatic neuritis of the right sciatic nerve, a right sacro-iliac strain, and a rotation of the bodies of the lumbar vertebræ.

The compensation court directed an examination to be made by a medical advisory board consisting of Dr. Clayton Andrews, Dr. John C. Thompson, and Dr. Charles H. Arnold. The members of this board were of the opinion that plaintiff was not suffering from any disability attributable to the accident. Dr. Arnold testified that, while plaintiff walked with a slight limp and rotated the toes of

his right foot outward about 5 per cent. more than those of his left foot, this would not disable him in his work, nor could he discover any physical cause for it. He and the other two members of the advisory board did not believe that there could have been any recurrence of the injury so long after the accident had occurred and under the circumstances that plaintiff claimed. Dr. James E. M. Thomson, an orthopedic specialist, also testified that he could find no evidence of a sacro-iliac strain or of traumatic neuritis. As he put it, "I tried my best to find something." He and Dr. Arnold and Dr. Rowe, a roentgenologist, further declared that the X-ray films produced by Dr. Smith did not show any pathological rotation of the bodies of the lumbar vertebræ, but indicated merely a slight twist of the pelvis by the patient on the X-ray table at the time the films were taken. Motion picture films taken of unguarded actions of plaintiff clearly demonstrate that he is not suffering from total disability.

In this situation we are unable to agree with the finding of the workmen's compensation court, initially and on rehearing, that plaintiff is totally disabled. The opinion of the medical advisory board and of defendant's expert witnesses appears to be that plaintiff has not suffered any industrial disability as a result of the accident. It is shown, however, that he walks with a slight limp and an outward rotation of his right foot. It may be that this does not involve any handicap in industrial employment, which appears to have been the test applied to the situation by the medical experts on both sides. This does not exclude the possibility, however, that some limitation may have resulted in the physiological functions or movements of his right leg. If so, he is entitled to compensation under subdivision (3) of section 48-121, Comp. St. 1929, irrespective of whether an industrial disability is present or not. Perhaps the testimony of defendant's doctors must be construed to imply that the limp and outward rotation of the foot are wholly cultivated. We are not willing, however, to pass judgment upon that question at the present time, and, in

fairness to plaintiff, we shall permit the case to be remanded to enable testimony to be taken on whether such an impairment exists, or whether the limp and foot rotation are purely affected.

Taking the view, as we do, that the weight of the evidence clearly establishes that total disability does not exist, and that it further shows that plaintiff was able to have carried on his previous occupation or other industrial employment had he not been discharged, we necessarily must hold that a temporary disability allowance is not involved. The fact that since the institution of this proceeding Dr. Lewis has undertaken to administer sporadic diathermy treatments to plaintiff is not persuasive.

The bill of Dr. Lewis for the medical care given plaintiff at the time of the accident should be allowed by the trial court, and if it be determined that plaintiff's limp and foot rotation are not wholly affected, he should, as a matter of fairness, be allowed payment also for the subsequent treatments shown in the record, even though their necessity and utility are questionable. Should it be found that some limitation of the functions of plaintiff's leg actually exist, and that his limp and foot rotation are not mere affectation and cultivation, he should be reimbursed for the initial bill of Dr. Arthur L. Smith, as a diagnosis made for treatment purposes, although the examination was not made until after the institution of this proceeding. The second bill of Dr. Smith and the bill of Dr. Johnson are charges for examinations made wholly for testimony purposes, and so are not chargeable against defendant.

In making disposition of the cause on its merits, we have hurdled, for the moment, one or two contentions of the parties, and these we now turn to discuss. We have previously indicated that the compensation court, on initial hearing and on rehearing *en banc,* entered an award in favor of plaintiff for total disability. Because a rehearing was had in the compensation court, the appeal which defendant took to the district court was necessarily, under section 48-174, Comp. St. Supp. 1939, in the nature of an error

proceeding. Since the disability award made by the compensation court found support in the testimony of Drs. Lewis, Smith and Johnson, the district court held that it was precluded from trying the case *de novo* and therefore was obliged to confirm and ratify the finding of the compensation court on this issue. It vacated the award of the compensation court and dismissed the proceeding, however, on the ground that plaintiff had failed to make the necessary claim for compensation within six months from the date of the accident. The record shows that, within three weeks of the time of the accident, plaintiff requested the chief of the fire department to pay the medical bill of Dr. Lewis for attending him until his return to work. The chief refused to do so, possibly because of the doubt that appears to have been shared by the members of the fire department, whether plaintiff had actually sustained an accident at the fire. Plaintiff made no further claim for compensation, but on August 18, 1937, within a year of the date of the accident, he instituted this proceeding in the compensation court.

The requirement of section 48-133, Comp. St. 1929 (*Id.* Comp. St. Supp. 1939), that a claim for compensation must be made within six months after the occurrence of an injury, has been previously held to be a condition precedent to a right of action under the workmen's compensation law. *Park v. School District,* 127 Neb. 767, 257 N. W. 219. In the case of a latent injury, the time, of course, does not commence to run until the employee has or is charged with knowledge that disability is resulting. *Travelers Ins. Co. v. Ohler,* 119 Neb. 121, 227 N. W. 449; *Scott v. State, ante,* p. 348, 289 N. W. 367. Medical expenses are compensation rights within the meaning of the workmen's compensation law (*Baade v. Omaha Flour Mills Co.,* 118 Neb. 445, 225 N. W. 117), and a demand for payment of medical expenses is necessarily a claim for compensation, where it is made under such circumstances as to manifest an intention to claim the benefits of the statute. Giving to the compensation law the liberal construction to which it is entitled, we

must accordingly hold that, where a claim for any compensation benefits is made within six months after the occurrence of an injury, this is sufficient to support the employee's right to institute proceedings within a year, to recover every benefit which has then accrued under the law. Other courts have so held. *New Staunton Coal Co. v. Industrial Commission*, 304 Ill. 613, 136 N. E. 782; *Aiello v. Ford Motor Co.*, 273 Mich. 15, 262 N. W. 726. It is not necessary for the employee to specify the extent of the benefits to which he thinks himself entitled, and unless he attempts to conceal the scope of his rights for the purpose of misleading the employer, and the employer is in fact prejudiced thereby, the requirement of the statute is sufficiently met by a claim or demand for any compensation right, sufficient to advise the employer of his intention to bring the injury under the statute and to avail himself of its provisions. The fire chief, as one of plaintiff's superior officers, was a proper person under the regulations and practice of the department, as disclosed by the record, on whom to make the necessary claim or demand in this case. It follows that the district court erred in dismissing the proceedings on the ground that plaintiff had failed to comply with the statutory requirement for making claim.

The district court, as has been indicated, held that, since there was some evidence to support the finding of the compensation court on the question of total disability, it could not review that finding on error. Plaintiff contends that, since defendant took no cross-appeal from the holding of the district court, we are not at liberty to try the case *de novo*. Such cross-appeal could have accomplished nothing. It is our duty to give the compensation law a liberal interpretation, and to avoid setting up procedural snarls not imposed by the legislature, which are designed to trip either party and to prevent the supreme court from assuming jurisdiction to determine the merits of a case. Section 48-174, Comp. St. Supp. 1939, expressly imposes upon us the obligation to try the case *de novo* on the record, where any finding of fact upon which the judgment of the court has

been made to depend is not conclusively supported by the evidence. Here, the erroneous finding of the district court that plaintiff had failed to make timely claim for compensation, upon which the judgment was based, left the case in our lap for trial *de novo* under the statute.

The judgment is reversed and the cause remanded to the district court, with directions to remand it in turn to the compensation court for proceedings in accordance with this opinion.

REVERSED.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. ELIZABETH T. CRAMB ET AL., APPELLANTS.
290 N. W. 440

FILED FEBRUARY 16, 1940. No. 30735.

1. **Mortgages.** Section 20-2142, Comp. St. 1929, provides that the district court may authorize an action at law to be brought upon a note which has been secured by a mortgage.
2. ———. A mortgagee can pursue only one remedy to collect his debt at a time. He may foreclose his mortgage in a court of equity, or he may bring a suit at law upon his note.
3. ———. After a mortgagee has foreclosed his mortgage in a court of equity, and sale has been had, confirmation entered, deed delivered, and the foreclosure case is at an end, he may, if authorized by the district court, withdraw his note and bring a law action thereon.
4. ———. The construing together of a note and mortgage simply means that, if there are any provisions in one which limit or explain the provisions of the other instrument, they will be given such effect as will carry out the intent of the parties.

APPEAL from the district court for Jefferson county: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

W. J. Moss and *Melvin Moss*, for appellants.

Hartigan & Skultety, Franklin L. Pierce, Philip M. Wellman and *William W. Graham, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an action at law upon a promissory note, in which the Federal Farm Mortgage Corporation asked judgment for $500, with interest thereon at 5 per cent. from April 15, 1938, together with costs. The defendants demurred to the plaintiff's petition, which demurrer was overruled, and the defendants electing to stand on their demurrer, judgment was entered in favor of the plaintiff and against the defendants. As will be seen by further statement of the facts, this resolves itself into an action at law for a judgment for the balance of a mortgage debt remaining unsatisfied after the foreclosure of the mortgage.

The action was commenced in the district court for Jefferson county on December 3, 1938, and the defendants were personally served with summons. The plaintiff, Federal Farm Mortgage Corporation, is a corporation duly organized under an act of congress known as the Federal Farm Mortgage Corporation Act (12 U. S. C. A. sec. 1020 *et seq.*). The principal place of business is in Washington, D. C. The land bank commissioner is an officer of the Farm Credit Administration, which is an executive and administrative agency of the United States government, which office was created by the Federal Farm Loan Act (12 U. S. C. A. sec. 653). This office was transferred from the Treasury Department to the Farm Credit Administration, and the name of the office was changed from farm loan commissioner to land bank commissioner (12 U. S. C. A. sec. 638-a). Additional statements about this federal set-up will be found set out at length in the opinion by Judge Rose, recently released, entitled *Federal Farm Mtg. Corporation v. Hughes, ante*, p. 454, 289 N. W. 866.

On July 23, 1935, the defendants secured a loan from the land bank commissioner, for which they gave their promissory note in the sum of $1,900, bearing 5 per cent. interest from September 18, 1935, and payable semiannually on the 1st day of April and October. The principal sum was payable on an amortization plan, in 20 equal instalments of $95 each, the first instalment being payable April 1, 1939,

the last payment to be due and payable October 1, 1948. To secure the payment of said note, the defendants gave a mortgage to the land bank commissioner, subject only to a prior mortgage in favor of the Federal Land Bank of Omaha in the principal sum of $5,500, bearing date July 23, 1935, and recorded in book 83, page 87, and the second mortgage given to the land bank commission under date of July 23, 1935, was filed for record August 15, 1935, and recorded in book 83, page 89, of the mortgage records of Jefferson county, Nebraska.

It is further alleged that said land bank commissioner made said loan in his own name, but on behalf of the plaintiff herein, the Federal Farm Mortgage Corporation, pursuant to an act of congress, found as amended in 12 U. S. C. A. sec. 1016-g, and that the plaintiff is, and ever since has been, the owner and holder of said note.

The defendants failed to pay the interest instalments, as provided by the terms of the note, and the plaintiff thereupon elected to exercise its option to declare the whole of the balance of the principal of said indebtedness to be due and payable in the amount of $2,030.63, the same covering the unpaid principal of $1,900, the interest instalment due April 1, 1936, and the interest instalment due October 1, 1936, each in the sum of $47.50, and the accrued interest to February 15, 1937, in the sum of $35.63, and the plaintiff on March 5, 1937, brought action to foreclose said mortgage.

On May 14, 1937, decree of foreclosure was entered, finding the amount due plaintiff $2,077.39, with interest at 5 per cent. from May 14, 1937. An order of sale being issued, said property was sold by the sheriff on March 21, 1938, for the sum of $1,725.03, and the sale was confirmed April 15, 1938. As said sale did not realize a sufficient amount to pay the amount found due the plaintiff on said note, this action at law was brought on the note, and the prayer of the petition is that the plaintiff, Federal Farm Mortgage Corporation, prays judgment against defendants in the sum of $500, with interest at 5 per cent. from April 15, 1938.

To this petition the defendants filed a demurrer December 24, 1938, on the following grounds: (1) That the court has no jurisdiction of the persons or the subject of the action; (2) that there is another action pending between the same parties for the same cause; (3) that the petition does not state facts sufficient to constitute a cause of action.

On April 19, 1939, the demurrer was argued and overruled. Defendants electing to stand upon their demurrer, cause came on for trial May 5, 1939; jury waived; trial to court; finding in favor of plaintiff, and judgment entered for $526, with 5 per cent. interest from date, from which judgment defendants appeal, and supersedeas bond given in the sum of $600.

The alleged errors of the trial court relied upon for reversal are in overruling the demurrer, and in assuming jurisdiction to enter a judgment in an action at law upon the note and mortgage which had been foreclosed and the property sold under an order of sale to satisfy the same. In support thereof, the defendants cite chapter 41, Laws 1933, which act purported to divest district courts of the power to enter a deficiency judgment in actions for the foreclosure of real estate mortgages. This act amended section 20-2141, Comp. St. 1929, to read: "When a petition shall be filed for the satisfaction of a mortgage, the court shall have the power only to decree and compel the delivery of the possession of the premises to the purchaser thereof." This act of 1933 was passed with an emergency clause, and took effect April 26, 1933, and the defendants contend that it applies to all mortgages executed after April 26, 1933.

To meet these contentions of the defendants, the plaintiff argues that chapter 41, Laws 1933, does not divest district courts of jurisdiction of actions at law for the recovery of the unpaid balance of a mortgage debt subsequent to the foreclosure of the mortgage. The plaintiff contends that chapter 41 has no force and effect with respect to actions at law.

In the case at bar, the mortgage had been foreclosed, the property had been sold, and the foreclosure proceedings had

in all respects been completed. The plaintiff thereafter proceeded under section 20-2142, Comp. St. 1929, which provides that no proceeding shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, *unless authorized by the court.* It is self-evident that an action at law is separate and distinct from a suit to foreclose a mortgage, and that chapter 41, Laws 1933, amends and repeals sections 20-2141 and 20-2143, Comp. St. 1929, but does not amend, nor purport to amend, section 20-2142; in fact, it left intact all of the provisions of the law with respect to actions at law on notes secured by mortgages. The plain provision of chapter 41 forbids a district court to enter a deficiency judgment in an equity action for the foreclosure of a real estate mortgage.

Section 20-2142, Comp. St. 1929, was section 848 of the Code in 1866 and thereafter. In Laws 1897, chapter 95 was introduced by Senator Beal, amending section 848 of the Code by striking out the last five words, to wit, *"unless authorized by the court,"* but in *Moore v. Neece,* 80 Neb. 600, 114 N. W. 767, filed January 23, 1908, it gave the entire history of chapter 95, Laws 1897, and held that, as the amendments to this Act had not been concurred in by the House in which the measure originated, and as such amendments were not receded from in the House in which they were made, therefore chapter 95 was held to be void, and the original law (Code, sec. 848) was in full force and effect.

In *Meehan v. First Nat. Bank of Fairfield,* 44 Neb. 213, 62 N. W. 490, it was held that it was not the intention of this law to allow two actions for one debt to be prosecuted concurrently, and that the creditor could bring an action in equity upon the mortgage, or could bring an action at law on the note, and that, having elected which means he will adopt, *"he must exhaust the remedy so chosen before resorting to the other."* It was held that an action at law on the note could not be brought during the pendency of, or after judgment in, foreclosure proceedings without leave having been obtained of the court having jurisdiction of the

action of foreclosure, and that such authorization of the court should be alleged by the plaintiff or his action could not be maintained.

When the mortgagee has foreclosed the property, the note is introduced in evidence, and becomes in a sense the property of the court, and the mortgagee must obtain leave of the court to withdraw it for the purpose of bringing suit. Therefore, if the foreclosure proceeding is entirely closed, and the mortgagee applies to the court to withdraw the note, and then is authorized by the court, he may proceed to bring suit on the note for the balance that is justly due and unpaid.

In the case at bar, in section 8 of the petition this application for withdrawal, and authority of the district court to bring suit, reads as follows: "And plaintiff has obtained leave of the District Court of Jefferson County, Nebraska, to withdraw said note from the file in said foreclosure action and to bring this action at law against the defendants for the balance remaining due thereon, with interest and costs." If such allegation had not appeared in the petition, it would be subject to demurrer. *Mann v. Burkland,* 68 Neb. 269, 94 N. W. 116; *Wolff v. Phelps,* 3 Neb. (Unof.) 511, 92 N. W. 143; *Armstrong v. Patterson,* 97 Neb. 229, 149 N. W. 408; *National Fidelity Life Ins. Co. v. Gordon,* 130 Neb. 130, 264 N. W. 155.

Equity jurisdiction ended with the confirmation of the sale and the issuance of the sheriff's deed. Then, when the district court grants the request to withdraw the note, and permits the bringing of an action at law, the court acquires unlimited jurisdiction to grant legal remedy, with no possibility of conflict, which the former statutory limitation was designed to prevent.

Section 14, art. III of the Constitution, provides: "And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

The purpose of chapter 41, Laws 1933, is to divest district courts of power to enter deficiency judgments in mort-

gage foreclosure actions, and to amend sections 20-2141 and 20-2143, but in this chapter there is no reference, directly or indirectly, to section 20-2142.

The defendants contend that, where instruments are executed at the same time, for the same purpose, and in the course of the same transaction, they are to be construed as one instrument, and that a note and a mortgage securing it, made contemporaneously, are to be construed together as one contract.

In 3 R. C. L. 870, sec. 54, it is said: "But construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and the whole agreement actually made may be effectuated."

Somewhat in point is the case of *Petters v. Storm,* 132 Neb. 542, 272 N. W. 409, which holds that a mortgagor has no right to insist that his liability is wholly discharged because the mortgagee releases the mortgage, unless the security was sufficient to have fully paid the debt. See *Grable v. Beatty,* 56 Neb. 642, 77 N. W. 49.

We have examined all of the assignments of error without finding prejudicial error in the overruling of the demurrer and entry of the judgment by the trial court, and the said judgment is hereby

AFFIRMED.

MESSMORE, J., not participating.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. JOHN A. FISCHER, APPELLEE: ELIZABETH FISCHER ET AL., APPELLANTS, ARTHUR A. BOHN, INTERVENER, APPELLEE.

290 N. W. 444

FILED FEBRUARY 16, 1940. No. 30647.

1. **Annuities.** The fact that a deed and a contract for an annuity are executed simultaneously will not charge the land with

payment of the annuity, as a reservation, if the contract is not referred to in the deed. Comp. St. 1929, sec. 76-106.

2. ———. In such a case, where there is no reservation, the contract for the annuity, to constitute a charge on the land, must itself contain language effectual to create a lien.

3. **Acknowledgment.** A notary public, who is likewise a stockholder and officer of a corporation, is not disqualified to take the acknowledgment to a mortgage on a homestead merely because the mortgagor intends to use part of the proceeds to pay an indebtedness to the corporation, where the corporation is not a party to the mortgage, either by being named as mortgagee or by having a beneficial interest in its immediate enforcement. *Quesner v. Novotny*, 116 Neb. 84, 215 N. W. 796.

APPEAL from the district court for Madison county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

M. S. McDuffee, for appellants.

Moyer & Moyer, Philip M. Wellman, Franklin L. Pierce, M. B. Foster and *Frederick M. Deutsch, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

This is a foreclosure suit. The Federal Farm Mortgage Corporation instituted proceedings on its second mortgage, and Arthur A. Bohn set up his first mortgage by petition in intervention. The trial court decreed foreclosure of both mortgages. Louisa C. Fischer, the mortgagor's mother, who tried to establish a lien on the property, under an annuity agreement, superior to the rights of intervener Bohn, and Elizabeth Fischer, the mortgagor's wife, who sought to claim that the mortgage of intervener Bohn had a void acknowledgment and so was not a homestead lien, have appealed.

Two questions are controlling: (1) Did the annuity agreement existing in favor of Louisa C. Fischer create a charge or lien upon the property? (2) Was intervener's mortgage, on homestead property, acknowledged before a notary public who was disqualified, and so void?

The answer to the first question depends upon the provisions of a quitclaim deed executed by Louisa C. Fischer in favor of her son, defendant John A. Fischer, and of the annuity agreement executed concurrently by Fischer and his wife in favor of the mother. The mother, who was a widow, was a life tenant of the property and the son the remainderman. Prior to the encumbrances here involved, they had joined in executing a mortgage thereon. When this mortgage became due, the banker who had negotiated the loan for Fischer suggested that, in order to facilitate its refinancing or the making of a new loan, the mother ought to execute a conveyance of her life estate to the son. She accordingly executed a quitclaim deed, for "one dollar and other consideration," which did not purport to reserve any rights in the property and which made no reference to any other instrument. The son and his wife at the same time executed an instrument which recited that, as part of the purchase price for the property involved, they agreed "to pay to the said Louisa C. Fischer the sum of two hundred twenty-five dollars on the first day of March, 1931, and two hundred twenty-five dollars each and every six months thereafter during the natural life of the said Louisa C. Fischer." This instrument was acknowledged and was recorded at the same time as the quitclaim deed.

Since a vendor's lien has never been recognized in this state (*Edminster v. Higgins,* 6 Neb. 265), the payments under the annuity agreement would not constitute a lien in favor of defendant Louisa C. Fischer unless some right was reserved by her in the property at the time of the conveyance or unless a separate lien was created by manifest intent and agreement. A provision in a deed of conveyance for the payment of an annuity to the grantor is ordinarily held to constitute a charge or lien upon the land by way of reservation. *Pinkham v. Pinkham,* 60 Neb. 600, 83 N. W. 837; *Bankers Life Ins. Co. v. Ohrt,* 131 Neb. 858, 270 N. W. 497. A reservation will similarly be held to exist where a deed and a contract for an annuity are executed simultaneously as part of the same transaction and the contract is

specifically referred to in the deed so as to constitute a part of it. *Hylton v. Krueger*, 134 Neb. 66, 277 N. W. 792. But where, as here, the deed itself contains no provision for payment of an annuity and no specific reference to the contract by which such an obligation may at the same time have been created, there can be no reservation. Section 76-106, Comp. St. 1929, expressly provides: "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred *from the terms used.*" (Italics ours.)

The right of Louisa C. Fischer to a lien in this case depends therefore solely upon the terms of the separate annuity agreement. Since no reservation is involved, the language used in the agreement must be such as would be sufficient in any independent instrument to create a lien on the property. A mere promise in writing to pay an annuity, as part of the consideration for a conveyance, is not enough. An intention to constitute the land as security for the performance of the annuity obligation must clearly appear (3 Tiffany, Real Property (2d ed.) 2748, sec. 661), and where, as here, third party rights are involved, this necessarily can be done only by the use of language effectual to create an actual lien. The annuity agreement in this case contains no such language, and the trial court therefore properly held that it was not a lien on the land.

The remaining question is whether intervener Bohn's mortgage was acknowledged before a disqualified notary public, so as to render it void as a homestead lien. The notary public was F. J. Dankers, who was a stockholder in and cashier of the First National Bank of Madison, Nebraska. Defendants contend that the bank was originally the real mortgagee under Bohn's mortgage, or that it at least had such a direct interest therein as to disqualify Dankers to act as notary public, and that the acknowledgment was accordingly void.

We cannot agree that the bank ever was the actual mortgagee. Ed Fricke, another officer of the bank, who engaged in the mortgage loan business on the side, had placed the

previous loan for the Fischers with a private investor. When it became due, John A. Fischer asked him to endeavor to renew it or to obtain a new loan for him. Fricke suggested that a large enough loan be obtained to pay off his indebtedness to the bank, which was not yet due but upon which the bank had been charging him 10 per cent. interest. Fricke then solicited intervener Bohn to make a loan of $7,500 to Fischer. Bohn agreed to do so, but said he would require a few days to raise the money. On the strength of the commitment, Fricke had the loan papers drawn up and the mortgage recorded. It had been his practice to have all loan papers drawn in his own name and to execute assignments to the lender. Papers were not drawn, however, until he had obtained an outside loan commitment.

The loan papers in this case appear to have been executed on August 30, 1930. Bohn did not have his money available until September 10, 1930. Fricke meanwhile had the mortgage recorded and at the same time prepared and apparently executed an assignment in favor of Bohn. The assignment was not delivered to Bohn, however, or recorded until September 10. As an accommodation to the parties, the bank advanced the $7,500, although the evidence does not indicate whether this was done as a charge against Bohn or Fricke, or how it was carried. In any event, Fischer's testimony shows that he knew the bank was not making the loan to him, nor did he consider that it had any interest in the mortgage. So far as the record indicates, the bank never held the note or mortgage in its possession or ever claimed any rights thereunder. On September 10, Bohn paid the bank the amount of its advance together with interest thereon. The burden rested on defendants to establish that the bank was the actual mortgagee, and the circumstances set out do not sustain the burden of this contention.

Defendants further contend, however, that the bank had a direct interest in the loan transaction, by reason of the fact that it was paid $3,900 out of the proceeds, and that in this situation Danker's interest as a stockholder disquali-

fied him to act as a notary public in taking the mortgage acknowledgment. It appears that, after the $7,500 had been credited to Fischer's account, he drew a check in favor of the bank for $3,900 to apply upon his indebtedness to it.

In *Quesner v. Novotny,* 116 Neb. 84, 215 N. W. 796, it was held that a notary public who is likewise a stockholder and an officer of a corporation is not disqualified from taking the acknowledgment to a homestead mortgage merely because part of the proceeds thereof are to be used to pay an indebtedness owing the corporation, where the latter is not an actual party to the mortgage either as the named mortgagee or as the holder of a beneficial interest therein. There is some logic in the contention that a pecuniary interest in the making of a mortgage ought to be as disqualifying as an interest in the instrument itself or in the enforcement thereof, but it is our duty to adhere to the rule adopted in *Quesner v. Novotny, supra,* since, in a situation such as this, instruments have undoubtedly been drawn in reliance upon the court's previous declarations, including perhaps the mortgage involved in this case.

Defendants cite *Wilson v. Griess,* 64 Neb. 792, 90 N. W. 866, and say that it cannot be distinguished from the present situation. In that case, however, the First National Bank of Sutton, which held a note from another bank for collection, took a mortgage upon the debtor's homestead, naming the other bank as mortgagee but including in its amount some indebtedness which he owed the First National Bank. It was properly held that the First National Bank thus had a beneficial interest in the mortgage itself, and that one of its stockholders and officers was accordingly disqualified from taking the acknowledgment as notary public.

Defendants rely, also, upon *Anderson v. Cusack,* 115 Neb. 643, 214 N. W. 73, but that case similarly is not in point. There a note and homestead mortgage were taken in the name of the president of a bank as collateral security for some indebtedness which the mortgagor owed the bank. The president obviously never had any personal rights in

the mortgage and was simply acting as trustee for the beneficial interests of the bank. In this situation, the acknowledgment, taken by a stockholder of the bank as notary public, indisputably was void.

In the present case, the First National Bank of Madison neither was the named mortgagee nor did it have any interest in the enforcement of the mortgage by virtue of a beneficial interest thereunder.

We have discussed the controlling questions upon their merits and have ignored the procedural hurdles attempted to be raised with respect to our consideration of them. This makes unnecessary the consideration of any of the other questions presented in the briefs.

The trial court properly allowed foreclosure of intervener Bohn's mortgage.

AFFIRMED.

JACOB BRUNTZ V. STATE OF NEBRASKA.
290 N. W. 420

FILED FEBRUARY 16, 1940. No. 30683.

Criminal Law. Conviction set aside because of the violation of section 29-2011, Comp. St. 1929, in the comment of the county attorney to the jury that, "The defendant does not get on the stand to tell you about this case."

ERROR to the district court for Scotts Bluff county: J. LEONARD TEWELL, JUDGE. *Reversed.*

Howarth N. Olsen, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Clarence S. Beck, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and CHAPPELL and KROGER, District Judges.

JOHNSEN, J.

Jacob Bruntz was convicted of assault with intent to commit robbery and brings error.

The principal question arises out of the county attorney's comment upon defendant's failure to testify. In his argument to the jury he said: "The defendant does not get on the stand to tell you about this case." The trial court immediately admonished the county attorney and instructed the jury to disregard his remark.

Section 29-2011, Comp. St. 1929, provides that the refusal or neglect of an accused to testify shall not create any presumption against him, "nor shall any reference be made to, nor any comment upon, such neglect or refusal."

An annotation in 84 A. L. R. 795, sets out the decisions generally and summarizes them as follows: "The weight of authority seems to be that comments of the prosecuting attorney on the failure of the defendant to testify in a criminal case, though highly improper, may under some circumstances work no injury, where the trial judge promptly intervenes, excluding the comments and admonishing the jury to disregard them. In other words, comments of that kind stand on very much the same footing as other improper arguments, and whether they call for a reversal or not depends on whether, after a full consideration of all the circumstances, including the action of the trial judge at the time they were made, the appellate court is of opinion that no prejudice resulted."

In 17 C. J. 302, it is said: "It has been held that a conviction will not be reversed for references to defendant's failure to testify where defendant's guilt was conclusively shown."

In *Hardesty v. State*, 95 Neb. 839, 146 N. W. 1007, we held: "On the trial of accused under a criminal charge, misconduct of the county attorney in stating to the jury that 'defendant had an opportunity to go upon the witness-stand himself and deny this charge, but he didn't do it,' does not require a reversal of his conviction on a record showing that no other error was committed; that the trial court disapproved the misconduct by sustaining an objection to the improper remark; that the county attorney thereupon stated he should not have made it; and that accused was not prejudiced thereby."

The opinion states: "While the truth of the accusation against defendant was a question for the jury, the reviewing court can affirmatively say that his guilt was established by evidence so clear and conclusive that he could not have been harmed by the county attorney's misconduct. * * * What is here said is not to be understood as indicating a purpose to depart from the line of decisions upholding the spirit and purpose of the statute. It is apparent that defendant was not prejudiced by the misconduct of which he complains. For the harmless error assigned, the conviction will not be set aside."

It is not our purpose, however, to encourage violations of the statute, nor have we the right to speculate in any case on whether prejudice has resulted from the comment. The only possible aim of such a remark is to thwart the statute. If we treat violations indulgently, we shall soon—in the words of Pope—"first endure, then pity, then embrace." We will apply the rule recognized in *Hardesty v. State, supra,* where the evidence of guilt is so conclusive that all will agree that no other factor could possibly have influenced the result, and not otherwise.

The judgment is reversed and the cause remanded to the district court for a new trial. The other contentions raised by defendant are without merit and do not require discussion.

REVERSED.

IN RE ESTATE OF CARRIE LEE.
OWEN R. TERRY, APPELLEE, V. MAUDE TERRY JOHNSON, APPELLANT.

290 N. W. 437

FILED FEBRUARY 16, 1940. No. 30718.

1. **Courts.** County courts of the state, which are by the Constitution and laws given exclusive original jurisdiction in all matters of probate, settlements of estates of deceased persons, etc., have the power and authority, with respect to the sub-

jects mentioned, to try and determine actions of an equitable character, and grant equitable relief, when proper, to the same extent as a district court regarding other subjects in the exercise of its general equitable jurisdiction.

2. Contracts. When in an option agreement it is provided who shall approve the form of its acceptance, and when, within the time therein provided, the optionee makes an acceptance which is insufficient to comply with the terms of the option and sends a copy to the party who is to make approval thereof but who makes no objection thereto until after the time provided in the agreement that the acceptance is to be made, and when, in a reasonable time thereafter and before the optionor has done anything to change her position with reference thereto, in the presence of and with the approval of the party provided in the option to make such approval, an acceptance is made in accordance with the terms of the option whereby the optionee parts with valuable rights and makes a full performance of the agreement on his part, and as a result thereof the optionor receives and accepts all the benefits provided in the option contract, the optionor is, under the equitable doctrine of estoppel, estopped to assert that the acceptance thereof has not been made within the time provided in the agreement and the optionee is entitled to performance thereof.

APPEAL from the district court for Hall county: ERNEST G. KROGER, JUDGE. *Affirmed.*

Frank A. Peterson and *George E. Hager*, for appellant.

B. J. Cunningham, H. G. Wellensiek, W. P. Lauritsen and *Prince & Prince, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER and MESSMORE, JJ., and ELLIS and WENKE, District Judges.

WENKE, District Judge.

This is an appeal from the judgment of the district court for Hall county, on an appeal from an order of the county court of Hall county, granting to the appellee, Owen R. Terry, performance of the agreement entered into with the appellant, Maude Terry Johnson.

The facts in this case are as follows: Carrie Lee, a widow and resident of Hall county, died on August 18, 1936, and her will, dated June 24, 1936, was offered for probate by

the Grand Island Trust Company, executor named therein. Objections thereto were filed by Owen R. Terry and Henry G. Terry, nephews, and Harry M. Hollandsworth and Bertha Sprague, all beneficiaries in a prior will of the deceased dated November 7, 1935. After hearing, the will of June 24, 1936, was admitted to probate, and an appeal from the order of allowance thereof was made by the contestants to the district court for Hall county. On August 25, 1937, while said appeal was pending, Maude Terry Johnson, a niece, and a residuary beneficiary of the will of June 24, 1936, entered into an agreement with Owen R. Terry, a nephew and beneficiary of the prior will dated November 7, 1935, in regard to a settlement of the contest, which agreement will be hereinafter more fully referred to. Subsequent thereto, and pursuant to an order of the county court, the appellee filed a claim in the matter of the estate of Carrie Lee in the county court of Hall county on June 7, 1938, based on this agreement, to which the appellant and the executor of the estate filed answers, which claim was approved by the county court, and an appeal thereof taken to the district court. The judgment of the district court was for the appellee and enforced the agreement. This appeal is from the judgment of the district court.

The appellant's first contention is that the county court was without jurisdiction to hear the claim of appellee, for the reasons that the agreement involved the title to real estate, and that it involved more than $1,000, and therefore such action should have been brought in the district court.

This action is for the specific performance of an agreement entered into between the appellee, as beneficiary under the prior will of the testatrix, and the appellant, as an heir at law and a residuary beneficiary under the will offered and allowed for probate, to settle the contest of the latter will, to dismiss the appeal and to have said will finally allowed and approved, and in consideration thereof to provide for the distribution of the share of the residuary beneficiary under this latter will. That such an action for the specific performance thereof is within the general equitable

powers of the county court under the Constitution and statutory provisions granting it exclusive jurisdiction of the settlement of estates of deceased persons, and not within the original jurisdiction of the district court, has been previously determined by this court in the case of *Genau v. Roderick*, 4 Neb. (Unof.) 436, 94 N. W. 523, Pound, C., and approved in the case *In re Estate of Shierman*, 129 Neb. 230, 261 N. W. 155, wherein the court said: "The district court has no original jurisdiction of a suit in equity for specific performance of a contract entered into by the heirs at law and next of kin of a testator, for the purpose of settling a will contest. * * * The Constitution gives the county court 'original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians, and settlement of their accounts.' * * * The statutes provide that its original jurisdiction in these matters shall be exclusive. * * * As to such matters, the county court is a court of general jurisdiction. *Lydick v. Chaney*, 64 Neb. 288. It has full and complete equity powers as to all subjects within its exclusive jurisdiction. *Williams v. Miles*, 63 Neb. 859."

The agreement in this suit involves the settlement of a will contest and the distribution of a residuary beneficiary's share and comes within the purview of the statutory and constitutional provisions as to the jurisdiction of the county court, granting it exclusive jurisdiction in the settlement of estates of deceased persons.

It is the further contention of the appellant that the agreement of August 25, 1937, entered into between the appellee and appellant, is, in fact, an option offering to the appellee a one-half interest of the appellant's residuary share of the estate of Carrie Lee, deceased, provided that within ninety days from the date thereof the appellee secure a dismissal of the appeal of the contest of the will dated June 24, 1936, in which appellant is a residuary beneficiary, and that the will be admitted to probate and that the time for appeal pass, and because the dismissal filed November 22, 1937, by the appellee was insufficient to dis-

miss the appeal and time being the essence of the option, the option is automatically withdrawn and therefore the enforcement of the agreement should be denied.

From a careful study of the terms of the agreement and from the conduct of the parties subsequent thereto, as shown by the application for continuance filed October 16, 1937, by the contestants, and by the filing of the dismissal within the ninety days, it is apparent that the parties treated the agreement as an optional offer to be accepted by the appellee within the time therein specified, and the court finds that it was an option agreement. The dismissal of November 22, 1937, filed by the appellee for the purpose of accepting the offer under the provisions of the agreement was insufficient to dismiss the appeal of the contest of the will as to all contestants and therefore not in accordance with the terms of the agreement. Since an acceptance of an option must be strictly in accordance with the terms thereof, the question is whether or not the appellant, or optionor, under the facts herein established, is estopped to claim that the acceptance was not in accordance with the terms of the agreement. The facts disclose that after the time for acceptance of the option and subsequent to the dismissal filed on November 22, 1937, which was within the ninety days provided in the agreement, a copy of which was sent to and received by the attorneys, Prince & Prince, named in the agreement to approve the form of the dismissal, W. A. Prince, a member of that firm, in the fore part of February, 1938, at the opening of a term of the district court for Hall county, objected to Mr. Cunningham, counsel for all the contestants, as to the form of the dismissal being insufficient to dismiss the appeal. In reply thereto, and on February 24, 1938, Mr. Cunningham wrote to Prince & Prince suggesting that, since they were named in the agreement to approve the form of the dismissal of the appeal, they draft a dismissal for that purpose. In reply thereto, and on March 1, 1938, the firm of Prince & Prince wrote to Mr. Cunningham what would be required in order to properly dismiss the appeal, and asking that he give the matter his immediate attention

and advise what his intentions were in reference thereto. On March 8, 1938, in open court, W. A. Prince of the firm of Prince & Prince being present, and demanding an unconditional dismissal so that no question could be subsequently raised that compliance with the contract had not been made, the appeal was dismissed without qualifications as to all of the contestants and the will of June 24, 1936, in which the appellant was a residuary beneficiary, was thereafter admitted to probate in the county court and the time for appeal therefrom has passed, and all the requirements of the acceptance of the optional offer have been complied with. During this time the appellant had done nothing to change her position in regard thereto.

It was provided in appellant's optional offer that the firm of Prince & Prince was to approve the form of dismissal of the appeal, and they, although under no obligation to do so, have acted with reference thereto. The optionee, acting in response to these objections as to the sufficiency of the dismissal, and complying with the requirements of the firm of Prince & Prince as to the form thereof by unconditionally dismissing the appeal in open court as to all contestants, has thereby parted with a right to have a trial of the contest of the will under which the appellant is a residuary beneficiary. This situation has become possible through the provisions of the option agreement making Prince & Prince the parties to approve the form of the acceptance, which responsibility they assumed. Since this provision was part of the option offered by the appellant herein, and this provision being for her protection and benefit, and she having received the benefit thereof, we believe that the doctrine of estoppel should apply.

An estoppel arises from the conduct of a party and may be predicated upon silence or omission as well as upon written words. "Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is,

from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel." 2 Pomeroy, Equity Jurisprudence (4th ed.) sec. 802, cited in *Brisbin v. E. L. Oliver Lodge No. 335,* 134 Neb. 517, 279 N. W. 277. "The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit." 10 R. C. L. 694, sec. 22, cited in *Brisbin v. E. L. Oliver Lodge No. 335, supra.* "The doctrine of equitable estoppel, or estoppel *in pais,* is that a party may be precluded by his acts or conduct from asserting a right to the detriment or prejudice of another party who, entitled to rely on such conduct, has acted upon it." *Draper v. Oswego County Fire Relief Ass'n,* 190 N. Y. 12, 82 N. E. 755. "An estoppel by matter *in pais* may be defined as an express or implied admission become indisputable by reason of the circumstance that the party claiming the benefit of it has, while acting in good faith and in accordance with the real or presumed assent of the other party, been induced by it to change his position. And the parties may have been equally innocent in effecting this change of position or they may not have been equally innocent." *Rea v. Pierson,* 114 Neb. 173, 206 N. W. 760.

When, as in this case, the appellant has in her optional agreement provided for certain counsel to approve the form of the instrument by which the appellee is to accept and perform the option by dismissal of the appeal of the will contest in the district court, and when acceptance thereof is made within the time provided in the option and copy thereof sent to counsel for approval, but when the form of the dismissal is insufficient to dismiss the appeal as to all of the contestants, and when, subsequent thereto, and after the time fixed in the agreement for acceptance, counsel designated in the agreement to approve the form of the dismissal act with reference thereto and object to the sufficiency thereof, and thereafter, before the appellant has done anything to change her position with reference thereto and

within a reasonable time, appellee, in the presence of, by the requirement of and with the approval of such counsel in open court, enters an unqualified dismissal as to all contestants, and as a result the appellee and contestants lose their rights to contest the will and the will is thereafter admitted to probate in the county court and the time for appeal passes and the appellant receives all of the benefits provided for in the agreement, under such facts we think the principle of estoppel applies and the appellant is estopped to assert that acceptance thereof has not been made within the time provided by the agreement, and the appellee is entitled to the performance thereof.

The judgment of the district court is therefore

AFFIRMED.

CHARLES M. CLAYTON ET AL., APPELLANTS, V. DAVID W. EVANS, APPELLEE.

290 N. W. 447

FILED FEBRUARY 23, 1940. No. 30762.

Judgment. After courts, having jurisdiction, have determined issues presented and the time for direct action has expired, litigants who have been indifferent thereto cannot successfully maintain a collateral action to set aside those proceedings so that they can present in the original action issues which could have been raised in the regular course of that litigation.

APPEAL from the district court for Nemaha county: VIRGIL FALLOON, JUDGE. *Affirmed.*

John L. Mattox, for appellants.

Lee Kelligar, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is an action to quiet title against a sheriff's deed and to set aside all proceedings had subsequent to the decree in

a foreclosure action. The plaintiffs are husband and wife. The defendant is the grantee in the sheriff's deed.

In 1921 Mr. Clayton became the owner of certain real estate in Nemaha county, which he and his wife later occupied as their homestead. In 1929 the Claytons mortgaged the premises to the Lincoln Trust Company. The Lincoln Trust Company became bankrupt. The First Trust Company became successor-trustee, and as such brought an action in 1934 to foreclose the mortgage. The Claytons filed personally signed answers in the foreclosure action. Other appearances were made later, both personally and by attorney.

Decree of foreclosure was entered in September, 1934. The nine months' statutory stay of the order of sale was had. Further stays were had under the moratorium acts. An order of sale issued July 5, 1935, and the property was sold August 14, 1935, to the First Trust Company. On August 16, 1935, the Claytons by their attorney filed objections to the confirmation of the sale. Confirmation proceedings were delayed by the moratorium stays.

The district court for Lancaster county authorized the First Trust Company to assign the foreclosure decree to Evans. The assignment was made. The court order and the assignment were filed in the foreclosure action. On June 21, 1938, Evans, as the owner of the decree, filed a motion to confirm the sale of August 14, 1935.

June 21, 1938, the court ordered the moratorium set aside, confirmed the sale, ordered the sheriff to deed the property to Evans, and ordered a writ of assistance. Sheriff's deed was issued, delivered to Evans, and by him recorded. There is no showing that the Claytons were represented in the hearing on June 21, 1938. However, by six separate letters from his attorney (the first in December, 1937, the last in May, 1938), Mr. Clayton was advised of the assignment of the decree; that the moratorium law had been declared unconstitutional; that probably all moratoriums would be set aside; that it was necessary to act promptly as court would be sitting and might act upon the moratorium; that his

presence in court was necessary; and that his attorney wanted instructions. No action was taken by Clayton, no attention given to these letters, and no excuse shown for his lack of diligence. On July 20, 1938, the court ordered the moratorium money then on hand paid to Evans.

The Claytons brought this action in October, 1938, alleging that the sheriff's deed is void; that it rests upon an order of the court made in the foreclosure action; that said order is void because Evans was not a party to that action; that the assignment to Evans was invalid because the district court for Lancaster county was without authority to authorize the same, and the First Trust Company was without authority to make the assignment; that the district court was without authority to set aside the moratorium stay; that the plaintiff in the foreclosure action, having accepted the benefits of the moratorium, was estopped to have it set aside; that the order setting aside the moratorium and confirming the sale was made without notice to the Claytons, and that it became final without their knowledge. The Claytons further complain because the court ordered paid to Evans the money which had been paid into court under the moratorium.

Plaintiffs pray that the sheriff's deed be canceled, that defendant be enjoined from asserting ownership to said property, that their title be quieted, and for equitable relief.

Defendant, by answer, pleads the record in the foreclosure and bankruptcy proceedings.

The trial court found generally for the defendant, and dismissed the petition.

Plaintiffs do not cite any statutory provision authorizing a court to grant the relief which they seek, nor do they cite decisions of courts sustaining their cause. The absence of precedents would not bar the granting of the writ. The absence of a showing justifying the decree sought does bar relief. Plaintiffs rely upon the maxim that equity will not suffer a wrong to be without a remedy.

The matters of which they now complain, if grounds for complaint, should have been presented in the original

action. Plaintiffs personally appeared in that action and were represented by competent counsel. Mr. Clayton was repeatedly advised by his counsel that action to complete the foreclosure would be taken, and he did nothing. Mrs. Clayton does not show lack of notice of any of these matters.

The original plaintiffs in the foreclosure action are not parties to this suit, nor are they, or any one interested in the trust being foreclosed, complaining as to what was done. Plaintiffs exercised their rights to prevent the earlier termination of the foreclosure. Plaintiffs were not overreached, and no fraud was practiced upon them.

The assignment of the mortgage to Mr. Evans and the procedure followed thereafter did not create the situation about which plaintiffs complain. Everything that happened in the original action could have and, on the showing here made, would have happened, had the assignment not been made. It was proper for the trial court to permit the action to proceed, after the assignment, in the name of the original party. Comp. St. 1929, sec. 20-322.

After courts, having jurisdiction, have determined issues presented and the time for direct action has expired, litigants who have been indifferent thereto cannot successfully maintain a collateral action to set aside those proceedings so that they can present in the original action issues which could have been raised in the regular course of that litigation. It is a maxim that "Equity aids the vigilant, not those who slumber on their rights."

We find nothing in this record to justify an equity court's granting the relief prayed. The judgment of the trial court is

AFFIRMED.

BAKER STEEL & MACHINERY COMPANY ET AL., V. L. C. FERGUSON ET AL., APPELLEES: WESTERN SURETY COMPANY, APPELLANT.

290 N. W. 449

FILED FEBRUARY 23, 1940. No. 30671.

1. **Judgment.** A stay bond given to obtain a stay of execution as authorized by section 20-1507, Comp. St. 1929, when recorded as provided by section 20-1510, Comp. St. 1929, is a judgment within the purview of the statutes providing for the revivor of dormant judgments.
2. ———: REVIVOR. Under the provisions of section 20-1420, Comp. St. 1929, a proceeding to revive a dormant judgment may be instituted at any time within ten years after it becomes dormant.
3. **Constitutional Law.** A statute which makes a stay bond a judgment against the surety is not inconsistent with the due process clauses of the state and federal Constitutions.
4. **Judgment: REVIVOR.** The only defenses available against an application to revive are that there is no judgment to revive or that the purported judgment is absolutely void, and that the judgment was paid or otherwise discharged.
5. ———: ———. The validity of an assignment of a dormant judgment may not be adjudicated in a proceeding to revive it.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed.*

Hotz & Hotz, for appellant.

Kennedy, Holland, De Lacy & Svoboda and *Edson Smith, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is an appeal from an order of the district court for Douglas county, reviving a dormant judgment against the Baker Steel & Machinery Company and the Western Surety Company, the latter company being the signer of a stay bond given to meet the requirements of section 20-1507, Comp. St. 1929, to obtain a nine months' stay of execution.

The Western Surety Company brings the case to this court for review.

The record discloses that on September 28, 1927, one L. C. Ferguson obtained a judgment against the Baker Steel & Machinery Company in the amount of $3,637.79, with interest thereon at 7 *per centum per annum* from October 1, 1927. On October 17, 1927, a stay bond was filed under the provisions of section 20-1507, Comp. St. 1929, in which the Western Surety Company appeared as surety. Five years after the entry of the judgment it became dormant. On July 5, 1933, L. C. Ferguson and Thomas W. Ferguson, as assignee, filed their application for a revivor of the judgment. Service of the conditional order of revivor was had upon the Western Surety Company by the delivery of two certified copies of said order to the director of the department of insurance of the state of Nebraska, and upon the Baker Steel & Machinery Company by delivering a copy to Clifford J. Hotz, president, and by leaving a copy at the last usual place of business of the said corporation in Douglas county. The judgment was revived against the Baker Steel & Machinery Company on August 23, 1933, and kept in force by the issuance of an execution on August 19, 1938. On December 14, 1938, the judgment was revived against the Western Surety Company after innumerable unexplained delays dating from 1933. It is from this order that the appeal was taken.

The primary question involved is whether a stay bond given under the provisions of section 20-1507, Comp. St. 1929, is a judgment within the purview of the statute providing for the revivor of dormant judgments. The stay bond statute provides in part: "The sureties for the stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose, and have the force and effect of a judgment confessed from the date thereof against the property of the sureties, and the clerk shall enter and index the same in the proper *judgment docket,* as in the case of *other judgments.*" (Italics ours.) Comp. St. 1929, sec. 20-1510. Another statute provides

that an execution shall issue against the surety upon expiration of the stay. Comp. St. 1929, sec. 20-1513. The question is one of first impression in this state, although there are cases which point to the proper result. In *State v. Fleming*, 21 Neb. 321, 32 N. W. 73, this court pointed out that one of the conditions imposed upon a judgment debtor to obtain a stay was that execution would issue if payment was not made on expiration of the stay. And in *State v. Painter*, 117 Neb. 42, 219 N. W. 794, the court stated that it knew of no authorization for the issuance of an execution except on a judgment.

The argument is advanced that the bond cannot be a judgment for the reason that it is contractual in its nature and contains no statement that it is a judgment or that it may be summarily enforced as a judgment. Appellant overlooks the fact that, as the bond was given with the statute existing which provides that it should have the force of a judgment with the right to an execution, the law entered into the bond and became a part of it just as effectually as if written into the bond. *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388, 7 S. Ct. 254, 30 L. Ed. 447; *People v. Quigg*, 59 N. Y. 83. The direction in the statute that the stay bond should be indexed "in the proper judgment docket as in the case of other judgments" clearly makes the stay bond a judgment. We therefore hold that the stay bond was a judgment within the purview of sections 20-1515 and 20-1420, Comp. St. 1929, defining dormant judgments and providing for their revivor.

It is urged that the revivor proceeding is barred by the statute of limitations. Under section 20-1420, Comp. St. 1929, a judgment may be revived any time within ten years after it became dormant. Clearly the statute of limitations has no application. *Orchard & Wilhelm Co. v. Sexson*, 119 Neb. 370, 229 N. W. 17.

Appellant contends that the statute making a stay bond a judgment against the surety conflicts with the due process clauses of the state and federal Constitutions. We think this contention is without merit. Due process requires that

there be an opportunity to present any defense that one may have. It has been held, however, that such opportunity need not necessarily be made available before judgment is entered. An appeal on the record which included the bond afforded the required opportunity. The procedure employed was therefore consistent with due process. *American Surety Co. v. Baldwin*, 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231; *United Surety Co. v. American Fruit Co.*, 238 U. S. 140, 35 S. Ct. 828, 59 L. Ed. 1238.

Appellant filed a special appearance in the district court objecting to the jurisdiction of the court on the ground that proper service of the conditional order of revivor was not had. The special appearance was overruled and the alleged error in so doing preserved for our consideration. Service was had pursuant to section 44-207, Comp. St. 1929, providing for service on a foreign corporation by serving duplicate copies of the process on the department of insurance. Appellant admits that it was authorized to transact business in Nebraska prior to December 31, 1929. A judgment against it prior to that date, though dormant, is a liability. This being true, service of process was properly had under the provisions of section 44-207.

Appellant argues that it has been unlawfully deprived of its right to set off certain claims held by the Baker Steel & Machinery Company against L. C. Ferguson. With this we cannot agree. The only defenses available against an application to revive are (1) that there is no judgment to revive or that the purported judgment is absolutely void, and (2) that the judgment was paid or otherwise discharged. Set-off or counterclaim is not a defense to a proceeding to revive a dormant judgment unless there has been an agreement to apply it, in which event it is treated as a payment. *Lashmett v. Prall*, 83 Neb. 732, 120 N. W. 206. The complaint is made that a valid assignment from L. C. Ferguson to Thomas W. Ferguson was not established. Even if this be so, appellant could not assert a counterclaim as a defense. The revivor was properly had upon the joint application of the original judgment creditor and his as-

signee. The validity of the assignment is not an issue as against the judgment debtors. The revivorship proceeding merely recognizes the record and does not adjudicate the validity of the assignment.

We find no prejudicial error in the record.

AFFIRMED.

G. B. LENNOX ET AL., APPELLANTS, V. HOUSING AUTHORITY OF THE CITY OF OMAHA ET AL., APPELLEES.

290 N. W. 451

FILED FEBRUARY 23, 1940. No. 30841.

1. **Constitutional Law.** When constitutional restrictions are not imposed, the legislature may by curative act validate any proceeding which it might have lawfully authorized in the first instance.
2. ———. The legislature cannot by curative act destroy vested rights or impair obligations of contracts.
3. ———. Where a housing authority act passed in 1935 is alleged to contravene constitutional provisions, such allegations are not material where it appears that the legislature in 1937 passed additional supplemental and independent legislation remedying the alleged defects, when it does not appear that a judicial determination of unconstitutionality has intervened, that vested rights were infringed, or the obligations of contracts impaired thereby.
4. **Statutes.** Statutes *pari materia* must be construed together so as to give effect to all, if possible.
5. **Health.** The housing authority acts described in the opinion, providing for slum clearance and low-rent housing for persons of low income by means of assistance of the Federal Housing Authority, constitute a proper exercise of the police power of the state to protect the health, safety, morals and general welfare of its people.
6. ———. The elimination of unsafe and dilapidated tenements by replacement with safe, sanitary, low-rent dwellings is a legitimate object for the exercise of the police power.
7. **Constitutional Law: EMINENT DOMAIN.** Statutes creating housing authorities to operate for slum clearance and construction of dwellings for persons of low income, and granting the housing authority the right of eminent domain for the accomplishment

of such public purpose, are not violative of the due process clauses of the state and federal Constitutions.

8. ———: ———. Neither are such statutes violative of the provisions of the state Constitution prohibiting the taking or damaging of private property for public use without compensation.

9. ———. HEALTH. The housing authority acts do not grant special privileges to those entitled to housing benefits, for the reason that they involve a public purpose from which the entire community will benefit.

10. ———. The granting of administrative discretion is not an unconstitutional delegation of a legislative function, where adequate standards to guide the exercise of such discretion are provided for by the statute authorizing it.

11. ———. The housing authority acts are designed to enable local housing authorities to attain slum clearance and low-rent housing by means of assistance from Federal Housing Authority, and do not delegate legislative functions to the housing authority.

12. ———. The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend.

13. **Municipal Corporations.** In eradicating the slum menace the housing authority lightens the burden of the city in protecting all citizens against disease, crime and immorality. Public funds of the city may, with legislative sanction, be used to aid in the establishment of a housing authority, it being a governmental subdivision organized for a public purpose.

14. **Taxation.** Under statutes creating housing authority to operate for slum clearance and construction of dwellings for persons of low income, the housing authority is a governmental subdivision within the purview of the Constitution, and its property and bonds are legally exempted from taxation.

15. **Statutes.** Housing authority acts *held* not to be broader than their respective titles.

16. **Eminent Domain.** The federal government has no power to take or condemn private property for low-rent housing and slum clearance projects, since such purpose is not a public use within the purview of the federal Constitution.

17. **Constitutional Law.** The provisions of section 4, ch. 91, Laws 1937, providing for the conveyance of property to the federal government for slum clearance and low-rent housing projects, are invalid.

18. **Statutes.** When it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that

the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld.

19. **Constitutional Law.** Whether statutes relating to slum clearance and construction of dwellings for persons of low income will accomplish object of ridding communities of unsafe and objectionable dwellings is a matter of legislative concern and not for the courts.

20. ———. It is not the function of the courts to pass on the wisdom of legislative action.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed as modified.*

Kelso A. Morgan and *Burbank & Burbank*, for appellants.

Philip M. Klutznick, Eugene D. O'Sullivan, Harold C. Linahan, W. W. Wenstrand and *Edward Sklenicka, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is an appeal from a judgment of the district court for Douglas county dismissing plaintiff's petition in which a declaratory judgment as to the constitutionality of chapter 29, Laws 1935, and chapters 91, 92, 93 and 94, Laws 1937, commonly called the housing authority acts, was sought.

This suit was filed by plaintiffs in behalf of themselves and all others similarly situated. One of the plaintiffs is a property owner and taxpayer within the territorial limits of the housing authority project involved herein. The other plaintiffs own property outside the project and are taxpayers in the city of Omaha. The Housing Authority of the city of Omaha, the city of Omaha and their respective officers are made parties defendant. It is alleged that the Housing Authority of the city of Omaha was created under the provisions of chapter 29, Laws 1935, heretofore described, and that all of said act is wholly unconstitutional and void, because (a) it delegates legislative authority to

the governing board of the city and the five persons appointed to constitute the housing authority, contrary to section 1, art. II, and section 1, art. III of the state Constitution; (b) it fails to set up rules, standards and criteria to determine where a project is to be established, thereby resulting in the taking of private property without due process of law in violation of section 3, art. I of the state Constitution, and the Fourteenth Amendment to the Constitution of the United States; (c) that the body of the act is broader than its title, and (d) that the title contains more than one subject, contrary to section 14, art. III, of the state Constitution. For the foregoing reasons it is contended that the act is absolutely null and void. It is then alleged that the legislature at its 1937 session passed chapter 92, Laws 1937, to legalize the creation and establishment of housing authorities in metropolitan cities and to make valid the unconstitutional provisions of chapter 29, Laws 1935. Plaintiff contends that said chapter 92, Laws 1937, has no such validating effect. The petition alleges that a legislative policy was for the first time announced with the enactment of chapters 91, 93 and 94, Laws 1937, wherein the legislature finds that conditions exist in the state which constitute a menace to the health, safety, morals and welfare of its residents and justifies the enactment of the housing authority acts. It is contended that all of said acts delegate legislative authority contrary to constitutional provisions; that all of said acts passed by the 1937 legislature are amendatory of and supplemental to the 1935 act, although they were passed as independent acts; that all of said acts purport to take property for a public purpose to correct an emergent condition, where in fact there is no public purpose and no emergent condition, and that said acts are therefore prohibited by sections 3, 21 and 25, art. I of the state Constitution, and the Fourteenth Amendment to the federal Constitution; and that said acts are class legislation inhibited by section 18, art. III of the state Constitution. It is further contended that section 4, ch. 91, Laws 1937, authorizing the housing authority to sell

property to the federal government, contravenes the due process clauses of the state and federal Constitutions. There is set out in the petition the ordinance passed by the city council of the city of Omaha, creating the housing authority; a copy of an agreement releasing taxes and other charges; a copy of the cooperation agreement between the city of Omaha and the housing authority, the resolution of approval on the part of the city and the authorization of Project No. Nebraska 1-2, involved herein. It is contended that the proceedings set out do not conform to the applicable statutes, and, if they do, that said statutes are violative of sections 3, 16, 21, 24 and 25, art. I; section 1, art II; sections 1, 14 and 18, art. III; sections 1, 2, 4, 6 and 7, art. VIII of the state Constitution, and the Fifth and Fourteenth Amendments to the Constitution of the United States.

Plaintiffs contend that chapter 29, Laws 1935, is unconstitutional for the reasons hereinbefore set out, and that the attempt of the legislature to validate the acts performed thereunder by the enactment of chapter 92, Laws 1937, is ineffective for any purpose. The aforesaid validating act says: "The creation and establishment of housing authorities under the provisions of chapter 29, Session Laws of Nebraska, 1935, and any amendments thereto, together with all proceedings, acts and things undertaken, performed or done with reference thereto, are hereby validated, ratified, confirmed, approved and declared legal in all respects," etc. Plaintiffs contend that a statute purporting to validate, ratify and confirm an act will not correct a constitutional defect in an act previously passed. We do not feel that it is necessary to pass upon that point in connection with the matter presently before us for the reason that the legislature did not attempt to validate the prior statute but undertook merely to validate all proceedings taken under the former act. The validating act was general and not special legislation. Neither is it shown that any vested rights have been destroyed or any obligation of contracts impaired. New housing authority statutes were enacted governing the future conduct of the corporations therein created. We

think the general rule is that the legislature may validate irregular or unauthorized acts of quasi municipal and public corporations which it lawfully could have authorized originally, or which are defective as to matters with which it could have dispensed, and that it may cure the invalid creation of such bodies. 16 C. J. S. 879, sec. 428. The housing authority acts passed by the 1937 legislature were all approved on May 18, 1937, and became effective on the same date. They should therefore be considered together. All proceedings and undertakings performed with reference to chapter 29, Laws 1935, are therefore properly validated, providing the legislature had the power to authorize said proceedings in the first instance.

We are convinced that chapters 91, 92, 93 and 94, Laws 1937, are independent acts, complete in themselves. This being true, they may change, modify or repeal prior enactments without violating section 14, art. III of the Constitution, relating to amendments. *Hinman v. Temple,* 133 Neb. 268, 274 N. W. 605; *State v. Lehmkuhl,* 127 Neb. 812, 257 N. W. 229. It is true that sections 6, 9 and 12, ch. 29, Laws 1935, were repealed by section 19, ch. 94, Laws 1937, and the title to the act, as well as the act itself, so states. It is also true that sections 6 and 12, ch. 29, Laws 1935, were actually rewritten in the form of an amendment in chapter 94, Laws 1937, but the title of the act and the act itself met constitutional requirements in this respect.

It is alleged that necessary constitutional requirements were not met in the adoption of chapter 29, Laws 1935. The fact remains, however, that said act is presumed to be constitutional. There has been no judicial determination of invalidity. In 1937, chapter 94, Laws 1937, was enacted and it is contended that it supplies any defects that may have existed in the former law. The legislature also enacted chapters 91, 92 and 93, Laws 1937, having to do with housing authorities in cities of the metropolitan class. In a test of the legality of the creation, organization, operations and purposes of the housing authority of the city of Omaha, we necessarily conclude that chapter 29, Laws 1935, and

chapters 91, 92, 93 and 94, Laws 1937, must be construed together. All parts of chapter 29, Laws 1935, which have been repealed are clearly noted. All changes in the form of amendments are clearly specified. In addition thereto it is provided by chapter 94, Laws 1937, that, in case of any possible inconsistencies, it shall control over any previous act. The result is that the 1937 acts validate all actions done under the 1935 law, supply requirements allegedly necessary to sustain the corporate existence and functions of the housing authority of the city of Omaha and grants new and independent powers by enacting new provisions into the law. We know of no reason why an earlier law, neither repealed by the legislature nor invalidated by the courts and presumed to be constitutional, should not be considered in connection with subsequent independent acts, in determining whether constitutional requirements have been met in effecting the purposes of the legislature. *Pierson v. Faulkner,* 134 Neb. 865, 279 N. W. 813; *Dornan v. Philadelphia Housing Authority,* 331 Pa. St. 209, 200 Atl. 834; *Krause v. Peoria Housing Authority,* 370 Ill. 356, 19 N. E. (2d) 193.

In the Illinois case last cited it appears that the legislature passed a housing authority act in 1934 which did not prescribe adequate standards in the delegation of duties to the state housing board provided for by the act contrary to constitutional requirements. The legislature in 1937 attempted to remedy the defects by amendment and the supreme court of Illinois held that such amendment effectually corrected the defects of the former act. *Krause v. Peoria Housing Authority,* 370 Ill. 356, 19 N. E. (2d) 193. We think the same result must obtain where the remedy is enacted by a supplemental and independent statute.

Plaintiffs contend for the rule announced in *Central Nat. Bank v. Sutherland,* 113 Neb. 126, 202 N. W. 428, wherein the court said: "If a legislative act when enacted is violative of the provisions of our Constitution, it cannot subsequently become a valid law merely because the reason for its invalidity has been removed, without being subsequently reenacted

by the legislature." This is undoubtedly the rule where the subject of the proposed legislation was at the time prohibited by the Constitution. But if the subject of the legislation be permitted by the Constitution, and the claims of unconstitutionality are directed toward the form and sufficiency of the act, we doubt not that such irregularities may be supplied by subsequent legislation where obligations of contracts and accrued vested rights are not thereby impaired and there has been no intervening adjudication of unconstitutionality.

In determining the validity of the housing acts, we will therefore treat chapter 29, Laws 1935, and chapters 91, 92, 93 and 94, Laws 1937, as being *pari materia*. The constitutionality of chapter 29, Laws 1935, can be properly considered only if chapter 94, Laws 1937, be treated as supplemental to it, and in effect an integral part of it. The question of constitutionality will therefore be considered with this view of the situation in mind.

Plaintiffs contend that the legislation before us was not enacted for a public purpose. In enacting the legislation, the legislature made certain findings to the effect that conditions existed relative to slum clearance and low income housing which required the establishment of sanitary and wholesome housing projects in cities of the metropolitan class with a view of promoting health and sanitation and preventing the spread of crime and disease. The findings of the legislature, while not absolutely controlling, are entitled to great weight. It is obvious that the legislation was passed in the exercise of the police power of the state to protect the health, safety, morals and general welfare of its people. We think that these objectives subserve a public purpose and as such are proper subjects for legislative action. Many states have enacted similar laws and we are impressed with the unanimity with which they have been upheld as being for a public purpose. *Dornan v. Philadelphia Housing Authority*, 331 Pa. St. 209, 200 Atl. 834; *Rutherford v. City of Great Falls*, 107 Mont. 512, 86 Pac. (2d) 656; *Marvin v. Housing Authority of Jacksonville*, 133

Fla. 590, 183 So. 145; *Housing Authority of County of Los Angeles v. Dockweiler*, 94 Pac. (2d) (Cal.) 794. The legislation being for a public purpose, the legislature may properly grant the right of eminent domain to housing authorities without constitutional violation, assuming, of course, that just compensation will be made to owners of property taken or damaged. *Rutherford v. City of Great Falls*, 107 Mont. 512, 86 Pac. (2d) 656; *Matter of New York City Housing Authority v. Muller*, 270 N. Y. 333, 1 N. E. (2d) 153; *Romano v. Housing Authority of the City of Newark*, 123 N. J. Law, 428, 10 Atl. (2d) 181; *Allydonn Realty Corporation v. Holyoke Housing Authority*, 23 N. E. (2d) (Mass.) 665.

The contention is advanced that the legislation delegates legislative powers to the city council of the city of Omaha and to the Housing Authority of the city of Omaha, contrary to section 1, art. II, and section 1, art. III of the Nebraska Constitution. The part of the legislation to which plaintiffs specifically refer is that part of section 3, ch. 29, Laws 1935, which says in part: "When it has been determined by the governing body of any metropolitan city, by ordinance in the exercise of its discretion, that it is expedient to create a housing authority, the mayor of such city, with the approval of the governing body of the city shall appoint five persons who shall constitute the housing authority." This does not delegate legislative authority to the governing body of the city. It merely provides the contingency upon the happening of which the enacted legislation becomes operative. Under many statutes, the future contingent event upon which the operation of the law depends is the favorable result of a popular election. The providing of such contingencies upon which the law might properly be limited to take effect does not constitute a delegation of legislative power. The applicable rule is: The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend. *State*

v. Frear, 142 Wis. 320, 125 N. W. 961; *State v. Sullivan*, 67 Minn. 379, 69 N. W. 1094; *Edwards v. Housing Authority of City of Muncie*, 19 N. E. (2d) (Ind.) 741; *Housing Authority of County of Los Angeles v. Dockweiler*, 94 Pac. (2d) (Cal.) 794.

It is also contended that subdivisions (b) and (c) of section 5, ch. 29, Laws 1935, constitute a delegation of legislative powers to the housing authority. Subdivision (b) provides in substance that the housing authority shall have power to determine what areas are unsanitary or substandard, and to prepare plans for projects in such areas; to acquire property for the development and to hold title thereto; to construct such project and to operate the property and establish rent schedules; and to perform many other designated acts in furthering the construction and operation of such projects.

It must be borne in mind that it is for the legislature to determine what the law shall be; to create rights, duties and powers, and provide the general mode of conduct to be followed. This does not mean that the legislature must lay down a strict rule which must be followed by an administrative officer or board, but that such persons or boards may be vested by the legislature within reasonable limits with the exercise of judgment in carrying out the expressed legislative purpose of the act. To ascertain and determine whether a certain area is unsanitary and substandard within the meaning of the act is an administrative function. The other functions prescribed in subdivision (b) are likewise rights, duties and powers properly delegated to the housing authority as the administrative agency. It cannot be seriously disputed that the legislature is clothed with power to delegate to administrative boards and agencies of the state the power of ascertaining the facts upon which the laws are to be applied and enforced. It may also authorize the doing of specific acts necessary to the furtherance of the purposes of the act. Such delegations of power and authorizations of acts do not transcend constitutional inhibitions so long as the law-making power is wholly reserved to the legislature

and no part thereof has been delegated to any other governmental subdivision, board or agency. *State v. Howard,* 96 Neb. 278, 147 N. W. 689; *Wells v. Housing Authority,* 213 N. Car. 744, 197 S. E. 693; *Dornan v. Philadelphia Housing Authority,* 331 Pa. St. 209, 200 Atl. 834; *Knoxville Housing Authority v. City of Knoxville,* 174 Tenn. 76, 123 S. W. (2d) 1085; *Chapman v. Huntington, W. Va., Housing Authority,* 3 S. E. (2d) (W. Va.) 502.

Plaintiffs contend that subdivision (c) of section 5, ch. 29, Laws 1935, constitutes an unlawful delegation of legislative power. This subdivision states: "To do all things necessary or convenient to carry out the powers expressly given in this act." We fail to see where this subdivision adds anything to the act in so far as a determination of constitutionality is concerned. The powers therein alleged to be delegated are limited to powers expressly granted which we hold to be administrative in character.

It is contended that chapter 29, Laws 1935, fails completely to make any legislative finding of convenience and necessity. However, chapters 91, 93 and 94, Laws 1937, found that certain harmful conditions exist. A remedy for these harmful conditions is provided. The determination of facts to ascertain whether a given locality contains the harmful conditions for which the housing authority acts were passed to rectify, does not constitute a delegation of legislative power.

To specifically discuss all of the alleged unlawful delegations of legislative authority would unduly extend this opinion. Suffice it to say that the housing authority acts involved herein have been carefully examined and we are convinced that constitutional requirements in that respect have not been transgressed.

Plaintiffs argue that the housing authority acts and the cooperation agreement contained in the record will result in the taking of their property, and that of others similarly situated, without due process of law, contrary to section 3, art. I of the Nebraska Constitution and the Fourteenth Amendment to the Constitution of the United States. The

argument on this point is based on the contention that there is no provision for a determination by a competent tribunal as to whether or not the creation of the district and the construction of the improvement will promote public health, convenience and welfare. The claim is made that the housing authority arbitrarily fixes the location and boundaries of the project, and the city council of the city approves or disapproves the caprice indulged in. In our opinion, the use of granted powers was properly hedged in by the act. The powers granted were specifically limited to the express purpose of "making provision for the preservation of the public health, safety, morals and welfare by facilitating sanitary housing conditions for families of low income and the elimination of congested and unsanitary housing conditions within the limits of the city creating it." Laws 1935, ch. 29, sec. 5. Any arbitrary action under the act would necessarily subject such action to the injunctive processes of the courts. The right of eminent domain is subject to approval by the city council before it can be exercised, and if attempted to be used in the furtherance of arbitrary action the injunctive process against such action would destroy the foundation for the exercise of that right. If the powers granted are lawfully exercised, the right of eminent domain, accompanied by full compensation for property taken or damaged, does not violate the due process clauses of the state and federal Constitutions.

The plaintiffs who are taxpayers in the city of Omaha living outside of the territorial boundaries of the housing authority project have no rights abridged which the state and federal Constitutions guarantee to them. In the first place, the housing authority has no power to tax or in any way to create any debt or charge against the city. The taxpayers of the city of Omaha as such are not affected. The act does provide, however, that a city may make donations to a housing authority and that the housing authority shall make reimbursements for all such loans made. Laws 1937, ch. 91, sec. 6. The exercise of this power would naturally increase the tax burden of all taxpayers of the

city. If a tax is for a public purpose, as distinguished from a private purpose, it will be upheld by the courts and will not amount to the taking of private property without due process of law. We think the well-settled rule is that the taking of property under the power of taxation properly exercised does not constitute a taking without due process of law. *De Pauw University v. Brunk*, 53 Fed. (2d) 647; *McLeland v. Marshall County*, 199 Ia. 1232, 201 N. W. 401. In eradicating the slum menace, the housing authority lightens the burden of the city in protecting all citizens against crime, disease and immorality. Public funds of the city may, with legislative sanction, be used to aid in the establishment of a housing authority, it being a governmental subdivision organized for a public purpose. *Spahn v. Stewart*, 268 Ky. 97, 103 S. W. (2d) 651; *State v. Housing Authority of New Orleans*, 190 La. 710, 182 So. 725; *Williamson v. Housing Authority of Augusta*, 186 Ga. 673, 199 S. E. 43. Consequently, we conclude that neither a property owner within the territorial boundaries of a housing authority project nor a taxpayer of the city of Omaha living outside the project may successfully claim a violation of the due process clauses of the state and federal Constitutions. *Williamson v. Housing Authority of Augusta*, 186 Ga. 673, 199 S. E. 43; *Rutherford v. City of Great Falls*, 107 Mont. 512, 86 Pac. (2d) 656.

Plaintiffs insist that the legislation is special rather than general and therefore inhibited by section 18, art. III of the state Constitution. We do not deem it necessary to cite authority for the statement that the legislation has general application to all cities of the metropolitan class and that it has none of the aspects of special legislation.

It is urged that chapter 93, Laws 1937, providing that the bonds and property of a housing authority shall be exempt from all taxes and special assesssments violates sections 1, 2, 4 and 6, art. VIII of the state Constitution. The aforesaid provisions relate to raising revenue upon uniform property valuations, exemptions of property from taxation, the prohibition against the remission of taxes,

and the right of municipalities to make improvements and levy special assessments therefor. We are obliged to hold that a housing authority, created and operated under the legislation before us, is a governmental subdivision within the purview of the Constitution, and consequently its property and bonds are legally exempted from taxation. *Fontenelle Forest Ass'n v. Sarpy County,* 118 Neb. 725, 226 N. W. 327; *Herman v. City of Omaha,* 75 Neb. 489, 106 N. W. 593. In cases involving similar statutes in other jurisdictions, the right to exempt the property and bonds of a housing authority from taxation has uniformly been upheld. *Marvin v. Housing Authority of Jacksonville,* 133 Fla. 590, 183 So. 145; *Williamson v. Housing Authority of Augusta,* 186 Ga. 673, 199 S. E. 43; *Housing Authority of County of Los Angeles v. Dockweiler,* 94 Pac. (2d) (Cal.) 794.

Plaintiffs allege that the respective enactments before the court are broader than their titles and therefore contravene section 14, art. III of the state Constitution, providing that no bill shall contain more than one subject and the same shall be clearly expressed in its title. We have examined the titles to the acts before us, and it appears clear to us that the matters contained in the acts themselves are germane to the purposes of the acts expressed in their titles. The constitutional provision does not require that the title be a synopsis of the law. The purpose of the constitutional inhibition was to prevent surreptitious legislation by advising legislators of the nature of the measures they are called upon to support or oppose. If by a fair and reasonable construction the title calls attention to the subject-matter of the bill, it may be said that the object is expressed in the title. We think the titles to the acts before us meet constitutional requirements. *State v. Price,* 127 Neb. 132, 254 N. W. 889; *Spier v. Thomas,* 131 Neb. 579, 269 N. W. 61; *Elliott v. Willie,* 112 Neb. 78, 198 N. W. 861.

It is urged that the proceedings taken in furthering the purposes of the housing authority project herein involved do not conform to the requirements of the applicable statute.

We have examined the ordinance passed by the city council of the city of Omaha creating the housing authority, the agreement releasing taxes and other charges, the cooperation agreement between the housing authority and the city of Omaha, and the resolution of approval on the part of the city and the authorization of the project involved herein. We hold that the ordinance and resolution meet all statutory requirements and that each of the agreements mentioned are legal and binding obligations authorized by the housing authority statutes. We further hold that any bonds or debentures issued by the housing authority of the city of Omaha will be the debts or obligations of the housing authority of the city of Omaha, and not a debt or obligation of the city of Omaha, the county of Douglas, or the state of Nebraska.

Plaintiffs also urge that the provision of section 4, ch. 91, Laws 1937, providing that "any state public body may upon such terms, with or without consideration, as it may determine: (a) Dedicate, sell, convey or lease any of its property to a housing authority *or the Federal Government,*" is violative of the due process clauses of the state and federal Constitutions. We think this is true in so far as the inclusion of the federal government is concerned. It has been held that the federal government has no power to condemn private property for low-cost housing and slum clearance projects, for the reason that it is not for a public use prescribed by the delegated powers of the federal government. *United States v. Certain Lands in City of Louisville,* 78 Fed. (2d) 684. The federal government cannot therefore properly take or own property for the purposes of providing slum clearance or low income housing. But we do not think that the inclusion of the federal government in this provision was such an inducement to the passage of the act that it would not have otherwise been enacted. When it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the

passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld. *Nelsen v. Tilley, ante,* p. 327, 289 N. W. 388. We think the foregoing rule controls the instant case.

In applying the applicable rule that all reasonable doubt must be resolved in favor of constitutionality, we conclude that the legislation is constitutional except in the one respect noted. This being true, the legislature had the power in the first instance to authorize the acts which were validated by chapter 92, Laws 1937. Consequently, the Housing Authority of the city of Omaha was lawfully created by virtue of this curative legislation.

Much is said in the briefs about the wisdom of this legislation, a subject with which we cannot concern ourselves. The wisdom of legislation is a matter for legislative and not judicial decision.

JUDGMENT ACCORDINGLY.

JOHNSEN, J., concurring specially.

I am in accord with the court's decision, except that I do not believe that we can or should attempt to determine in this case the power of the federal government in housing matters, as expressed in the sixteenth and seventeenth syllabus points. The opinion admits that, irrespective of the extent of such power, the rest of the statute is in any event constitutional, and this, it seems to me, is as far as it is necessary or possible for us to go.

The following clarification of the foregoing opinion was filed March 26, 1940.

CARTER, J.

Appellees by motion request a clarification of our former opinion in this case (*Lennox v. Housing Authority of City of Omaha, ante,* p. 582, 290 N. W. 451). It is urged that our holding in the former opinion to the effect that the federal government has no power to take and condemn private property for low-rent housing and slum clearance projects casts doubt on the power of the Housing Authority of the city of Omaha to secure bonds issued by it to the federal gov-

ernment, or an authorized governmental agency of the federal government, by a pledge of its revenues or a mortgage of any housing project, projects or other property of the authority. We do not think that our former opinion imports any such conclusion, but for the purpose of removing any doubts on the subject we desire to amplify our previous holding.

We think it is within the power of the legislature to authorize a housing authority to borrow money and secure the loan by a pledge of revenues or a mortgage of any housing project, projects or other property of the authority to any one desiring to make the loan, including the federal government or any authorized governmental agency of the federal government. And in case of default in the payment of such loans, we take the view that the federal government, or any governmental agency of the federal government empowered to make such loans, would have the same redress in the courts in the enforcement of payment as any person or private corporation would have under like circumstances.

The declaration of unconstitutionality contained in our former opinion is limited to that part of section 4, ch. 91, Laws 1937, specifically described therein, and in no event is it to be construed as affecting any other section of the questioned statutes.

B. L. FALLIS, APPELLANT, V. W. E. VOGEL, APPELLEE.
290 N. W. 461

FILED FEBRUARY 23, 1940. No. 30842.

1. **Workmen's Compensation.** A claimant for compensation under section 48-121, Comp. St. 1929, as amended by section 41, ch. 57, Laws 1935, who, through an injury, has suffered a permanent partial loss of the use or function of the left hand and left leg, is entitled to recover such proportion of the compensation allowed for total disability, under subdivision 1 of said section, as the extent of his loss would bear to the total loss of such members.
2. ———. In a cause arising under the workmen's compensation law, where the trial court found the employee to be temporarily

totally disabled for a period of 67 weeks, compensation to be allowed the employee is fixed by subdivision 1, sec. 48-121, Comp. St. 1929, as amended by section 41, ch. 57, Laws 1935; and where temporary total disability is followed by permanent partial disability, and the same is determined at the end of the 67th week and fixed to the extent of 25 per cent. of the ability of the employee to carry on his former occupation, such employee should receive 25 per cent. of 66⅔ per cent. of the weekly wage, received at the time of the injury, for the remaining 233 weeks and in no event beyond the period of 300 weeks, and thereafter 25 per cent. of 45 per cent. of such weekly wage for the remainder of his natural life, in accordance with subdivision 3 of said section 48-121, as amended, and with subdivision 1 of the same act.

3. ———. Section 48-174, Comp. St. Supp. 1937, providing for appeals from the district court to the supreme court in compensation cases, contains no specific provision or language as to the time for filing a bill of exceptions in the supreme court. Under such circumstances, this section of the statute contemplates the application of the general law relating to bills of exceptions for the purpose of appeal from the district court to the supreme court in compensation cases.

APPEAL from the district court for Hall county: ERNEST G. KROGER, JUDGE. *Affirmed.*

Lloyd W. Kelly and *B. J. Cunningham,* for appellant.

William H. Carns and *Hall, Cline & Williams, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

This is a proceeding under the workmen's compensation law. Plaintiff, a man 63 years of age, engaged in the occupation of a general painter for 38 years, while employed by the defendant, on September 21, 1936, in the painting of a ceiling, fell from a scaffold a distance of 14 feet onto some nail kegs, then to the cement floor, severely injuring him.

On April 20, 1938, plaintiff instituted suit in the Nebraska workmen's compensation court, setting forth his claim for disability. May 3, 1938, defendant answered,

alleging payment of compensation for total permanent disability for 67 weeks at $15 a week; alleged that the plaintiff's permanent disability consisted of 25 per cent. loss of the use of the left hand and 25 per cent. loss of the use of the left leg. November 7, 1938, an award was made by the judge who heard the compensation case, awarding compensation to the plaintiff in the sum of $15 a week for 300 weeks; $10 a week for the remainder of plaintiff's life, based on injuries to two members, sustaining 100 per cent. disability of the left leg and 100 per cent. disability of the left hand. Rehearing was waived by defendant in the compensation court, and an appeal taken to the district court for Hall county, where the case was heard *de novo*.

That the plaintiff was injured in the course of his employment and that his wages amounted to $31.20 a week is not in dispute. The plaintiff was paid $15 a week compensation for 67 weeks, totaling $1,005, and in addition thereto compensation in the sum of $5.20 a week for permanent partial disability for 68 weeks, and also $1,210.55 for necessary medical, surgical and hospital expenses.

The trial court fixed plaintiff's disability as permanent partial loss of the use of the left arm and permanent partial loss of the use of the left leg at 25 per cent.; found that such permanent partial disability was ascertainable from January 3, 1938; that plaintiff was entitled to compensation at the rate of $15 a week for temporary total disability for a period of 67 weeks, for which he had been paid, and in addition thereto the sum of $5.20 a week for the remaining 233 weeks, but not beyond 300 weeks, and that he had been paid such amount for 68 weeks; further found that after the 300-week period plaintiff was entitled to compensation in the sum of $3.51 a week for and during his lifetime, and, in addition, entered an order for the payment of all necessary medical, surgical and hospital expenses; found that any amounts paid by the defendant to the plaintiff are to be taken into consideration and credited to defendant. Without reference to the temporary total disability, as heretofore stated, the trial court, basing the

recovery due plaintiff and considering the permanent partial disability of two members as 25 per cent., figured 25 per cent. of 66 2/3 per cent. of the agreed weekly wage of the plaintiff ($31.20), amounting to $5.20 a week, and for the permanent partial disability of 25 per cent. for the loss of the use of two members, in figuring the plaintiff's compensation for life and after the 300-week period, as aforesaid, took 25 per cent. of 45 per cent. of the weekly wage of plaintiff ($31.20), amounting to $3.51. From this finding and judgment the plaintiff appealed.

Plaintiff's injuries consisted of severe shock, comminuted fracture of the left humerus near the shoulder, comminuted compound fracture of the lower left ulna and radius involving the joint, longitudinal fracture of the middle phalanx of the fourth finger on the left hand, fractures of the transverse processes of the third and fourth lumbar vertebræ, separation and slight displacement of the symphysis pubis, blood in the urine and injury to the kidney, laceration of the right heel, and bruises of the left scapula and coccyx. Plaintiff remained in the hosiptal for a period of 110 days, began to walk at time of leaving and has continued to walk.

The medical experts, with the possible exception of the attending physician, fixed the disability to plaintiff's left hand, the loss of use thereof, and the loss of use of the left leg at 25 per cent. and considered his ability to carry on his work as a painter. They agreed that he could not climb ladders, or work from scaffolding, or paint in corners, due to lack of muscular power in two fingers on his left hand which he cannot close. Dr. J. W. Martin estimated plaintiff's disability at 25 per cent., based on limitations of motion in the arm and leg, and testified that he also took into consideration plaintiff's ability to do useful labor. He examined him 12 different times between April 6, 1937, and April 21, 1939, and also examined X-rays taken by Dr. Johnson.

Dr. R. W. Fouts testified to the same degree of disability as the other medical experts. As to the ability of the plain-

tiff to carry on his work as a general painter, the doctor testified: "Oh, I think there is some of the work of a painter that he couldn't do at all even if he never had had an injury. I think there is some work of painting that he could do more than 75 per cent. of to take into consideration all of it; it would be around there somewhere I do know; it is an estimate, but certainly it is more than 50 per cent. as a painter doing general work, I believe." The attending physician testified that 25 per cent. would be the extent of the plaintiff's disability in his left hand and left leg, with the exception of carrying on his occupation, in which case his disability measured 100 per cent.

Several witnesses, contract painters acquainted with plaintiff's ability as a painter, testified that he was a good mechanic and knew his business; that they would hesitate to employ him because he was not physically sound and would be unable to climb ladders, work from a scaffold, or hold a paint pail in his left hand while painting with his right; further, that a painter uses his left hand from 20 to 40 per cent. of the time while painting, and that plaintiff would be unable to do this. It was also testified that he would be able to do some kinds of painting at reduced wages.

Plaintiff testified that as a result of the accident his left leg is weak; that he can walk about 10 blocks when his leg gives out; that he uses a cane in walking; otherwise he would fall; that for this reason he is unable to do the usual work of an outside painter. He testified that two fingers on his left hand cannot be closed by their own muscular power, but can be pushed and closed by his other hand or by some external force; that one finger is broken and cannot be moved or bent at all and is partially paralyzed. He made a complete recovery involving the fractures of the left upper extremities, and the two fractured vertebræ had healed perfectly, but there remain some persistent muscle atrophy and some associated weakness of the leg. The stiffness of which plaintiff complains is his inability to stoop and rise without the use of a cane and, as contributing to his general inability to perform his work as a painter,

was not caused, according to the expert medical testimony, by this accident, but was caused by generative hypertrophic osteo-arthritis of the spine, common to people of his age. The foregoing constitutes the substance of the evidence necessary to a determination of this case.

The section of the workmen's compensation law here involved is section 48-121, Comp. St. 1929, as amended by section 41, ch. 57, Laws 1935, and subdivisions 1 and 3 thereof.

This court in *Frost v. United States Fidelity & Guaranty Co.*, 109 Neb. 161, 166, 190 N. W. 208, in fixing compensation where two members were injured, resulting in a permanent partial disability to each member, said that it was specifically provided for by the statute (Comp. St. 1922, sec. 3044, now Comp. St. 1929, sec. 48-121), "that in all cases involving a *permanent* and *partial* loss of the use or function of any of the members mentioned the compensation shall be in such proportion to the amounts named in subdivision 3 as the loss of the use of the member bears to a total loss." This rule was followed in *Schlesselman v. Travelers Ins. Co.*, 112 Neb. 332, 199 N. W. 498; *Johnson v. David Cole Creamery Co.*, 109 Neb. 707, 192 N. W. 127; *Ashton v. Blue River Power Co.*, 117 Neb. 661, 222 N. W. 42; *Radford v. Smith Bros.*, 123 Neb. 13, 241 N. W. 753. In the *Ashton* case this court stated the reasoning in *Frost v. United States Fidelity & Guaranty Co., supra,* "is not only in accord with the literal terms employed by the legislators, but fairly expressive of the true legislative intent evidenced by this act."

In *Radford v. Smith Bros., supra,* the rule was again announced as in the preceding cases. That was a case involving disability to more than two members. The opinion analyzed section 48-121, Comp. St. 1929, subdivisions 1 and 3 thereof. Therefore, under the provisions of said section 48-121, a claimant for compensation, who has sustained an injury, for the loss of the use of the left hand and for the loss of the use of the left leg, is entitled to recover such proportion of the compensation allowed for total disability, under subdivision 1 of said section, as the extent of the

loss of the use of two members will bear to the total loss of such members.

The defendant contends that the bill of exceptions was not filed in time, and that the judgment of the district court must therefore be affirmed, because the pleadings are sufficient to support the judgment. That part of section 48-174, Comp. St. Supp. 1937, pertinent as referred to by the defendant follows: "Any appeal from the judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in actions at law except that such appeal shall be perfected within thirty days from the entry of judgment by the district court."

The judgment in the instant case was entered in the district court for Hall county June 9, 1939; motion for a new trial was overruled September 22, 1939; the transcript for appeal was filed in the supreme court October 21, 1939; the bill of exceptions was filed in the supreme court November 16, 1939, 55 days from the date of the overruling of the motion for a new trial. Defendant states that to comply with section 48-174, Comp. St. Supp. 1937, the plaintiff was under obligation to perfect his appeal within 30 days from the entry of the judgment of the district court, or the overruling of the motion for a new trial; that the bill of exceptions was, in fact, filed out of time and that it constituted an integral part of the proceedings necessary to perfect the appeal; citing *Scott v. Dohrse,* 130 Neb. 847, 266 N. W. 709, which holds chapter 57, Laws 1935 (the compensation law) to be a complete and independent act, and citing other cases of like holding.

When the transcript is filed in the supreme court, the appeal is perfected. There is no limitation on the filing of the bill of exceptions except under the general rule. Section 48-174, Comp. St. Supp. 1937, contains no specific provision as to the time for filing a bill of exceptions on appeal from the district court to the supreme court. Under such circumstances, this section of the statute contemplates the application of general laws with reference to bills of exceptions for the purpose of appeal from the district court

to the supreme court in compensation cases. Defendant's contention in this respect is not well taken.

For the reasons given in this opinion, the judgment of the district court is

AFFIRMED.

IVEL W. MILLER, APPELLEE, V. CLAUDE C. JONES, APPELLANT.
290 N. W. 467

FILED MARCH 1, 1940. No. 30731.

1. **Pleading.** Where an action is founded upon an instrument for the unconditional payment of money only, the petition is sufficient if it contains the elements set out in section 20-837, Comp. St. 1929.
2. ———. An instrument, based upon a business transaction, wherein A states, "I owe B $1,300," contains an implied valid and legally sufficient consideration and promise to pay, and is an unconditional admission of an existing debt which obligates A to pay B the stated amount.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Waring & Waring, for appellant.

Sloans, Keenan & Corbitt, contra.

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS, District Judge.

SIMMONS, C. J.

Plaintiff owned a bakery at Fort Morgan, Colorado. In the spring of 1928, he sold the bakery to the defendant. There was no written contract. Full payment of the purchase price was not made. On December 5, 1933, defendant owed the plaintiff $1,300. On that date, defendant "wrote" the following on the back of an envelope and "handed" it to the plaintiff: "Dec. 5. 1933. This is to certify that I, Claude C. Jones, owe I. W. Miller Thirteen Hundred Dollars

($1,300) Claude C. Jones." Defendant has paid no part of said sum.

Plaintiff's amended petition herein contained the usual caption, the names of the parties, and the following:

"Comes now plaintiff herein and for cause of action against the defendant alleges as follows:

"1. That on or about the 5th day of December, 1933, the defendant promised for a good and valuable consideration to pay, in writing, to the plaintiff the sum of $1,300.00; said instrument being in words and figures as follows:" (The instrument above set out is copied verbatim.)

2. (Alleges the residence of the parties.)

"3. That due demand has been made upon the defendant to pay said $1,300, with interest, and that the defendant has failed, neglected and refused to pay the same.

"4. That there is due from the defendant to the plaintiff the total sum of $1,611.00."

The petition concluded with a prayer for judgment for $1,611, interest and costs.

The defendant demurred to the amended petition for the reason "that the same fails to state facts sufficient to constitute a cause of action" against him. This demurrer was overruled.

Defendant by objection and by motion in effect renewed this demurrer at the close of plaintiff's opening statement, at the offering of evidence by the plaintiff, and at the conclusion of plaintiff's case. Said demurrers, objections, and motions were overruled. Defendant states: "The theory (of the demurrer) was that the instrument sued on was not a promissory note and that it does not therefore import a consideration, and that the consideration must be alleged in the petition."

The defendant answered, preserved his demurrer, and denied the allegations of the petition.

Plaintiff testified to the facts recited in the opening paragraph of this opinion, to all of which defendant made repeated and timely objections, presenting the same reasons urged in the demurrer, and finally moved to strike the testimony for the same reason.

Defendant offered no evidence. Plaintiff moved for an instructed verdict, which was sustained, and judgment was entered. Defendant's motion for a new trial was overruled. Defendant appealing assigns as error the overruling of his demurrers to the petition and to the evidence; the admission of evidence of the original contract over objection; and the direction of a verdict for the plaintiff. These assignments then go to the sufficiency of the petition to state a cause of action and the competency and sufficiency of the evidence to sustain a judgment.

Defendant's first contention is that the instrument sued on is not a negotiable instrument. Plaintiff admits that contention; hence, it will not be discussed.

Defendant's next contention is that, in an action based upon a nonnegotiable instrument, the consideration must be alleged and proved. This calls for a construction of the statute with reference to pleadings, and a construction of the instrument.

"In an action, * * * founded upon an account, promissory note, bill of exchange, or other instrument for the unconditional payment of money only, it shall be sufficient for the party to give a copy of the account or instrument, * * * *and to state that there is due to him* on such account or instrument, from the adverse party, a specified sum, which he claims with interest." Comp. St. 1929, sec. 20-837.

It is evident that the legislature contemplated that the requirements of a pleading, applicable to accounts, promissory notes, and bills of exchange, shall apply to other instruments for the unconditional payment of money only. This court in construing this section of the statutes has said: "It is to be observed that this section deals with an action founded upon an account or upon some instrument for the unconditional payment of money only; and in such an action the pleading is declared to be sufficient if the pleader gives a copy of the account or instrument, with all credits and indorsements thereon, and states that there is due him on such account or instrument, from the adverse party, a specified sum, which he claims with interest."

First Nat. Bank of Chadron v. Engelbercht, 57 Neb. 270, 77 N. W. 685.

Wyoming has a statute in the main in the identical language of section 20-837, Comp. St. 1929. Presented with a similar problem of construction, that court held: " * * * where the instrument upon which the action, counterclaim, or set-off is founded is one for the unconditional payment of money only, whether negotiable or not, it is unnecessary, in the short form of pleading authorized by section 4406, to aver consideration for the promise or order." *Brown v. Cow Creek Sheep Co.*, 21 Wyo. 1, 126 Pac. 886. See, also, 8 C. J. 858; 10 C. J. S. 1186, sec. 565; 8 Am. Jur. 560, sec. 948; 4 Bancroft's Code Pleading, 3592, sec. 2065; *Prindle v. Caruthers*, 15 N. Y. 425; *Scott v. Esterbrooks*, 6 S. Dak. 253, 60 N. W. 850.

It follows that the petition herein is sufficient if the instrument set out falls within the statutory classification of an instrument for the unconditional payment of money only. That the instrument is unconditional and refers to money only need not be demonstrated.

We are called upon, not to name the instrument, but to determine its legal effect. Instruments, similar to the one here involved, have been variously held to be acknowledgments of debt, due bills, results of an account stated, and nonnegotiable promissory notes, from which a promise to pay and a valid consideration may be legally implied.

" * * * to be an instrument for the payment of money, it must be an instrument which acknowledges an absolute obligation to pay, not conditional or contingent; one, the execution of which being admitted, it would be incumbent on the plaintiff, in an action to enforce it, only to offer the instrument in evidence to entitle him to a recovery. In other words, an instrument that admits an existing debt." *Trepagnier & Bros. v. Rose*, 18 App. Div. 393, 46 N. Y. Supp. 397.

In *Shimel v. Williams*, 136 Misc. 464, 240 N. Y. Supp. 161, the instrument was an "I. O. U." It was held: "An express promise to pay is not necessary; an implied promise

arising from the existence of the debt is sufficient. * * * Accordingly, the legal presumption of a consideration which obtains with respect to negotiable notes does not attach to the instrument here. But none the less does the evidence of a consideration appear within the note as clearly as if it were expressed to have been given for 'value received' * * * for the instrument here is not merely the expression of a promise; it is the declaration of a debt. As such it constitutes an admission of every element which is necessary to create a valid debt, including a consideration. A promise there may be indeed without a consideration, but a debt without a consideration is a contradiction in terms."

In a note to his executors, a testator said: "You will pay Philip E. Gallagher five hundred ($500.00) dollars. I owe him that." It was held: "The words, 'I owe him that,' imply a debt, and there can be no debt in a legal sense without a consideration to support it. Both a debt and a consideration are implied in the words quoted." *Matter of Gallagher v. Brewster,* 153 N. Y. 364, 47 N. E. 450.

This court has said: "A debtor is one who owes." *McArthur v. Clarke Drug Co.,* 48 Neb. 899, 67 N. W. 861.

"Used in a business sense in correspondence or contracts between business men dealing with one another, the word (owing) naturally implies a legal obligation." *In re Bresler's Estate,* 155 Mich. 567, 119 N. W. 1104.

"To say that one owes a debt means simply that he is obliged or bound to pay." *McDuffie v. Lynchburg Shoe Co.,* 178 Ala. 268, 59 So. 567.

Debt has been defined as "that which one person is bound to pay to another." 17 C. J. 1373. "Ordinarily the term imports a duty or obligation to pay, for the enforcement of which an action will lie." 17 C. J. 1376.

The word "due" is often used in business transactions as synonymous with "owing" or "remaining unpaid." *Fowler v. Hoffman,* 31 Mich. 215. See annotation Ann. Cases, 1918 E, pages 760-772.

Likewise, the word "due" has often been construed as being synonymous with the word "payable." See Ann.

Cases, 1918 E, page 769. See, also, 19 C. J. 819, 822.

See, also, 8 C. J. 116; 19 C. J. 823; 10 C. J. S. 522, sec. 84; 7 Am. Jur. 847; 1 Daniel, Negotiable Instruments (7th ed.) secs. 36 and 37; *Gay v. Rooke*, 151 Mass. 115, 23 N. E. 835; *Beeching v. Westbrook*, 8 Mees. & Wels. (Eng.) *411; *Smith v. Ice Delivery Co.*, 8 Ga. App. 767, 70 S. E. 195; *Long v. Straus*, 107 Ind. 94, 6 N. E. 123; *Currier v. Lockwood*, 40 Conn. 349; *Hopson v. Brunwankel*, 24 Tex. 607; *Cummings v. Freeman*, 2 Humph. (Tenn.) 143; *Lincoln v. Butler*, 14 Gray (Mass.) 129; *Jacquin v. Warren*, 40 Ill. 459; *Brady v. Chandler*, 31 Mo. 28; *Brewer v. Brewer*, 7 Ga. 584.

"An I. O. U. professes to be the result of an account stated between the parties, and an acknowledgment from the maker that he owes the person to whom he gives it so much money." *Lemear v. Elliott*, 4 L. T. Rep. n. s. 304.

This court has held: "The rendering of an account between parties and agreeing upon the amount due as appearing therefrom will support an action for the balance thereby shown without an express promise to pay." *Hendrix v. Kirkpatrick*, 48 Neb. 670, 67 N. W. 759. "An account stated implies a promise by the debtor to pay the agreed amount of debt owing to the creditor." *In re Estate of Black*, 125 Neb. 75, 249 N. W. 84. See 1 C. J. 699.

The consideration is the settling of the account. 1 C. J. 698; 1 C. J. S. 714, sec. 34.

The law permits a suit on the written instrument, without pleading and proving the original items of indebtedness. *In re Estate of Black, supra; O'Neal v. Patterson*, 206 S. W. (Mo. App.) 596; *Shearer v. Shearer*, 84 Colo. 234, 269 Pac. 19; 1 C. J. 707.

"A promissory note, duebill, or I O U, being an admission of a certain sum due, is *prima facie* evidence of account stated." 1 C. J. 690. See 1 C. J. S. 714, sec. 34.

We conclude that the instrument in suit is an unconditional admission of an existing debt for money only which the defendant is obligated to pay to the plaintiff, and that there is implied in it a valid and legally sufficient consideration and a promise to pay. It follows that it is an "instrument

for the unconditional payment of money only," and that the several demurrers were properly overruled.

Defendant's next contention is that the evidence is insufficient to sustain a recovery. The evidence has been recited herein. It followed the complaint and conformed to it. The defendant made no attempt to deny those facts. The testimony warrants the finding and judgment. No prejudicial error is found.

The judgment of the trial court is

AFFIRMED.

CHARLES E. PEARSE ET AL., TRUSTEES, ET AL., APPELLEES, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT.
290 N. W. 474

FILED MARCH 1, 1940. No. 30734.

1. **Trial.** Instruction offered on measure of damages, and refused, is set out at length. It correctly states the law, but every principle therein was covered by the trial court in its three long instructions on measure of damages, and there was therefore no error in rejecting the tendered instruction.
2. **Eminent Domain.** There is merit in giving short, definite instructions to the jury, but elaboration at some length can be overlooked in an instruction dealing with the measure of damages, and seeking to clarify this subject for the jury.
3. **Appeal.** If the amount of the verdict is supported by some competent evidence, then it cannot be said to have been arrived at by the jury through passion and prejudice, and the verdict cannot be set aside on that ground, but a remittitur can be ordered when the clear preponderance of the evidence shows the verdict to be excessive.
4. **Remittitur.** From a verdict and judgment for $1,883, it is directed that a remittitur be filed to reduce the judgment to $1,200.

APPEAL from the district court for Madison county: ADOLPH E. WENKE, JUDGE. *Affirmed on condition.*

August Wagner, C. N. McElfresh and *Webb Rice,* for appellant.

Moyer & Moyer and *Mapes & Mapes, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an appeal by the Loup River Public Power District from judgment on a verdict against it for $1,883 for a right of way and perpetual easement for an electric power transmission line across a farm of 240 acres.

The Public Power District, hereafter called the condemner, began proceedings in the county court for Madison county to acquire a right of way by condemnation under the power of eminent domain. Appraisers were appointed, who returned an award of $750, from which award the condemner appealed to the district court on the ground the award was excessive.

A stipulation was entered into between the parties that damages in the future to growing crops would be paid if and when they arose, and were not to be compensated for in these proceedings.

In the trial in the district court the plaintiff proceeded on the theory that the award was wholly inadequate.

The evidence discloses that the 240-acre farm lies 4½ miles east of the city of Madison, and that every acre is tillable. It is fenced and cross-fenced, and the buildings consist of a large modern house, a horse barn for 25 head of horses, a cattle barn, hog sheds, feed lots, silo, granaries, chicken house, farrowing pens, grain elevator, with a capacity of 5,000 to 6,000 bushels, hollow tile corncrib with a capacity of 4,500 to 5,000 bushels of corn, a complete water system throughout the yards and feed lots. The farm is adapted to raising and feeding live stock, and the land, of loess soil, is best for raising corn, alfalfa, and small grain. Because of a scientific plan for rotation of crops, pursued for years, the yield is above the average, as the farm has in the past produced crops of 60 bushels of corn per acre, 80 to 90 bushels of oats, and unusually fine crops of alfalfa. A graveled road connects the farm with Madison, and it is considered one of the best farms in the county. Many wit-

nesses testified that this farm was worth $90 to $100 an acre, and the condemner in his brief admits that $85 an acre is a fair valuation.

The transmission line crosses the farm on a straight north and south line close to the east side of the farm, and consists of three cables suspended from cross-arms supported by two poles. These poles are 50 feet long, set seven feet in the ground, and are creosoted, and the life of the poles is from 30 to 40 years. Each of the six supporting structures across this farm are the same. Two poles are set 14 feet six inches apart, and the east pole of each of the six pairs is set from 12 to 15 feet inside the east boundary line fence of the farm, and the poles are X-braced to give them strength and resistance to high winds. Each of the three electric cables, or conductors, are made with a core of seven strands of steel galvanized wire, around which are wound a number of strands of aluminum wire, which carries the current. The life of a conductor of that sort is indefinite. Similar conductors after having been in service for 20 years show no evidence of deterioration.

D. J. DeBoer, chief electrical engineer of the condemner, testified that he did not know of a single case where this kind and size of a cable was broken, but if a break should occur the line would be de-energized the instant that the cable hit the ground, as automatic circuit breakers immediately take the line out of service the instant it hits the ground, that is, the line would be absolutely dead in a little over one-tenth of a second.

The lowest point which the cables hang to the earth at 60 degrees F. is 28 feet in four of the spans, 29 feet in another, and 35 in another; the distance to the ground would be reduced about six inches for each ten degrees rise of temperature as the cables expand. These clearances equal or exceed those required by the National Safety Code when a power line goes over highways. The weight of the cables is one-half pound per foot, or from 275 to 300 pounds per span.

This power line is designed to carry from 69,000 to

115,000 volts of electricity. Electricity of this voltage will arc or jump from this uninsulated cable to another well-grounded object a distance of between five and six inches. These lines are patrolled or inspected by men on foot, and it is testified that a major repair, such as replacing a cross-arm or pole, which would require going upon the farm property with a repair truck, would not be required more often than once every 15 years. Each pole is equipped with a ground wire extending from the top of the pole to the ground to carry off lightning, but there is no danger in coming in contact with the poles, or with these ground wires, except during a lightning storm. There is a large steel tower in this line one mile north of this farm which affords added protection from lightning, and it is testified that the presence of these six structures on this farm tends to reduce danger from lightning strokes to live stock and fences. The residence and farm buildings are located from 400 to 500 feet from the transmission line.

Several witnesses for the condemner testified that the market value of the farm would not be decreased more than $150 to $200, and a county supervisor from Platte county testified that he had two such transmission lines across his farm, that he had personally farmed around such structures for a period of nine years, and that the diminution of market value by reason of the building of the transmission line would not in his opinion exceed $15 to $20 for each structure.

Robert Fulton, an electrical engineer, of Lincoln, was the expert called by the plaintiff. He was 51 years of age, a graduate of the college of engineering of the University of Nebraska, has been consulting engineer in the installation of many municipal electric systems in the state, and from 1934 to 1937 was chief electrical engineer for the Platte Valley Public Power & Irrigation District, and since that time has been in the employ of several electrical districts. He testified that he is familiar with the transmission line extending from near Columbus to Norfolk, Nebraska; that it is insulated for 69,000 volts, and all of the balance of

the construction is suited for 115,000 volts; that any person would be safe within 15 feet of the wires, and that a person thoroughly familiar with such transmission lines could approach much closer without danger; that it is dangerous for an ordinary person to approach nearer than 15 feet to the actual conductor, therefore a farmer should not start a stack of hay within 50 feet of such conductors; that in working on haymaking tools, binders, or combines, where the clearance is 27 feet, he would be in danger if standing on the top of a combine which would put him 17 or 18 feet in the air. Another danger mentioned was that children should not fly kites near these conductors.

A number of farmers were called by the plaintiff, who testified as to the increased difficulty in farming the land. One testified that grain could not be cut along the fence line between the posts and the fence with an eight-foot binder; that in checkrowing corn one would have to cut the wire north and south and resplice it 12 times in the field where the poles stand; that the weeds would grow up around the poles, and that these could not be mowed with a tractor or horse-mower, but would have to be mowed by hand, and that it would be necessary to cut these weeds at least three times during the crop season.

Another responsible farmer, who had been county commissioner of Madison county for 12 years, testified there would be difficulty in farming the narrow strip of land between the pole lines and the fence in cutting grain, in discing, and in harrowing, and that the presence of this power line would make a difference to him of $15 an acre on the entire farm, or damage the farm $3,600.

The evidence of one real estate agent was that the power line decreased the value of the entire farm from $5 to $10 an acre, and another that it decreased it from $12.50 to $15 an acre.

This is perhaps an inadequate abridgement of the several hundred pages of evidence in the bill of exceptions, but gives the great variance of the testimony before the jury, which ran from a damage of $12 to $15 a structure for the

six structures up to the same amount per acre for the entire farm, and on this evidence the jury returned a verdict of $1,883.

The condemner sets out 18 assignments of error for the reversal of this judgment, charging that the verdict is excessive, that the jury entirely disregarded the important fact that the transmission line is limited to about three acres of land along the edge of the east line of the appellee's farm, and in no manner interferes with the use of the remaining 237 acres, or casts any burden thereon, and that the testimony of competent witnesses that the market value of the remainder of the tract was in no manner decreased was entirely disregarded by the jury.

Objection is made to the receipt of certain evidence, over the objections of condemner, about children flying kites, and stacking hay near the line. Condemner also objects to the giving of instructions Nos. 9, 11 and 12.

The condemner offered just one instruction, which was refused by the trial court, reading as follows: "In assessing plaintiffs' damages, you will allow them such damages as you find from a preponderance of the evidence they have sustained in depreciation, if any, of the fair market value of their farm. Such depreciation is to be measured by the difference in the fair market value of the farm immediately before the construction of the transmission line thereon and immediately thereafter. Your finding must be based upon the evidence and not upon conjecture. In weighing the evidence relating to such depreciation you may consider every element of annoyance, disadvantage, and danger resulting from the improvement, which would influence an intending purchaser's estimate of the market value of the farm, if any such are proved by the evidence, but you are not at liberty to consider speculative, imaginary, or fanciful disadvantages, or consequences which the owners themselves might avoid by the exercise of reasonable care. Nor are we here concerned with damages that possibly may arise in the future from negligence of the District in the construction or maintenance of its line, as such damages would

be recoverable by the party injured in a separate action, if and when they arise, and you will not consider such speculative damages in making up your verdict in this case. All damages to which plaintiffs are entitled in this action are measured by the depreciation in the fair market value of their land, and resulting from the proper construction and maintenance of the improvement. When you have so assessed their damages, you will have allowed them full compensation in this case."

It is argued rightly that it is error to refuse a proffered instruction which is warranted by the evidence and correctly states the law of the case, unless the principles involved are covered by other instructions. *Hyndshaw v. Mills,* 108 Neb. 250, 187 N. W. 780; *First Nat. Bank v. Carson,* 30 Neb. 104, 46 N. W. 276.

An examination of the instructions given by the trial court discloses that the subject of the measure of damages was covered by the court's three instructions Nos. 10, 11 and 12; that these three instructions were, as claimed by condemner, three times as long as the one instruction above set out. However, each element set out in the above instruction was covered by the court's three instructions, and some of the principles were simplified and others were amplified so that the jury would clearly understand each principle of law.

There is undoubtedly merit, as a rule, in giving short instructions, but if any elaboration is to be allowed in the charge to the jury it would be overlooked in the instructions dealing with the measure of damages to be allowed, for this subject is often troublesome to the members of a jury while deliberating.

We can admit that the instruction tendered is a fair and concise statement of the law on the measure of damages, and yet hold that the trial court covered the subject completely, and with perhaps greater clarity. We conclude that the court's charge to the jury was correct, and did not tend to confuse the jury.

In the brief of the condemner, it is set out that three

projects in Nebraska are being federally financed by the Public Works Administration, designed to eventually produce 500,000,000 K. W. H. of electric current annually, and "to get this power to the farms and to make it available for industries, it must be sent out to Norfolk, Scottsbluff, Hastings, Grand Island, Kearney, Beatrice, South Sioux City, to Lincoln and Omaha, and to a hundred other communities in the commonwealth. It is necessary to construct transmission lines to do this. These transmission lines must cross farm lands. If unreasonable, exorbitant and excessive allowances must be made for right of way easements, the success of the entire development which includes irrigation for thousands of acres of productive lands may be aborted. Costs of the projects have already greatly overrun estimates. * * * This is not to suggest that to speed our material development, private property should be taken without just compensation. But is to suggest that proper regard should be had for the obverse side of the shield, to the end that public funds be not taken for private remuneration except upon full value received."

The plaintiffs' farmer witnesses, as well as reliable real estate agents, have testified that the land was worth from $5 to $15 an acre less upon the whole tract than it was before the line was built. In *Dunlap v. Loup River Public Power District,* 136 Neb. 11, 284 N. W. 742, 124 A. L. R. 400, this court said it was proper to consider the reasonable market value of a farm before and after such power line is built across it, and, if an owner cannot sell his farm at as good a figure with this line across it as before, that this was proper to consider. See *Kentucky Hydro-Electric Co. v. Woodard,* 216 Ky. 618, 287 S. W. 985; *Kentucky Hydro-Electric Co. v. Reister,* 216 Ky. 303, 287 S. W. 357; annotation, 49 A. L. R. 697; *Lilienthal v. Platte Valley Public Power and Irrigation District,* 134 Neb. 281, 278 N. W. 492; *Asche v. Loup River Public Power District,* 136 Neb. 601, 287 N. W. 64; annotation, 124 A. L. R. 407.

There is no question but what it will be difficult for repair trucks to get through the cultivated fields to this line.

The plaintiff testified that there was only one gate which gave access to the fields, and from that, one would go north through the yard, around the residence, and to a lane east of the feed lots, and turn east across the fields to that line.

So far as the amount of the verdict returned in this case by the jury is concerned, it cannot be set aside and disregarded as being arrived at through passion and prejudice, for the verdict is well within the testimony returned by several of the witnesses.

However, in the opinion of the court, the verdict is much too high, for the plaintiffs retain all of their land except the few square feet of ground occupied by the 12 poles making up the six structures. They may cultivate their land as before, so far as these 12 poles do not interfere. There will be abundant room for alfalfa stacks, even if none can be placed within 50 feet of these three transmission lines. If there is difficulty in planting checkrowed corn along this narrow strip of land along the east fence occupied by these six structures, perhaps other crops can be planted on this ground with much less annoyance and trouble.

The rule of this court has been that, on appeal in an action for damages, a judgment on a verdict which the clear preponderance of the evidence shows to be excessive may be reversed unless appellee files a remittitur for the excess. *Corr v. City of Omaha,* 122 Neb. 323, 240 N. W. 312, in which a remittitur was ordered of $3,000.

In *Nutter v. Standard Land Co.,* 100 Neb. 548, 160 N. W. 948, the jury rendered a verdict of over $16,806.79, and a remittitur was ordered of all above $6,600. In *Sternberger v. Sanitary District,* 100 Neb. 449, 160 N. W. 740, the jury returned a verdict of $1,585.15, and it was directed that all of the judgment above $500 should be remitted.

In *Wiles v. Department of Public Works,* 120 Neb. 689, 234 N. W. 918, a verdict returned in the amount of $9,000 was affirmed after a remittitur was filed in the amount of $3,000. In *McGinley v. Platte Valley Public Power and Irrigation District,* 133 Neb. 420, 275 N. W. 593, a verdict and judgment of $23,813.70 was by remittitur reduced to

$17,000 without the expense of another trial. See full discussion of the subject of remittitur and additur in 13 Neb. Law Bulletin, 416.

In the light of the actual facts, and these former decisions of our court, it is the opinion of the court that the sum of $1,200 would be sufficient to cover all the damages to this farm in running this power line directly down the east boundary fence of this farm, and not angling across the farm, as happens in many cases.

The court is not substituting its judgment for that of the jury, and is not depriving the plaintiffs of another jury trial. We are simply indicating that, if a verdict had been rendered in the sum of $1,200, it would probably have met the approval of this court. The plaintiffs have the alternative of a reversal, with another trial to a jury, together with the expense and time involved therein, or they may file the remittitur suggested, and have the judgment stand affirmed. The decision as to which course will be taken must be made by the plaintiffs, and not by this court.

If the plaintiffs will file a remittitur within 30 days, reducing this judgment to $1,200, the judgment of the lower court will be affirmed, as thus modified, otherwise the judgment will stand reversed and remanded for a new trial.

AFFIRMED ON CONDITION.

CARTER, J., dissenting.

The plaintiff is entitled to recover for the depreciation of the general market value of his land resulting from the construction of the transmission line. This damage may include any reasonable fears arising from the construction of the power line that would depreciate its general market value. But such fears should be limited to dangers known and reckoned with by purchasers and vendors of real estate generally. Without such a foundation the evidence is not properly admitted for the jury's consideration. To permit the owner to testify to his personal fears, largely speculative and conjectural, without showing that the dangers upon which they were based were of such general knowledge as to affect the market value of the land is, in my

opinion, clearly erroneous. Also, the calling of electrical engineers as witnesses who recite dangers never heard of by the purchasing public, and therefore not affecting the general market value of the land, is likewise improper. A noted text-writer states the rule as follows: "Damages alleged to flow from the taking of part of a tract are not allowed if they can have no effect upon present market value. * * * Damage to remaining land from unfounded fears is not recoverable." 2 Nichols, Eminent Domain (2d ed.) 736.

In *Illinois Power & Light Corporation v. Cooper*, 322 Ill. 11, 152 N. E. 491, the court in discussing the question before us said: "Electricity is an element of great potential danger, in the control and use of which great care is necessary, and it may be that persons having no actual knowledge of the practical operation and effect of such lines heavily charged with electricity may fear the dangers which they imagine exist because of the location of the line on the property in question. If this is so, and by reason of such fear the persons affected are not willing to buy the lands on which the line is constructed, the law cannot regard the depreciation created by such a cause as resting upon any substantial basis and cannot allow any compensation on account of any claimed depreciation which is due to mere fear founded in reality upon lack of knowledge and not justified by the facts." The majority opinion cites *Kentucky Hydro-Electric Co. v. Woodard*, 216 Ky. 618, 287 S. W. 985, in support of its opinion. This case adopts the rule applied in *Alabama Power Co. v. Keystone Lime Co.*, 191 Ala. 58, 67 So. 833, as follows: "While, therefore, it is the intent of the law that all the actual damages which may naturally and proximately result to the remainder of a man's tract of land by reason of the condemnation of a right of way for a public purpose across it shall be paid to him, the law will not permit mere speculative elements of damages, based upon an ill-defined fear that at some unknown and indefinite time in the future some misfortune may come to some man or beast by reason of such improvement, to enter into the

consideration of those who, under the law, are required to fix the amount of the damages." Also, in *Kentucky Hydro-Electric Co. v. Reister*, 216 Ky. 303, 287 S. W. 357, cited by the writer of the majority opinion, the court followed the *Woodard* case and added: "The evidence in this case was, to a large extent, the opinions of witnesses who gave but few facts upon which these opinions were based. Necessarily the extravagance and groundlessness of these opinions is reflected in the verdict." It is noteworthy that both of these cases upon which the court relies were reversed and remanded *for a new trial.* And in *Yagel v. Kansas Gas & Electric Co.*, 131 Kan. 267, 291 Pac. 768, the Kansas court in a very exhaustive discussion of the subject of fear as an element of damage in a condemnation for an electric power line said: "Where a right of way for the erection or maintenance of towers and wires for the transmission of electricity is condemned, the owner may recover compensation for the actual damages arising from depreciation in the value of his remaining land, caused by the presence of these things upon the right of way; but the possible fears of prospective purchasers from their presence upon the right of way cannot be made a basis on which to predicate such depreciation or affect the amount of the recovery."

I submit that this court ought to establish a fair and dispassionate rule as to the competency of evidence on the question of fear in this type of case. To permit any and all persons to testify without foundation to speculative, conjectural, groundless and mythical dangers tends to create an orgy of fear that proper instructions cannot cure and which inevitably results in unconscionable verdicts. The difficulty arises from an unrestrained and indiscriminate admission of prejudicial evidence rather than from any errors in the instructing of the jury. In my judgment, the case should be reversed and remanded for a new trial in which the evidence of fear should be limited to those reasonable fears that affect the general market value of farm lands.

Another error, as grievous as the first, is contained in the court's opinion. I refer to the requirement that a remittitur of $683 be filed in lieu of a retrial. It has long been the rule in this state that, where a verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted. *Bentley v. Hoagland,* 94 Neb. 442, 143 N. W. 465; *Stewart v. City of Lincoln,* 114 Neb. 362, 207 N. W. 511. I agree that, where the jury has made an error the extent of which the court can with some certainty ascertain, a remittitur is a proper remedy. *McKay, Munger & Wentz v. Hinman,* 13 Neb. 33, 13 N. W. 15; *Trester v. Pike,* 60 Neb. 510, 83 N. W. 676; *Ord Hardware Co. v. J. I. Case Threshing Machine Co.,* 83 Neb. 353, 119 N. W. 682; *Braun, Ray Bros. & Finley Co. v. Roberts Construction Co.,* 122 Neb. 182, 239 N. W. 924. But if there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be required. *Babbitt v. Union P. R. Co.,* 78 Neb. 410, 110 N. W. 1014. Under such circumstances a remittitur is nothing more than a substitution of the judgment of the court for that of the jury. The presumption is that an excessive verdict is the result of any prejudicial error that appears in the record. A remittitur therefore cannot properly be required in any case where the record discloses such error. Any other rule places the court in the position of appraising the amount of damage the error caused. A litigant gaining a verdict as a result of an appeal to passion and prejudice ought not to be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent. In almost every case similar to the one before us, the court has resorted to a remittitur to correct the errors occurring in the court below, even though there was no yardstick available by which the correctness of the remittitur could be measured. The perpetuation of an erroneous practice cannot supply the sound reason that should underlie its exercise. The usurpation of the functions of a jury by this court cannot be successfully condoned by a claim that it has acquired virtue

because the practice has become venerable with age and dignified by constant use.

The only justification offered in the majority opinion for imposing the requirement of a remittitur is that it has been done before on many occasions, which statement is supported by a list of cases and the amount of the remittitur allowed in each. It will be noted that the promiscuous use of the doctrine of remittitur by this court is of comparatively recent vintage. The court has gone astray only in very recent years. I might add that, while the listing of these cases may give the practice the force of numbers, it adds absolutely nothing to its legal soundness.

The writer of the majority opinion attempts to anticipate the argument that the court, by requiring a remittitur, is substituting its judgment for that of the jury by suggesting that the plaintiffs can choose between a remittitur and a retrial and that this obviates any requirement for another jury trial. The words of the majority opinion are the best evidence of the fallacy of this assertion: "The court is not substituting its judgment for that of the jury, and is not depriving the plaintiffs of another jury trial. We are simply indicating that, if a verdict had been rendered in the sum of $1,200, it would probably have met the approval of this court." It has always been my understanding that the defendant also was entitled to some consideration in the enforcement of constitutional rights. The defendant is not even placated with an option as a substitute for his constitutional right to a fair and impartial jury trial. The fact of the matter is that he is arbitrarily deprived of a jury trial and just as forcibly required to take something else in its place, and the substitute is a judgment against him, which, if rendered by the verdict of the jury, *"would probably have met the approval of this court."*

The majority opinion attempts to eliminate the question of passion and prejudice as the reason for the excessive verdict by saying: "So far as the amount of the verdict returned in this case by the jury is concerned, it cannot be set aside and disregarded as being arrived at through

passion and prejudice, for the verdict is well within the testimony returned by several of the witnesses." Later in the opinion the following is found: "The rule of this court has been that, on appeal in an action for damages, a judgment on a verdict which the clear preponderance of the evidence shows to be excessive may be reversed unless appellee files a remittitur for the excess." In the one statement the court in effect says there is no passion and prejudice because the evidence sustains the verdict, while in the other the court says the verdict is excessive by a clear preponderance of the evidence and imposes the requirement of a remittitur as a remedy for the jury's error. If an opinion be no stronger than its logic, I submit that this opinion can never be accepted as authoritative.

The verdict in the instant case was excessive because of passion and prejudice superinduced by the admission of incompetent evidence of conjectural fears and dangers not affecting the general market value of the land. Any excessive judgment, not the result of error, is in law the result of passion and prejudice. The remedy is the granting of a new trial and not the requirement of a remittitur. Passion and prejudice permeate the whole trial and vitiate the entire verdict. Obviously, passion and prejudice may be quite as effective in begetting a wholly wrong verdict as to produce an excessive one. For this court to say that $683 of the verdict was the result of the passion and prejudice of the jury and that the remaining $1,200 is free from any such vice constitutes, in my judgment, a trespass into the realms of the divine.

The following cases, in addition to the Nebraska cases cited, sustain my contention that a new trial is the only proper remedy in the instant case. *Rhyne v. Turley*, 37 Okla. 159, 131 Pac. 695; *Davis Iron Works Co. v. White*, 31 Colo. 82, 71 Pac. 384; *Cleveland Ry. Co. v. Mueller*, 31 Ohio App. 488, 166 N. E. 391; *Minneapolis, St. P. & S. S. M. R. Co. v. Moquin*, 283 U. S. 520, 51 S. Ct. 501, 75 L. Ed. 1243.

This court ought to impose upon itself the same discipline

with reference to the preservation of constitutional guaranties that it imposes upon other departments of government which the people have likewise been obliged to trust with power. Our very form of government requires that judicial decisions be based upon rules of law and not upon the whim or caprice of the judge. A failure to adhere to and maintain this principle can only result eventually in a form of judicial oppression.

SIMMONS, C. J., concurs in the dissent.

There does not appear to be a material dispute between the majority opinion and the dissent of Carter, J., on the rule as to the proper measure of damages in cases of this character. The dissent presents the question of the evidence properly admissible under the rule. I concur in the conclusion reached by Carter, J., in his dissent on that question, and likewise in his conclusion on the question of the remittitur ordered herein.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. WILLIAM J. THIELE, APPELLANT.
290 N. W. 471

FILED MARCH 1, 1940. No. 30654.

1. **Mortgages.** Section 1, ch. 41, Laws 1933, amending section 20-2141, Comp. St. 1929 (now Comp. St. Supp. 1937, sec. 20-2141), providing: "When a petition shall be filed for the satisfaction of a mortgage, the court shall have the power only to decree and compel the delivery of the possession of the premises to the purchaser thereof," *held* not to abolish actions at law on debts secured by real estate mortgages, and suit may be brought on a promissory note secured by a real estate mortgage at the election of the creditor.
2. ———. Sections 20-2142, 20-2144, and 20-2145, Comp. St. 1929, providing for the contingency of the creditor electing to sue on a note (debt), were left intact and not amended or repealed by the legislature of 1933, in passing chapter 41, Laws 1933, amending sections 20-2141, 20-2143, Comp. St. 1929.
3. **Statutes.** "Statutes should be so construed as to give effect to the intention of the legislature, and if a statute is plain and

unambiguous, there is no room for construction or interpretation." *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 935.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Wagner, Wagner & Albert, for appellant.

Walter, Flory & Schmid, Philip M. Wellman, William W. Graham and *Franklin L. Pierce, contra.*

Heard before SIMMONS, C. J., EBERLY, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

Plaintiff brought this action at law on a promissory note for $1,500, dated May 22, 1934, and secured by a real estate mortgage. The cause was tried to the court, judgment rendered in favor of plaintiff, and defendant appeals.

Defendant in his answer alleges that the note was secured by a real estate mortgage; that defendant owned the real estate at the time the note and mortgage were executed and delivered; that plaintiff is not entitled to sue on the note because such a proceeding is an indirect proceeding to satisfy the mortgage, and the plaintiff is limited in its relief to possession of the real estate. The second defense is that plaintiff had agreed with defendant to look solely to the real estate for the satisfaction of the debt.

Appellant contends the court erred in holding that the holder of a note secured by a real estate mortgage, executed after the deficiency law (Laws 1933, ch. 41) became effective, may maintain suit upon such note.

Section 1, ch. 41, Laws 1933 (Comp. St. Supp. 1937, sec. 20-2141) provides: "When a petition shall be filed for the satisfaction of a mortgage, the court shall have the power *only* to decree and compel the delivery of the possession of the premises to the purchaser thereof." (Italics ours.)

Appellant's contention is that the word "only" appearing in said section provides the only remedy for satisfaction of a mortgage in Nebraska, and the suit on the note, secured by a real estate mortgage, is a proceeding to satisfy that

mortgage; that this provision of the statute limits the mortgagee to the sale of the mortgaged property. In furtherance of this contention appellant states: "The law in force where a contract is made is as much a part of the contract as if it were expressed therein," citing *Watkins & Co. v. Kobiela*, 84 Neb. 422, 121 N. W. 448; 13 C. J. 560; 12 Am. Jur. 14, sec. 386; that, therefore, the contract is that the debt shall be satisfied by the sale of the real estate securing it, and that the only remedy is the right to sell the real estate and deliver possession.

The case of *Seieroe v. First Nat. Bank of Kearney*, 50 Neb. 612, 70 N. W. 220, is cited by appellant on the proposition of law that agreements to look to security alone are valid, which, for the purposes of this case, would mean that the law relating to deficiency judgments, in effect at the time of the signing of the note in question, secured by a real estate mortgage, governs and becomes a part of the contract between the mortgagee and the mortgagor, wherein, by such law, the mortgagee is to look to the land only for the payment of the debt. The cited case was an action on a promissory note secured by a real estate mortgage containing this clause: "But no general execution shall issue herein against the maker or indorser of said note, but the mortgagee, or his assigns, shall be entitled to immediate possession of the premises * * * and shall take the same in full satisfaction of said debt;" that is, upon failure of the mortgagor to comply with the conditions of the mortgage for nonpayment of interest or taxes; and the court held such clause "to exempt the makers and indorsers of the note from personal liability thereon, and to restrict the remedy of the holder of the mortgage security."

It will be readily ascertained that the clause quoted is a direct agreement between the parties, stating definitely in what manner they would be bound, and presents a clear distinction between the *Seieroe* case and the one at bar, for the reason that in the instant case there was no such agreement between the mortgagee and the mortgagor at the time of the execution and delivery of the note secured by the

real estate mortgage, and the construction of a statute was not involved.

The case of *Grand Island Savings & Loan Ass'n v. Moore,* 40 Neb. 686, 59 N. W. 115, is of no assistance to the appellant for the proposition of law claimed. In that case the mortgage contained a provision permitting the mortgagee to elect to collect the whole amount due on the happening of a contingency, and to authorize the mortgagee, on the happening thereof, to proceed not only to foreclose the mortgage, but to enforce personal liability on the note. This constituted an agreement between the mortgagee and the mortgagor and likewise did not involve the construction of a statute.

In the case of *Kennedy v. Hungerford,* 110 Neb. 22, 192 N. W. 959, at the time the note and mortgage were executed the payee agreed with the maker that he should not be liable personally on the note until the remedy provided by the mortgage against the land had been exhausted. It was therein held that, "as between the original parties such an agreement, if adequately proved, would abate the action upon the note until the condition of the agreement had been fulfilled." The court in the opinion stated: "Of course, in the absence of such an agreement there is no obligation upon the part of the mortgagee to foreclose the mortgage before beginning an action at law upon the note which it is given to secure." Citing *Grable v. Beatty,* 56 Neb. 642, 77 N. W. 49, and *Meehan v. First Nat. Bank of Fairfield,* 44 Neb. 213, 62 N. W. 490.

This court has held that a creditor whose debt is secured by a real estate mortgage may, at his election, sue at law or foreclose the mortgage. In *Grable v. Beatty, supra,* it was held:

"The holder of a note, which is secured by a mortgage, may maintain an action at law on the note, where neither note nor mortgage contains stipulations making the mortgaged property primarily liable for the debt.

"In the absence of an agreement by a mortgagee to look primarily to his security for satisfaction of the debt, a fore-

closure of the mortgage is not a condition precedent to an action at law on the secured claim."

See, also, *Federal Farm Mtg. Corporation v. Hughes, ante,* p. 454, 289 N. W. 866; *Federal Farm Mtg. Corporation v. Cramb, ante,* p. 553, 290 N. W. 440. The distinction is therefore clear. In the instant case, it is true, chapter 41, Laws 1933, the deficiency judgment law, was in effect when the note was executed. However, there was no agreement by which the mortgagor and the mortgagee declared that the latter would look only to the real estate for the satisfaction of the loan, and, as will be explained later in this opinion, the legislature, by the passage of chapter 41, Laws 1933, did not deprive the mortgagee of the right to proceed at law on the note. To determine this question we now construe the following sections of the statute referring to foreclosure of real estate mortgages.

Section 20-2139, Comp. St. 1929, provides for the filing of a petition for foreclosure and satisfaction of a mortgage in the district court. Section 20-2140, Comp. St. 1929, provides that, when a petition for the foreclosure and satisfaction of a mortgage is filed, "the court shall have power to decree a sale of the mortgaged premises, or such part thereof as may be sufficient to discharge the amount due on the mortgage, and the cost of suit." Section 20-2142, Comp. St. 1929, provides: "After such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court." This provision of the statute shows that a proceeding at law on the note, for which the real estate mortgage is collateral security, is referred to and clearly indicates that such action at law cannot be brought if a petition has been filed for the foreclosure of the mortgage except and unless authorized by the court. Section 20-2144, Comp. St. 1929, provides: "Upon filing a petition for the foreclosure or satisfaction of a mortgage, the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt

secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected and paid."

Particular attention is called to the language quoted above, "the complainant shall state therein (in the petition for foreclosure of the mortgage) whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof," which clearly indicates that an action at law on the note may be had, and if such law action has been started, or any proceedings relative thereto, the petition foreclosing the mortgage must so state. The legislature could have meant only one thing by this provision of the statute, viz., that a proceeding may be had at law on the promissory note,—the direct promise to pay the debt.

Section 20-2145, Comp. St. 1929, provides: "If it appear that any judgment has been obtained in a suit at law for the money demanded by such petition, or any part thereof, no proceedings shall be had in such case, unless, to an execution against the property of the defendant in such judgment, the sheriff or other proper officer shall have returned that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution except the mortgaged premises." The foregoing provision is self-explanatory.

The language contained in chapter 41, Laws 1933, is plain, clear and unambiguous. The legislature amended section 20-2141, Comp. St. 1929, by deleting therefrom so much of the section as empowered district courts to decree deficiency judgments in mortgage foreclosures after confirmation of sale. The act eliminated one of two remedies for collection of any deficiency remaining after foreclosure of the mortgage debt. Section 20-2142, Comp. St. 1929, was not repealed or amended by chapter 41, Laws 1933, and was left intact.

Sections 20-2142, 20-2144, and 20-2145, Comp. St. 1929, providing for the contingency of the creditor electing to sue on the note (debt) were left intact. There is no conflict, in the face of its plain language, between chapter 41, Laws

1933, and other provisions of the law with regard to actions at law before, during or subsequent to foreclosure under authority of the court. Abolishment of actions at law on debts secured by mortgages is not included in chapter 41, Laws 1933. If the legislature contemplated abolishment of such actions, it could have amended the statutory provisions thereof, instead of leaving them intact.

In *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 935, it was held: "Statutes should be so construed as to give effect to the intention of the legislature, and if a statute is plain and unambiguous, there is no room for construction or interpretation."

We hold that a suit on a note, secured by a real estate mortgage, is a suit at law, independent, separate and distinct from a suit in equity to foreclose and satisfy a mortgage; that the legislature in amending section 20-2141, Comp. St. 1929, did not interfere with the right to bring an action at law on a promissory note secured by a real estate mortgage, as shown by the circumstances in this case.

AFFIRMED.

FRANK BLANK, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

290 N. W. 464

FILED MARCH 1, 1940. No. 30724.

Appeal. Where the record fails to disclose evidence of plaintiff's contributory negligence, it is reversible error to submit the issue of contributory negligence to the jury.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed.*

Gordon Diesing, for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

Plaintiff, a guest in an automobile, owned and driven by Peter Redwelski, brought this action to recover damages for personal injuries sustained by him as the result of an automobile accident when the car in which he was riding collided with a repair truck belonging to the defendant. The cause was submitted to a jury, resulting in a verdict for the defendant. Plaintiff appeals.

The pleadings of the respective parties are sufficient to join the issues on the negligence pleaded therein and will not be here set out. The record discloses the following:

About 8 o'clock in the evening of February 26, 1938, the plaintiff was riding as an invited guest, seated at the right of the driver, Peter Redwelski, in his 1934 Chevrolet sedan, proceeding south on Twenty-fourth street in the city of Omaha. The street was dry, the night dark, cold and cloudy. The car proceeded past Twenty-fourth street and Poppleton avenue, toward Woolworth avenue, there being a gradual slope to the south. The car was six feet distant from the west curb of Twenty-fourth street on the right side of the south-bound street car tracks. When it approached the intersection of Twenty-fourth street and Woolworth avenue, having traversed about three-fourths of a block, at 20 miles an hour, its headlights set for city driving, throwing light for a distance of 50 feet ahead, plaintiff observed the truck approaching them. The headlights on the truck were not burning, and when the Chevrolet's lights disclosed the truck, plaintiff immediately exclaimed: "Look out, Pete, there is a car." At that moment the truck lights were switched on, blinding plaintiff. There was no torch burning in the telephone pole immediately in front of the Gurley house, which will be referred to later in the opinion, and there were no flares or wicks burning in the vicinity to warn of danger. There was north-bound traffic on Twenty-fourth street just before the accident. On cross-examination, the plaintiff testified that he had known Redwelski for six or seven years, had been in the car on two or three occasions within a month or so; did not see a street light

burning at Twenty-fourth and Woolworth avenue, and did not notice a street light on the east side of Twenty-fourth, approximately 100 or 150 feet from the intersection; nor did he notice lights in the filling station, located at the southeast corner of the intersection. Redwelski corroborated the testimony of plaintiff in detail. He stated that he was driving at a speed of 25 miles an hour.

Sebastian Sortino testified that on the evening in question he was driving south on Twenty-fourth street at a speed of 20 to 25 miles an hour, and when approaching the intersection of Twenty-fourth and Woolworth avenue, driving five or six feet from the west curb, his lights disclosed at a distance of 50 feet in front of him the street car truck, which was between the south-bound tracks and the west curb and standing stationary; he swerved his car to the right, barely missing a pedestrian; then turned the corner and parked on the north side of Woolworth; walked north on Twenty-fourth street, noticed the repair truck 15 to 20 feet from the corner north of Woolworth, between the west curb of Twenty-fourth street and the south-bound tracks. He was bound for the Gurley home, which was about 40 to 45 feet north of the intersection of Twenty-fourth and Woolworth. While he was standing on the third step of the Gurley home, he saw, 30 or 35 feet away, the Chevrolet car traveling south, about six feet from the west curb. The truck kept moving slowly toward the north, with no headlights burning. The Chevrolet suddenly swerved toward the curb; the lights of the truck flashed on, and the two cars collided. After the accident, the rear wheels of the Chevrolet were up against the curb, the car facing southeast. The truck was about five feet from the front of the Chevrolet north; the front bumper of the sedan was headed right into the left door of the truck. The witness testified that he saw no flares on the telephone pole, the only pole between the place of the accident and the corner. On cross-examination he testified that when he first observed the truck it was straddling the west rail of the south-bound tracks at a distance of about 15 feet from the north curb line of Woolworth avenue, standing stationary.

Frances Lenczowski testified that she was walking down Twenty-fourth street on the west side thereof, going south, and when about 100 feet north of Twenty-fourth and Woolworth she saw the truck "in the middle of the south-bound car line and the curb," between the west curb and the south-bound tracks; the truck, without headlights burning, was moving slowly north toward her; she saw the Redwelski car proceeding south; saw it swerve to the right; saw the truck flash on its lights. She testified that after the accident the "rear end of the car was facing this telephone pole touching the curb almost;" the front of the Chevrolet "was facing at an angle southeast;" the accident happened about 30 to 35 feet from the intersection of Woolworth and Twenty-fourth. On cross-examination the witness stated that the lights in the filling station were burning; that there was no street light at the intersection.

J. W. Gurley testified that he was looking out of a south window in his home, which faces east on Twenty-fourth street and is 35 or 40 feet north of the intersection of Twenty-fourth and Woolworth; he noticed the flash from the trolley wire that made connection with the rail in the intersection, near the southwest corner, on which corner are located a grocery store and a street light. The street light was not burning. He could see from the lights in the filling station the men working on the trolley wire; "saw some one out with a stick or something that looked as if they were trying to rake the trolley wire away from the rail;" the repair truck was straddling the west rail of the south-bound track; he watched at the window for a moment or so; then left the window, subsequently heard a crash, went to the door and met Sortino. After calling for an ambulance, he went out into the street, saw a Chevrolet automobile standing in the street, headed toward the southeast; the rear wheels of the car were near the west curb of Twenty-fourth street, directly in front of his home; the truck was five or six feet north of the left side of the Chevrolet; there were no flares burning and no torch burning on the telephone pole.

The testimony of defendant's witnesses follows: There was no "outrage of lights" or replacement thereof in the vicinity of Twenty-fourth and Woolworth on the night in question. The street lights were 400-candle power. The repair truck was a ton and a half truck, painted yellow, with a tower on it, averaging about 12 feet in height and, when raised, 20 feet. When the truck arrived to repair the wires, a flare, producing a red flame, was placed in the telephone pole in front of the Gurley home about seven feet distant from the ground. A holder on each side of the lights on the truck contained a red flag which could be seen by the lights. The lights on the truck were burning at all times, as were the street lights in the vicinity of Twenty-fourth and Woolworth and the lights in the filling station. The trolley wire to be repaired was broken about 10 feet north of the south turn of Woolworth avenue and was down for a distance of 90 to 100 feet, and required replacement from the first north span. One of the workmen for the defendant stood 12 to 15 feet in front of the truck in the center of the south-bound tracks. Witnesses for the defendant testified that at the time of the accident they could see the Chevrolet car coming from the north for a distance of 100 to 150 feet, straddling the west rail of the south-bound tracks; that it did not slacken its speed or change its course, and when 10 or 12 feet from the workman in front of the truck his son, standing on the sidewalk, called for him to look out, and he stepped back; the Chevrolet barely missed him and proceeded directly into the truck, which was standing on the rails of the south-bound track, headed north, with the platform of the tower right beneath the trolley wires, and the brakes on the truck set. The truck driver testified he did not flash on his lights at any time; that the cab of the truck was opposite the pole on the west side of the street; that automobiles passed between the truck and the west curb while it was standing there. The distance that the truck was knocked back north at the time of the impact varied from 15 to 20 feet, according to defendant's witnesses. The Chevrolet swung around toward the west and south, about

even with the telephone pole, stopping with the rear wheels on the curb line. The repair truck stopped with its wheels to the north. The left end of the front axle of the truck was badly bent; the wheel would not turn, and the left front wheel was cramped under the frame; the chassis was bent, and the steering wheel would not operate. To clear the street for traffic, it was necessary to drag the truck. It was not moved until the police arrived and took measurements, and it was then taken away by defendant's wrecker. The light on the southwest corner of Twenty-fourth street and Woolworth avenue was burning, as well as the lights in the grocery store and in the filling station.

The measurements of distances, as shown by exhibit 42, made to scale of one inch to 10 feet, disclose the distance from curb to curb on Twenty-fourth street, running north and south, to be 39 feet, 3 inches, with double car tracks running through the center of the street, leaving a distance, from the east rail of the north-bound track to the curb, of 12 feet, 8 inches, and, from the west rail of the south-bound track to the curb, 12 feet, 11 inches, on the west side. A trifle over 48 feet north of the intersection in question is the pole directly in front of the steps of the Gurley home, where the flare was presumably placed, and this location was also the scene of the accident. On the southwest corner of the intersection is the grocery store and in front of it an overhead street light. There is also a light on Twenty-fourth street north 144 feet distant from the filling station. The proximate distance from the grocery store to the scene of the accident would not exceed 80 feet. Estimates of the proximate distance between the filling station and the scene of the accident vary from 90 to 100 feet.

By measurement, a person standing inside of the Gurley home, looking south to a place in the center of the south-bound tracks, would be looking from a distance of 82½ feet to discern an object. Gurley testified that he discerned at that distance, from the lights in the filling station, a man with a stick lifting a wire. The witness Woodward, employed by the police department, arrived at the scene of

the accident about five minutes thereafter, made some notes and prepared a drawing, or map, received in evidence. He testified that the distance from the right front fender of the Redwelski car, as it faced slightly to the southeast, to the left front fender of the truck was 22 feet, 2 inches; that the left rear wheel of the truck was 12 feet, 2 inches, from the west curb, and that about half of the Redwelski car was on the west sidewalk. To recall the testimony of Redwelski, he did see the truck within a distance of 50 feet, applied his brakes, then released them, and attempted to turn to the right to avoid the accident. He further stated that he could stop his car within a radius of 35 to 40 feet, going at a speed of 20 to 25 miles an hour.

The left fender of the Redwelski car collided with the left front fender of the truck. The jury had the benefit of the testimony showing that men were working on the truck tower with appliances, repairing the trolley wires, at the time of the accident, and whether or not, if the position of the truck was such as testified to by plaintiff's witnesses, the men could have accomplished the work.

Plaintiff contends that the court erred in instructing the jury on the contributory negligence of the plaintiff, when, in fact, the evidence was insufficient to show the plaintiff guilty of any negligence. In instruction No. 5 the court properly instructed: "The negligence of the driver of the car in which the plaintiff was riding is not imputed to the plaintiff." The court then, in the same instruction, instructed with reference to the driver's negligence being the proximate and sole cause of the accident without any negligence on the part of the defendant, and in instruction No. 9 gave the comparative negligence rule, as applied to the plaintiff and the driver of the defendant's truck; likewise, instruction No. 12, wherein the jury were told that, if they found plaintiff to have been negligent but not to the extent to defeat recovery, then they would be privileged to reduce the amount of recovery in the proportion which plaintiff's negligence bears to the total negligence of plaintiff and defendant.

We have extensively reviewed the facts as disclosed by the record and fail to find any evidence that would warrant the submission to the jury of the issue of contributory negligence on the part of this plaintiff, and we are not privileged to determine upon what theory the jury found for the defendant; that is, whether it was the contributory negligence of the guest or the negligence of the driver of the car that was the direct and proximate cause of the injuries sustained by the guest. If the jury were permitted to pass upon the question of the contributory negligence of the guest, under the circumstances of this case, and predicate their verdict on such instructions, then the instructions were prejudicial to the substantial rights of the plaintiff. This court has, on repeated occasions, announced that where the evidence fails to show contributory negligence on the part of a plaintiff the issue should not be submitted to the jury. This principle of law is so well established that citation of authorities is deemed unnecessary.

Other assignments of error need not be discussed.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HENRY HAWK, APPELLANT, V. JOSEPH O'GRADY, WARDEN, APPELLEE.

290 N. W. 911

FILED MARCH 8, 1940. No. 30708.

1. **Habeas Corpus.** "On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered." *In re Fanton*, 55 Neb. 703, 76 N. W. 447.
2. ———. To obtain a release by habeas corpus, the judgment or sentence must be an absolute nullity.
3. ———. The sentence in the instant case, imposing punishment by confinement in the state penitentiary, is regular and in strict accord with the statutes.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Henry Hawk, pro se.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

Henry Hawk, this record discloses, presented his petition for a writ of habeas corpus to the district court for Lancaster county. On the basis that the petition was wholly insufficient to constitute a cause of action, the prayer of the same was denied. Hawk appeals.

From the record before us, it appears that Henry Hawk was convicted in the district court for Douglas county, Nebraska, of "First Degree Murder while attempting to rob," and on March 19, 1936, it was considered, ordered and adjudged by that court "that the defendant, Henry Hawk * * * be returned to the Federal Penitentiary at Leavenworth, Kansas, and at the expiration of the sentence he is now serving therein, he be by the warden of the said Federal Penitentiary delivered into the custody of the sheriff of Douglas county, Nebraska, *and be taken by said sheriff to the Nebraska State Penitentiary at Lincoln, Nebraska, and that said defendant be there imprisoned at hard labor during the term of his natural life.*" (Italics ours.)

At the time of his trial and sentence in the district court for Douglas county, Hawk was under sentence imposed by the federal court. The order made by the state court was no more than a mere recognition of that fact, consistent with comity which prevails between these jurisdictions. The valid sentence imposed by the district court for Douglas county we have indicated by italics above. It is under these provisions, so italicized, that the petitioner is detained in custody. Even if the provisions of the order and sentence relative to delivery of custody of the prisoner to the federal

officers and the return of the custody of the prisoner to the sheriff of Douglas county on completion of his federal sentence were to be deemed in excess of the powers of the district court for Douglas county, still under existing circumstances Hawk would be entitled to no relief.

We are committed to the rule that, "On an application for a writ of habeas corpus, errors or irregularities in the criminal trial, not jurisdictional, will not be considered." *In re Fanton*, 55 Neb. 703, 76 N. W. 447.

And, to obtain release by habeas corpus, the judgment or sentence must be an absolute nullity. *Hulbert v. Fenton*, 115 Neb. 818, 215 N. W. 104.

So far as the sentence in this case imposing punishment by confinement in the state penitentiary is concerned, it is regular and in strict accord with the statutes.

It follows that the denial of the writ of habeas corpus by the district court for Lancaster county, because of the manifest insufficiency of the application for the same, was, in all respects, proper, and is approved.

AFFIRMED.

FRED V. THOMPSON, APPELLANT, V. JOSEPH O'GRADY, WARDEN, APPELLEE.
290 N. W. 716

FILED MARCH 8, 1940. No. 30714.

1. **Indictment and Information.** By statute the county attorney of Douglas county is authorized to appoint deputies to assist him in the discharge of his duties, and a deputy so appointed and qualified may sign a criminal information.
2. ———. When the right of a person to sign an information as deputy county attorney is questioned for the first time after arraignment and plea of guilty, which plea has not been withdrawn, his appointment, qualification and right to sign, in the absence of showing to the contrary, will be presumed.
3. **Criminal Law.** "A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement." 16 C. J. 403.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Fred V. Thompson, pro se.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

Fred V. Thompson, the petitioner in a habeas corpus application, appeals from the final order of the district court for Lancaster county denying him the relief prayed for.

In his petition for a writ of habeas corpus, filed in the district court for Lancaster county on February 25, 1939, relator alleges that, in the district court for Douglas county, Nebraska, he was charged with a robbery committed on January 25, 1935, and when arraigned in that court he pleaded "guilty;" that by that court, on March 30, 1935, a judgment was made and sentence imposed against him, that he be taken to the state penitentiary and there imprisoned for a period of 20 years from and after that date. Relator, in effect, alleges that the information upon which he was convicted and sentenced was a "nullity," and wholly void, "in that it was not made, signed, verified, nor filed by a person authorized by law so to do." It may be said that the "charge" or "body" of this instrument is not challenged or questioned. The information thus attacked is in the form following, viz.:

"The State of Nebraska, Plaintiff, —vs— Tony Yankish and Fred V. Thompson, Defendants.	38-440.	Information: Robbery

"Now comes the County Attorney on behalf of the State of Nebraska and presents to the Court an information against the above named defendants, which is hereby ordered of record. Said information reads and is as follows, to-wit: * * *

"The State of Nebraska } ss
County of Douglas }

"Of the February term of the District Court of the Fourth Judicial District of the State of Nebraska, within and for the County of Douglas and State of Nebraska, in the year of our Lord one thousand nine hundred thirty-five, I, Paul J. Garrotto, Chief Deputy County Attorney, in and for the County of Douglas in said State of Nebraska, who prosecutes for and in behalf of said State, in the District Court of said District, sitting in and for said County of Douglas, and duly empowered by law to inform of offenses committed in said County of Douglas, come now here in the name and by authority of the State of Nebraska, and give the Court to understand and be informed, that on or about the 25th day of January in the year of Our Lord one thousand nine hundred thirty-five, Tony Yankish and Fred V. Thompson, late of the County of Douglas aforesaid, in the County of Douglas and State of Nebraska aforesaid, then and there being, then and there in and upon one Leo Herdzina, unlawfully, feloniously, forcibly and by violence did make an assault, and him, the said Leo Herdzina, in bodily fear then and there feloniously did put, and then and there from the person of him, the said Leo Herdzina, and against his will, unlawfully, feloniously, forcibly, by violence and by putting him in fear, did steal, take and carry away Two Hundred Ten Dollars in good and lawful money of the United States of America of the value of $210.00, the personal property of Metropolitan Utilities District, a public corporation, and which was then and there in the care, custody and control of said Leo Herdzina as Manager of said corporation, with the intent of them, the said Tony Yankish and Fred V. Thompson, in so doing, unlawfully, forcibly and with violence to steal, take and carry said property away: contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Nebraska.

"Paul J. Garrotto, Chief Deputy County Attorney.

"The State of Nebraska } ss
County of Douglas }

"I, Paul J. Garrotto, being first duly sworn, on oath depose and say that I know the contents of the foregoing information; that I have read the same, and the facts set forth in said information are true to the best of my knowledge and belief.

"Paul J. Garrotto

"Subscribed in my presence and sworn to before me this 7th day of March, A. D., 1935.

"Frank McGrath,
"Clerk of the District Court
"(Seal) By Maxwell F. McCollough,
"Deputy."

As applied to the foregoing instrument, relator's contentions are fully answered by the doctrines of this court announced in *Holland v. State*, 100 Neb. 444, 160 N. W. 893, viz.:

"1. 'It is too late to object to the verification of an information after the accused has been arraigned, and pleaded not guilty, unless such plea has been withdrawn.' *Johnson v. State*, 53 Neb. 103.

"2. Section 5599, Rev. St. 1913, authorizes a county attorney to appoint deputies to assist him in the discharge of his duties, and a deputy so appointed and qualified may sign a criminal information.

"3. When the right of a person to sign an information as deputy county attorney is questioned for the first time after arraignment and plea, and while a plea of not guilty is still pending, his appointment, qualification and right to sign, in the absence of a showing to the contrary, will be presumed."

See, also, 31 C. J. 635.

Then too, "The general rule is that where an objection is not made at the time prescribed by law, the ground of objection is waived. The rule that objections not made in the lower court will not be considered when made for the

first time on appeal is applicable to objections to defects in an indictment or information, and ordinarily the right to make such objections is waived if they are not made until the cause has been submitted to the jury." 12 Standard Ency. of Procedure, 661.

It is also a well-established principle of criminal procedure that, "A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement." 16 C. J. 403.

See, also, *Johnson v. State,* 53 Neb. 103, 73 N. W. 463; *Emery v. State,* 78 Neb. 547, 111 N. W. 374; *Matters v. State,* 120 Neb. 404, 232 N. W. 781; *Buthman v. State,* 131 Neb. 385, 268 N. W. 99.

It follows, therefore, that objections to the information in the instant case, and to the sentence based thereon, because it was "made, signed, verified and filed" by "Paul J. Garrotto, Chief Deputy County Attorney" in and for the county of Douglas, state of Nebraska, at the time when first made and disclosed, came too late and were wholly unavailing. Delay operated as a waiver. In addition, the deputy county attorney was vested with ample authority to perform the questioned act.

The judgment of the district court, therefore, is in all respects correct, and is

AFFIRMED.

EARL ALEXANDER, APPELLANT, V. JOSEPH O'GRADY, WARDEN, APPELLEE.

290 N. W. 718

FILED MARCH 8, 1940. No. 30743.

1. **Habeas Corpus.** "It is a general rule that habeas corpus will not lie to discharge from custody one serving a penal sentence, if the court imposing such sentence had jurisdiction of the offense and of the person of the defendant, and the sentence was within the power of the court to impose." *In re Carbino,* 117 Neb. 107, 219 N. W. 846.

2. **Criminal Law.** "The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him." 16 C. J. 821.
3. ———. "A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by section 11, article I of the Constitution." *McCarty v. Hopkins*, 61 Neb. 550, 85 N. W. 540.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed.*

Earl Alexander, pro se.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This is an appeal by Earl Alexander from the denial of a writ of habeas corpus by the district court for Lancaster county, Nebraska; that court having determined that his petition for the same "fails to state a cause of action in favor of relator." A certified copy of the judgment and sentence imposed upon appellant by the district court for Thurston county, Nebraska, is attached to the relator's application and forms a part thereof. Omitting the formal parts, the substance thereof is as follows, viz.:

"Now, on this 29th day of May, A. D. 1936, this cause came on for hearing upon the information filed herein by the County Attorney, the State appearing by Robert G. Fuhrman, County Attorney, and the defendant, Earl Alexander, appearing in person but without attorney.

"Thereupon the information herein was read to the defendant and he was asked how he plead thereto to which he replied 'Guilty.'

"The court thereupon read to the defendant section 29-2217, Compiled Statutes of Nebraska for 1929, and asked the defendant whether, after hearing and knowing what

penalty could be inflicted upon him under his plea of guilty, he still desired to plead guilty. To this interrogation by the court the defendant answered in the affirmative.

"Thereupon the court asked the defendant if he had anything to say why judgment and sentence of the court should not be pronounced upon him, to which he replied in the affirmative. The defendant thereupon addressed the court, asking that he be given a further chance. The court then asked for and received the remarks of the County Attorney.

"The court thereupon passed judgment and sentence as follows:

"It is the judgment and sentence of the court that the defendant, Earl Alexander, be confined in the penitentiary of the State of Nebraska at hard labor, Sundays excepted as to hard labor, no part of which shall be in solitary confinement, for a period of seventeen years (17), and pay the costs of prosecution herein.

"And it is, further, ordered, that the defendant be and he is hereby, committed to the custody of the Sheriff of Thurston County, Nebraska, who will convey him to the penitentiary of the State of Nebraska for service of the sentence pronounced herein. Costs $96.33.

"By the Court: Mark J. Ryan, District Judge."

Relator predicates his right to relief on two grounds: (1) That "the judgment fails to disclose an offense or to specify the offense of which the defendant was convicted," and (2) that defendant was "deprived of his liberty without the assistance of counsel for his defense."

"Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant." *Hulbert v. Fenton*, 115 Neb. 818, 215 N. W. 104.

The judgment or sentence in a criminal case is thus supported by the usual presumptions of validity when thus attacked.

To obtain release from a sentence by habeas corpus, it must be absolutely void. *Hulbert v. Fenton, supra*; *Michael-*

son v. Beemer, 72 Neb. 761, 101 N. W. 1007; *In re Carbino*, 117 Neb. 107, 219 N. W. 846.

In view of the collateral nature of the proceeding, facts, as distinguished from mere legal conclusions, must be alleged by the relator to negative the legal force and effect of the judicial record he has pleaded, including the presumptions of validity and regularity which the terms thereof invoke. There is no requirement of statute that the terms of the information be incorporated in the journal entry covering the imposition of penalties inflicted thereunder. Then too, the validity of a judgment record must be determined by due consideration of all proper entries and parts thereof construed together. In the instant case, the relator's petition establishes the existence of an information, presented and filed by the county attorney, which charged the relator with a crime; that relator pleaded guilty to the charges therein contained, and upon such plea of guilty was sentenced by the district court, which sentence has not been appealed from. But relator has wholly failed to allege the terms or legal effect of the information on which the judgment he seeks to collaterally attack was based. Obviously the presumption of regularity and validity, which supports judicial proceedings when collaterally attacked, supplies what relator's omission in his pleadings have produced. Under these circumstances, in the absence of averment to the contrary, we must assume that the information properly charged the offense to which relator pleaded guilty and upon which the district court for Thurston county rightfully imposed the sentence sought to be invalidated by this proceeding. 34 C. J. 517.

"It is a general rule that habeas corpus will not lie to discharge from custody one serving a penal sentence, if the court imposing such sentence had jurisdiction of the offense and of the person of the defendant, and the sentence was within the power of the court to impose." *In re Carbino*, 117 Neb. 107, 219 N. W. 846.

As to the failure of the trial court to provide relator with the services of an attorney, the rule appears to be, viz.:

"The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him." 16 C. J. 821.

So, also, this court is committed to the view that, "A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by section 11, article I of the Constitution." *McCarty v. Hopkins*, 61 Neb. 550, 85 N. W. 540.

It follows that the action of the district court for Lancaster county in its denial of the issuance of the writ of habeas corpus was, under the circumstances set forth in this record, correct, and it is

AFFIRMED.

FRANK DUNHAM, APPELLANT, V. JOSEPH O'GRADY, WARDEN, APPELLEE.

290 N. W. 723

FILED MARCH 8, 1940. No. 30778.

1. **Criminal Law.** Section 20-1310, Comp. St. 1929, is a provision of our Civil Code applicable to civil proceedings only, and wholly inapplicable to criminal prosecutions.
2. **Habeas Corpus.** Section 29-2814, Comp. St. 1929, is, by its terms, limited in application to cases where the imprisoned party is in custody by virtue of any warrant or commitment of a magistrate of this state having jurisdiction of criminal matters, and has no application whatever to cases where persons are imprisoned in the state penitentiary under sentence imposed by courts of record.
3. ———. The instant case is ruled by section 83-935, Comp. St. 1929, which provides: "When any convict is delivered to the warden the officer having such prisoner in charge shall deliver to the warden a certified copy of the sentence received by such officer from the clerk of the court where such convict was tried, and shall take from the warden a certificate of the delivery of such convict, and such certified copy of the sentence shall be evidence of the facts therein contained."

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Frank Dunham, pro se.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

Frank Dunham, relator, appeals from the final order entered in the district court for Lancaster county on May 9, 1939, upon his application for a writ of habeas corpus, wherein that court determined that "the relator is not unlawfully imprisoned or detained by the respondent," and denied the relief sought. Relator appeals. The correctness of the determination made is challenged on the grounds that the judgment of conviction or sentence fails to specify the offense of which the relator was convicted, or to designate when the sentence is to take effect.

Omitting formal parts, the judgment of conviction here involved is as follows:

"March 11, 1938. Defendant, Frank Dunham, was duly arraigned and entered a plea of 'Guilty.' Defendant was thereupon examined and made a full disclosure. Defendant was thereupon *ask* if he had anything to say further why sentence should not be pronounced upon him and had none.

"It is therefore considered and adjudged that defendant be confined in the Nebraska State Penitentiary at Lancaster in Lancaster county, Nebraska, at hard labor, Sundays and Holidays excepted, for a period of five (5) years, solitary confinement to be no part of this sentence. Costs taxed to defendant. E. G. Kroger, District Judge."

In support of his contentions, relator cites sections 20-1310, 29-2814 and 29-2202, Comp. St. 1929. It may be said that section 20-1310 is a provision of our Civil Code applicable to civil proceedings only, and wholly inapplicable to criminal prosecutions. Section 29-2814, as a part of the statute relating to habeas corpus, was originally enacted as a part of "An Act to Establish a Criminal Code," passed

March 4, 1873, and effective September 1, 1873. It constituted section 366 of that enactment, and by its terms its application is limited to cases where the imprisoned party is in custody, "by virtue of any warrant or commitment of any magistrate of this state having jurisdiction of such criminal matters." Section 248 of this act so passed defines "magistrate" as follows: "The term 'magistrate' in this code, when not otherwise expressly stated, is used to mean a justice of the peace, probate judge, mayor of a city, or incorporated village, or police judge." We have here presented a judgment and sentence of the district court for Hall county imposing a sentence of imprisonment in the state penitentiary for the term of five years. Section 314 of this act of 1873 limits jurisdiction of magistrates to misdemeanors "in which the fine cannot exceed one hundred dollars and the imprisonment cannot exceed three months." It is obvious, therefore, that section 29-2814, Comp. St. 1929, is wholly without application to the controversy here presented. It is ruled by section 83-935, Comp. St. 1929 (originally enacted as section 33 of chapter 75, Laws 1897), which provides: "When any convict is delivered to the warden the officer having such prisoner in charge shall deliver to the warden a certified copy of the sentence received by such officer from the clerk of the court where such convict was tried, and shall take from the warden a certificate of the delivery of such convict, and such certified copy of the sentence shall be evidence of the facts therein contained."

The certified copy of the judgment of a court of record thus constitutes the authority of the warden to retain the petitioner in the instant case. There are no specific statutory requirements as to what shall be included in the recitals of this certified copy of judgment or sentence. When it includes a statement of the nature of the imprisonment imposed and the duration thereof, it fulfills all purposes contemplated by this statute. It comes to us, as pleaded by relator in the instant case, by statute expressly made "evidence of the facts therein contained," and surrounded

by the presumption of its validity and regularity, which the allegations of relator's pleading and the issuable facts by him alleged in no manner challenge. Under these circumstances, the action of the trial court in the denial of the writ of habeas corpus was correct.

We do not overlook the claim of relator that the statutory provisions with reference to conduct of criminal trials embraced in section 29-2202, Comp. St. 1929, providing, "If the defendant have nothing to say, or if he show no good and sufficient cause why judgment should not be pronounced, the court shall proceed to pronounce judgment as provided by law," were not complied with, and that thereby and because thereof the criminal procedure followed by the trial court was wholly invalidated and the sentence imposed thereafter was likewise invalidated and nullified. It will be remembered that we are not determining these questions in a direct proceeding, but they arise only as a result of a collateral attack. It is clear that, considered as here presented, these claimed errors in no manner affect the jurisdiction of the trial court over the defendant or over the crime charged, and, therefore, the sentence imposed by the court is invulnerable to the attack as thus made. The error, if error there was, may only be redressed by a direct proceeding instituted for that purpose in a court of competent jurisdiction.

It follows that the judgment of the district court for Lancaster county is correct, and it is

AFFIRMED.

PHILIP F. ABBOUD, ADMINISTRATOR C. T. A., APPELLEE, V. LEWIS J. BOOCK, APPELLANT.
290 N. W. 713

FILED MARCH 8, 1940. No. 30784.

1. **Homestead.** The wife cannot dispose of the life estate of her husband in the homestead by her will, in absence of waiver on his part.

2. ———. The right of the surviving husband to a life estate in the homestead property in which they have lived is fixed by statute, and any disposal thereof must be in strict compliance with the applicable section of our statute.
3. ———. A surviving husband is not estopped from asserting his life estate in the homestead property by reason of having entered into a joint will with his wife in which his homestead right was not mentioned, nor because he qualified as executor of her will.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Reed, Ramacciotti, Robinson & Hruska and *Henry R. Marshall,* for appellant.

Anson H. Bigelow and *Walter H. Justin, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is a proceeding to secure a license to sell real estate belonging to a deceased wife, in order to pay legacies given in the joint will of the husband and wife. The husband objected to granting the license on that portion in which he claimed a homestead right. The court held that the husband disposed of the right of homestead by executing the joint will, and granted the license. Motion for new trial being overruled, husband appeals.

The administrator of the estate of Anna Louise Boock made application for license to sell real estate to pay costs of administration and specific legacies, there being insufficient personal property to pay the same. The surviving husband objects to the granting of the license on the ground that the property sought to be sold was at the death of the testatrix their homestead, and by reason thereof he has a life estate therein not subject to sale. A guardian *ad litem* of the minor heirs of the deceased wife also filed objections that it would not be advantageous to sell the property at forced sale. The trial court overruled all objections, and granted a license to the administrator to sell the real estate

at private sale within 90 days from the date of the decree, to be sold upon terms approved by the court, or at public sale, in the manner provided by law, for $500 cash, and balance on confirmation, with the right to sell in separate parcels if deemed advisable by the administrator. The trial court held that the widower had disposed of his right of homestead by entering into a joint will with his wife, and that all of the real estate belonged to the deceased at her death.

The petition of the administrator set out that the taxes and costs of administration would amount to the sum of $500; that all of the personal property has been reduced to cash except some fractional interests in a possible cause of action in Cook county, Illinois, of no present value.

The petitioner further shows that the joint will of Anna Louise Boock, deceased, and her husband, Lewis J. Boock, left bequests of $1,000 to Joseph W. Corbett and $100 apiece to each of six grandchildren, making a total of $1,600 in legacies, which by the express terms of the will are made a charge against said real estate, and left the remainder of her estate to her surviving husband; that the husband was appointed executor under the will, and charged jointly with the petitioner in the administration of said estate, but the husband refused to join in an application to the court for license to sell, and thereupon Philip F. Abboud, administrator C. T. A. (*cum testamento annexo*), applied to the county court for Douglas county for authority to file his petition separately for said license, and, being duly authorized, prays for a license to sell real estate from the district court.

The guardian *ad litem* of the grandchildren filed an answer, setting forth that the costs of the administration would exceed $800, the legacies, $1,600, and that the most that can be realized from a forced sale of the real estate is $1,250, and therefore prays that license be not granted.

Lewis J. Boock, widower of Anna Louise Boock, filed answer, showing that his wife died June 26, 1937; that they were married February 11, 1915, and resided together con-

tinuously until her death, and that no children were born of said marriage. The widower further alleges that the property was purchased by the husband and wife in 1922, with the proceeds of their separate estates, although the fee title was placed in the name of the wife; that upon the death of the wife the homestead character of the property continued in the husband, and he acquired a life estate therein, and that he has continued to occupy the premises since her death, and has not by any act on his part relinquished or abandoned his homestead therein, and he therefore prays that no license be granted.

The reply of the administrator alleges that lots 1, 2, 3, and 4, in block 3, of Cottage Home View addition to Omaha, were purchased, and that they resided upon lots 3 and 4 thereof, which thereupon became their homestead, and denies each and every other allegation, and that lots 1 and 2 are not subject to the claim of homestead. He further alleges that on February 20, 1934, the husband and wife jointly executed their last wills and testaments, and delivered the same to a third person for the benefit of the survivor, and for the benefit of Joseph W. Corbett, son of the deceased, and her grandchildren; that said joint will remained unrevoked until the death of Anna Louise Boock, when it was admitted to probate as her last will and testament on July 27, 1937.

It is claimed in the brief of the administrator that the husband's act in agreeing to, and in joining in, a joint will would seem sufficient to be charged as his election to take under the will, and bar his homestead rights, especially as the Nebraska statutes do not bar disposing of the homestead life estate by will.

The answer to this argument is furnished by an examination of the two sections of our statute relating to this question. Section 40-104, Comp. St. 1929, reads: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife."

Section 40-117, Comp. St. 1929, reads: "If the homestead

was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will."

"A homestead right is created by statute; not devised by a will. Undoubtedly the testatrix so understood when her will was executed. Hence, there is little, if anything, in the provisions of said will which could in any way throw light upon the intention of the parties when they made the prenuptial contract. Whatever the facts may be in that regard, the will does not constitute such material and sufficient evidence as to change the result of the trial." *Mill Owners Mutual Fire Ins. Co. v. Petley,* 210 Ia. 1085, 229 N. W. 736.

Another case from Iowa, involving an antenuptial contract, throws light on the question involved in the case at bar. Especially is this true because the homestead rights of the husband were not mentioned in the instant case.

"What effect upon this controversy is to be given to the antenuptial contract? It does not in terms make any mention of homestead or homestead rights, nor do we think it should be held that the relinquishment of such right was intended or was in the contemplation of the parties in making the contract. The homestead right is a favorite of the law, and its surrender or waiver will not be presumed, nor will such intent be inferred from the use of words of a general and indefinite signification." *Plistil v. Kaspar,* 168 Ia. 333, 150 N. W. 584.

Several opinions of this court assist us in the disposition of the case. "The law is settled that, where a husband and wife reside upon a homestead and the wife dies, the homestead character of the land continues and the surviving husband, although he may have no children or dependents residing with him, may still retain the homestead as such." *Dougherty v. White,* 112 Neb. 675, 200 N. W. 884. See, also, *Bartels v. Seefus,* 132 Neb. 841, 273 N. W. 485.

"The homestead statutes are designed to protect a person in his home, and that the nature of his title thereto is of secondary importance to his right of shelter therein." 89 A. L. R. 540, Ann.

"A widow need not account to the estate of her husband for the rents and profits of their homestead which have accrued subsequent to his death." *In re Estate of Fletcher,* 83 Neb. 156, 119 N. W. 232. See, also, *Laughlin v. Gardiner,* 104 Neb. 237, 176 N. W. 727; *Lewis v. McAdams,* 129 Neb. 490, 262 N. W. 7; *In re Estate of Robertson,* 86 Neb. 490, 125 N. W. 1093.

"Under the provisions of section 17, chapter 36, Compiled Statutes 1903, a homestead which was the separate property of the wife, at her death, vests in her surviving husband for life, and the wife has no power to limit or dispose of the life estate of the survivor by will." *Brichacek v. Brichacek,* 75 Neb. 417, 106 N. W. 473.

"Frederick Teske and wife for a valuable consideration orally agreed with Carl Teske that he should at their death have certain lands, in a part of which they had at the time a homestead estate. In an action by Carl against Frederick it was decreed that the agreement was void as to the homestead estate and valid as to the remainder of the land." *Teske v. Dittberner,* 83 Neb. 701, 120 N. W. 198.

From the exhaustive article on "Homesteads," by Dean Foster, found in 3 Neb. Law Bulletin, 389, we cite two paragraphs:

"Section 45—Rights of Possession on Death of Homestead Owner. Since a life estate in the homestead vests in the surviving spouse on the death of the owner, it follows that such spouse is entitled to possession of the homestead premises as against every one. Even though debts exist which are enforceable against the homestead, the administrator of the deceased owner's estate or the creditors must proceed to their collection not by taking possession of the property but by a judicial sale. An administrator, taking possession of the homestead, is subject to an action of ejectment and an accounting for rents and profits received. The surviving

spouse may lease the homestead and is liable to no one for an accounting of the rents and profits received subsequent to the death of the homestead owner."

"Section 46—Restraint on Testamentary Disposition. If a homestead owner were left entirely free to devise the homestead, by his mere whim or caprice, he could render of little avail the precautions that the legislature took to prevent the disruption of his home, upon his death. Hence, his power to devise is expressly restrained. Every devise he makes is subject to the life estate of the spouse, in the event of the spouse's survival. Even if the surviving spouse accepts the executorship under a will which devises the homestead to the children, the devise to the children is subject to the life estate of the surviving spouse. The assent of the spouse cannot supply the lack of power of the testator, nor can the spouse be concluded as to homestead rights on any theory of election, for no choice is here possible."

From these authorities and others which amply support us, we reach the following conclusions:

(1) That the wife cannot dispose of the life estate of her husband in the homestead by her will, in absence of waiver on his part;

(2) That the right of the surviving husband to a life estate in the homestead property in which they have lived is fixed by statute, and any disposal thereof must be in strict compliance with the applicable section of our statute;

(3) A surviving husband is not estopped from asserting his life estate in the homestead property by reason of having entered into a joint will with his wife in which his homestead right was not mentioned, nor because he qualified as executor of her will.

We therefore find that the trial court erred in granting license to sell the real estate in which the surviving husband had a life estate.

REVERSED.

FREMONT JOINT STOCK LAND BANK, APPELLEE, V. MARIE H. MORSE, APPELLEE: ELIZABETH KANE, APPELLANT.
290 N. W. 907

FILED MARCH 8, 1940. No. 30767.

Mortgages. Rentals paid in by order of the district court under the provisions of the moratory law (Comp. St. Supp. 1937, sec. 20-21,159) are required to be distributed as provided by the act. There being no taxes, interest, insurance, cost of maintenance and upkeep of the real estate to be paid, the court may properly direct the fund derived from such rentals to be applied on the portion of the mortgage debt remaining unpaid after crediting the proceeds of the sale of the mortgaged real estate.

APPEAL from the district court for Cuming county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

A. R. Oleson, for appellant.

Zacek & Nicholson, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is an appeal from an order of the district court for Cuming county applying rents collected by the clerk of the district court under the provisions of the 1937 moratory law (Comp. St. Supp. 1937, sec. 20-21,159) to the payment of the portion of the decree of foreclosure remaining unpaid after crediting the proceeds received from the sale of the security.

The act in question provides in part that "The court shall make an order or orders for possession of such real estate, determine fair rental terms to be paid by the party or parties to be in possession and the application and distribution of the rents, income and profits from such real estate, and make such provision for the preservation of such property as will be just and equitable during the continuance of said cause, which order or orders shall provide that such rents, income or profits shall be paid to and distributed by the clerk of the district court of the county in which such suit

is pending, in accordance with the order of the court entered therein, without compensation to the clerk; and further provided, that, in such distribution, expenses of the conservator to be approved by the court, taxes, interest, insurance, cost of maintenance and upkeep of such real estate and interest shall be paid in the priority named and any balance distributed as the court may direct." It is clear that rents, income and profits are to be paid in for the benefit of the owner of the decree of foreclosure, to be applied as directed by the statute. It is stipulated that the amount remaining due, after crediting the proceeds derived from the sale of the security, exceeds the amount of rents, income and profits in the hands of the clerk of the district court for distribution. The order granting the moratory stay and fixing the rentals to be paid in by the parties in possession is not in the record. The distribution of such rents, income and profits is in accordance with the provisions of the statute. The appellant, having invoked the provisions of the moratory law, is now in no position to dispute the validity of its express provisions.

There is no error affirmatively appearing in the record. The judgment of the district court is therefore

AFFIRMED.

EULA MORRIS, APPELLANT, V. WALTER MORRIS, APPELLEE.
290 N. W. 720

FILED MARCH 8, 1940. No. 30729.

1. **Divorce.** Evidence that the former wife in a divorce proceeding has since become employed, and that the defendant-husband has again married and is unable to carry his financial load, does not afford a sufficient basis for modification of the allowance made for wife and child support, at a subsequent term, where the extent of the former wife's earnings is not shown. Comp. St. Supp. 1939, sec. 42-324.
2. ———. To avoid possible injustice in such a situation, the court may, in its discretion, remand the cause to the district court to permit evidence of the former wife's earnings to be

received and a decree to be entered conforming to the sound equities of the situation as they then appear to exist.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Reversed.*

Dent & Deakins, for appellant.

Hoagland, Carr & Hoagland, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

The question presented is whether the trial court was justified in reducing the alimony and child support allowance in the divorce decree in this case from $60 to $30 per month.

Plaintiff was granted a divorce from defendant and the custody of their nine-year-old child on June 24, 1938. The decree provided that defendant should pay plaintiff the sum of $60 per month for the support of herself and child, except that, if his income fell below $160 per month, it was to be reduced to 40 per cent. of his earnings, but in no event was it to be less than $35 per month, unless plaintiff remarried, when it should be reduced one-half. On January 21, 1939, after having paid only $130 under the decree, defendant filed this application for modification, to reduce the payments to $25 per month. The trial court, after a hearing, entered an order changing the amount of the payments to $30 per month. Plaintiff has appealed.

The application for modification was made under section 42-324, Comp. St. Supp. 1939, which provides: "After a decree for alimony or other allowance for the wife and children, or either of them, * * * the court, from time to time, on the petition of either of the parties and hearing thereon, may revise and alter such decree respecting the amount of such alimony or allowance, or the payment thereof. * * * And the court may make any decree respecting any of the matters which such court might have made in the original suit."

It has been held that an application under this section cannot be used simply to review the equities of the original decree. *McIlwain v. McIlwain,* 135 Neb. 705, 283 N. W. 845. Where it is made at a subsequent term, it must be founded, we have said, upon facts or circumstances which have arisen since the decree. *Graham v. Graham,* 135 Neb. 761, 284 N. W. 280. Except where new, controlling conditions have subsequently arisen, the matter is treated as *res judicata. Chambers v. Chambers,* 75 Neb. 850, 106 N. W. 993. These principles govern not alone an allowance for the support of the wife, but have been recognized as being applicable to an allowance for child support as well. *Wassung v. Wassung,* 136 Neb. 440, 286 N. W. 340.

To the writer it has always seemed that, where no fixed property settlement or gross sum alimony award was involved, the doctrine of *res judicata* should not have been applied and ought not to have been permitted to calcify the apparent purpose and language of section 42-324, Comp. St. Supp. 1939, and section 42-312, Comp. St. 1929. But the present situation is, of course, governed by the rules which the court has laid down and not by the writer's individual views. Testing the facts by these rules, it appears that the only changes which have occurred in the condition of the parties subsequent to the decree are that defendant has married again and that plaintiff has left the jurisdiction, with the child, and is now employed.

The fact that defendant has married again is not of itself sufficient to justify a modification of the decree. *McIlwain v. McIlwain, supra.* It is a circumstance that may be considered, however, in weighing the equities of the situation, where other facts are present sufficient to warrant the court, in its sound discretion, to modify the decree.

The subsequent employment of plaintiff is a circumstance that may justify a modification of the decree, as a matter of judicial discretion, if there are appealing equities in defendant's situation. The evidence here demonstrates rather clearly that defendant cannot reasonably carry his present family load and pay plaintiff $60 per month. He is a rail-

road brakeman, with average net earnings of $120 per month after payment of his necessary road expenses. His earnings are substantially the same as at the time of the decree. An income of $160 per month is implied in the decree, but this figure is a bit inflated and fails also to take into account his necessary road expense. He was without legal counsel in the divorce proceeding, and as a matter of emotionalism, blindness, or gesture offered to pay plaintiff $60 per month. This probably is the root of his present problem, for the court accepted his ostensible magnanimity and made no judicial inquiry into his financial situation. His willingness to pay $60 per month was expressed in the form of a written agreement incorporated into the decree, but it is not contended here that there is anything in this situation that would prevent a consideration by the court of the present application, so we are not called upon to deal with that question.

Defendant's declaration of willingness to pay was more ostentatious than his record of performance, for, as previously indicated, he had paid only $130 on the decree at the time the present application was made. Immediately following the divorce, he became involved in a legal morass of debts accumulated from the marriage, which threatened to disrupt his employment and forced him to go to the expense of bankruptcy. Plaintiff also felt it necessary to prod him with citations and with summons in garnishment against his employer.

Without detailing further facts, it is quite obvious from the record that defendant cannot reasonably carry his present financial load and pay an allowance of $60 per month. To jeopardize his employment and seniority rights further is not the answer to the difficulty, from the standpoint of either plaintiff or defendant. Our first solicitude must, of course, be for the reasonable needs of plaintiff and her child, but defendant's duty to the second wife cannot be wholly ignored, if there is any way it can fairly be taken into account. *McIlwain v. McIlwain, supra.* The fact that plaintiff is now employed is a circumstance that permits the situa-

tion of the parties to be reexamined and some adjustment to be made in the equities between them. The difficulty confronts us in this case, however, that the record contains no evidence as to the extent of plaintiff's earnings. This information seemingly was not readily available to defendant, possibly because plaintiff was not present personally at the hearing. The trial court might have required it to have been disclosed by plaintiff's counsel. Perhaps defendant did not exercise the necessary diligence to obtain it. Without it, however, we are not able to say whether the modification made by the trial court was fair or proper.

In the ordinary judicial proceeding we would be justified, perhaps, in reversing the decree and dismissing the application, but we will not blind ourselves to the possible injustice which may result in the present situation, and will remand the cause to allow evidence to be received on the extent of plaintiff's earnings, and leave the way open for a decree to be entered based upon such evidence and the equities which shall then appear to exist. Under the circumstances, we have no way of judging, and we express no opinion upon the propriety of the extent of the reduction made by the trial court on the previous hearing. Under the rule announced in *Wassung v. Wassung, supra,* no reduction can be made in the amount of the payments accrued up to the time of the filing of the application for modification, although the manner of collecting such accrued payments may, if necessary, be regulated or controlled.

REVERSED.

FRANK MILLSLAGLE V. STATE OF NEBRASKA.
290 N. W. 725

FILED MARCH 8, 1940. No. 30761.

1. **Indictment and Information.** One who aids in the commission of a crime may be charged in simple and direct terms as if he were the principal offender, but a statement of the manner of his participation in the crime, while unnecessary, does not make the information bad.

2. **Criminal Law.** The fact that an accomplice has been guilty of wilful false swearing on a material matter is a circumstance that may possibly, in a particular instance and situation, make his testimony unworthy of belief on its face, if it lacks corroboration.
3. ———. In the ordinary case, even though the accomplice may have been guilty of a conscious falsehood on a material matter, and even though his testimony is lacking in corroboration, it may not be utterly unworthy of belief on its face, and, in such a situation, the rights of an accused will be adequately protected if the jury are instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has wilfully sworn falsely in regard to a material matter they should be hesitant to convict upon his testimony, without corroboration, and that in no case should they convict unless they are satisfied from the evidence, beyond a reasonable doubt, of the guilt of the accused.
4. **Opinion Modified.** *Jahnke v. State,* 68 Neb. 181, 104 N. W. 154, modified to conform to the rules expressed in the second and third syllabus points hereof.
5. **Criminal Law.** If the proceedings are otherwise free from error, a conviction based upon the uncorroborated testimony of an accomplice will only be set aside on appeal, where such testimony on its face produces an irresistible conviction of pervading taint or of inherent moral weakness which revolts our natural credulity.
6. ———. The conviction in this case is set aside for the improper admission, on rebuttal, of immaterial and incompetent testimony carrying a direct implication of defendant's guilt.

ERROR to the district court for Dawes county: EARL L. MEYER, JUDGE. *Reversed.*

Greydon L. Nichols, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Rush C. Clarke, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ., and KROGER and ELLIS, District Judges.

JOHNSEN, J.

Frank Millslagle, referred to herein as the defendant, brings error from a conviction for cattle stealing.

His first contention is that the information is defective, in charging him as an accessory instead of as a principal.

Section 28-201, Comp. St. 1929, provides that, "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." He argues that, in view of this provision, the information fails to charge a crime in alleging that he aided and abetted another to commit the theft.

It is unnecessary for us to pass upon this contention, for defendant has failed to read the complete information. It charges that, on October 11, 1938, in Dawes county, Nebraska, he did "wilfully, unlawfully and feloniously aid and abet another, to wit, one Roy Shumway, to commit an offense, to wit, the theft of certain cattle, and did then and there and thereby steal, take and drive away certain cattle, to wit, nine head of mixed heifers, the personal property of one Gerhart Aschwege * * * the owner thereof, and against his will." Paring this verbiage, it is simply a charge that defendant, at a specified time and place, feloniously aided Roy Shumway to steal nine head of cattle belonging to Gerhart Aschwege, and so was guilty of the crime of cattle stealing under section 28-515, Comp. St. 1929. It would have been sufficient to have charged defendant, in so many words, with stealing the cattle, without undertaking to set out the manner of his participation in the crime, but the addition of this explanation to the charge that he "did then and there and thereby steal" the cattle in question did not make the information bad. *Scharman v. State*, 115 Neb. 109, 211 N. W. 613.

The next contention is that the evidence is insufficient to sustain a conviction because it depends, defendant says, solely upon the uncorroborated testimony of Roy Shumway, an accomplice, who is claimed to have wilfully sworn falsely on a material matter. While the record is not entirely clear, we gather that a complaint was filed against defendant shortly after the crime, and that defendant was discharged on preliminary hearing, when Shumway testified that he alone committed the theft. Thereafter another complaint was filed against defendant, and Shumway then testified, both on the preliminary hearing and on the trial

in the district court, that defendant and he stole the cattle together and that it was defendant who had suggested the theft. Shumway explained the contradiction in his testimony with the statement that he had originally tried to shield defendant, because defendant's wife was his sister.

It is argued that the situation is controlled by *Jahnke v. State,* 68 Neb. 181, 104 N. W. 154, where it was said: "The evidence of an accomplice should be closely scrutinized. If it appears that such witness has wilfully sworn falsely in regard to a material matter upon the trial, his evidence cannot be sufficient, if uncorroborated, to support a verdict of guilty." The *Jahnke* case is cited and quoted in the recent case of *Ruzicka v. State, ante, p.* 473, 289 N. W. 852, where we held that a conviction may rest on the uncorroborated evidence of an accomplice, when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused, but that such evidence, if uncorroborated, is insufficient to support a verdict of guilty where it appears that the accomplice has wilfully sworn falsely in regard to material matters or otherwise shown that his evidence is unreliable.

A reading of these cases will show that in both of them the court regarded the testimony of the accomplice as demonstrating on its face that it was unworthy of belief. In the *Jahnke* case, the accomplice told one story under oath before a coroner's jury; testified to another on the witness-stand in district court; executed a subsequent affidavit repudiating his testimony on the trial; and signed, finally, an affidavit retracting his repudiation. Manifestly, a court would hesitate to approve a conviction hanging on such an unstable thread. In the *Ruzicka* case, the opinion says: "The credulity of this court is such that we cannot accept the statement of Dorothy Le Grand (the accomplice) * * * as true." Here again the court would have been failing in its duty, if it had said: "In spite of the odorous falseness of the testimony, on which the conviction rests, the responsibility is not ours, but the jury's." While it is not the court's privilege to pass upon the credibility of witnesses

or the guilt of an accused as such, it cannot consciously close its eyes to an inescapable conviction that the waters of judicial administration have been utterly polluted, nor knowingly permit its processes to move in such a channel.

The fact that an accomplice has been guilty of wilful false swearing on a material matter is a circumstance that may possibly, in a particular instance and situation, make his testimony unworthy of belief on its face, if it lacks corroboration. If such testimony appears on its face to be baldly perjurious or preposterous, and there is no independent evidence upon which a conviction can rest, the trial court should not hesitate to direct a verdict of acquittal. It is not every case, however, that requires this degree of protection. In the ordinary case, even though the accomplice may have been guilty of a conscious falsehood on a material matter, and even though his testimony is lacking in corroboration, it may not be utterly unworthy of belief on its face, and in such a situation the rights of an accused will be adequately protected if the jury are instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has wilfully sworn falsely in regard to a material matter they should be hesitant to convict upon his testimony, without corroboration, and that in no case should they convict unless they are satisfied from the evidence, beyond a reasonable doubt, of the guilt of the accused. On an appeal to this court, we will scrutinize the evidence also and will not hesitate to set aside a conviction based upon the uncorroborated testimony of an accomplice, where on its face it produces an irresistible conviction of pervading taint or of inherent moral weakness which revolts our natural credulity.

To the extent that *Jahnke v. State, supra,* appears to declare that a conviction resting upon the uncorroborated evidence of an accomplice, who has been guilty of a conscious falsehood on a material matter, will in every case be set aside as a matter of law, it is modified to conform to the views herein expressed. Similarly, nothing in *Ruzicka v. State, supra,* is to be construed as in conflict herewith.

Without detailing the evidence in the present case, it is sufficient to say that it is not such as would justify us in setting aside the conviction, under the foregoing rules. It may be added that the trial court in this case gave instructions that are in harmony with the principles just discussed.

We deem it necessary to consider only one further assignment of error, based on certain testimony offered by the state in rebuttal. Defendant's wife was permitted to be asked on cross-examination: "Did Roy (Shumway, the accomplice) at that time, while you were being questioned by Mr. Davis (special agent of the Nebraska Stock Growers Association) recall or attempt to recall to your memory the fact that you were at the door when your husband left on the night of October 11th and that you cried?" To which she answered, "No." On rebuttal, Davis, over proper objection, was allowed to testify as follows: "Did Roy Shumway make any statement to his sister Mrs. Millslagle concerning the evening of October, or the evening or night of October 11, 1938, in your presence at this time?" "Yes." "And what did Roy Shumway say to Mrs. Millslagle?" "Mrs. Millslagle and Bus (Roy Shumway) were talking and Bus said, 'You remember the night I got out to your place and you came to the door and you tried to get Frank and I not to get the cattle' and she wouldn't reply to it. She didn't make any statement in regard to that." The county attorney then repeated: "You have stated that Roy Shumway called her attention to the fact that on that evening she tried to get them not to go after the cattle and she refused to admit that, is that true?"

This testimony did not impeach Mrs. Millslagle on any material point, and, in the form in which it was offered, it was clearly incompetent. It might have been material to have shown by direct proof that on the night of the theft Mrs. Millslagle sought to induce defendant and Shumway not to steal the cattle, if that were the fact, but it was not material whether Shumway had said to her, at a subsequent time and in the absence of the defendant, "You remember the night I got out to your place and you came to the door

and you tried to get Frank and I not to get the cattle." The state accordingly had no right to question her about Shumway's statement. *Johnston v. Spencer,* 51 Neb. 198, 70 N. W. 982; *Carter v. State,* 36 Neb. 481, 54 N. W. 853. When it made the inquiry, it was bound by her answer and could not attempt to impeach it. *Swogger v. State,* 116 Neb. 563, 218 N. W. 416.

We recognize that the attempted impeachment of a witness on an immaterial matter will not ordinarily, perhaps, constitute prejudicial or reversible error. Comp. St. 1929, sec. 20-853. But in a criminal case, where immaterial and incompetent evidence is admitted which carries a direct implication of guilt on the part of the accused, it may obviously be prejudicial. Here, the indirect proof that Mrs. Millslagle sought to prevent defendant and Shumway from stealing the cattle may easily, in the conflicting state of the record, have helped to induce a conviction. Coming as it did, near the end of the trial, it was somewhat climactic, and it was only intensified when, at the close of all the evidence, the court had it read again in the presence of the jury and attempted to strike it from the record.

Defendant's right to a fair trial ought not thus to be sideswiped. The permanence of judicial administration depends as much upon the fairness of the processes by which a result is achieved as upon the justness of the result itself. No result is just which is achieved by unfair processes.

For the error stated, the judgment will be reversed and the cause remanded for a new trial. The other assignments of error do not necessitate further discussion.

REVERSED.

ELIZABETH BURLAGE, APPELLANT V. LEFEBURE CORPORATION ET AL., APPELLEES.
291 N. W. 100

FILED MARCH 15, 1940. No. 30701.

Workmen's Compensation. Under the workmen's compensation law of Nebraska, an injury is not compensable, where employee on his own initiative leaves his line of duty under his employment for purposes of his own and pursues those purposes to his injury and death.

APPEAL from the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Affirmed.*

G. E. Price and *Archie C. O'Brien,* for appellant.

Dressler & Neely and *H. J. Lutz, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, sec. 48-101. Elizabeth Burlage, dependent widow of the employee, Walter W. Burlage, is plaintiff. The defendants are the employer, Lefebure Corporation, of Cedar Rapids, Iowa, and the latter's insurance carrier, Iowa Mutual Liability Insurance Company. The employee was a traveling salesman of general office supplies under the contract with the employer, hereinafter called "Corporation," and was required to furnish his own automobile in the performance of his duties and to operate it at his own expense. His average compensation in commissions exceeded $22.50 a week.

While traveling toward Omaha on highway 30, about 6:30 p. m., August 21, 1937, the automobile driven by employee collided with a truck at Johnson's corner, about seven miles southeast of Fremont, and he was fatally injured, dying the same evening.

Plaintiff alleged in her petition that the accident arose "out of and in the course of" her husband's employment

and other facts necessary to recovery of compensation under the workmen's compensation law. Comp. St. 1929, sec. 48-101.

Defendants admitted the accident, resulting injury and death; denied other allegations of the petition; pleaded affirmatively, among other defenses, that the employee was on a mission of his own at the time of the accident, and that it did not arise "out of and in the course of" his employment by the corporation, compensation, therefore, not being recoverable. Comp. St. Supp. 1939, sec. 48-152.

The cause was first heard before a judge of the compensation court who disallowed compensation on the ground that the injury was not compensable because the employee, on his own initiative, had left his line of duties in the course of his employment and was pursuing purposes of his own at the time of the accident, within the meaning of the compensation law. Comp. St. Supp. 1939, sec. 48-152. On a hearing before the three judges of the compensation court, the same conclusion was reached. On appeal to the district court the decision was the same. Plaintiff appealed to the supreme court.

Counsel for plaintiff take the position that the only legal question involved is whether the accident resulting in the death of employee arose out of and in the course of his employment by the corporation and they confidently assert he was then "at work connected with and incidental to his employment as traveling salesman," within the meaning of the workmen's compensation law liberally construed. These propositions were argued at length from the standpoint of plaintiff, with references to the evidence and precedents.

Liberal construction of the workmen's compensation law to give effect to its purpose is a rule too well settled to admit of controversy, but the statute cannot be liberalized by judicial interpretation to allow noncompensable claims. By a long line of decisions the law on the burden of proof has been held to be as follows:

"Burden of proof rests upon plaintiff, in cases arising under workmen's compensation law, to prove with reason-

able certainty that the employee met with an injury or death in an accident arising out of and in the course of his employment." *Porter v. Brinn-Jensen Co.*, 131 Neb. 611, 269 N. W. 96, and cases cited in opinion. Comp. St. 1929, sec. 48-101.

The statutory clause, "Personal injuries arising out of and in the course of employment," has been declared by the legislature "not to cover workmen who on their own initiative leave their line of duty or hours of employment for purposes of their own." Comp. St. Supp. 1939, sec. 48-152.

In support of the allegation that the accident and resulting injury and death arose out of and in the course of the employment, plaintiff testified in substance that she and her husband had been residing at Grand Island and that the territory assigned to him by his employer had been canvassed from his headquarters there; that his territory had been previously changed from time to time, requiring a corresponding change of residence; that in a conference between employee and Leo Lefebure, an officer of the corporation, at which plaintiff was present, it was agreed there should be a reassignment of territory with headquarters at Omaha and that employee should move to that city; that the general manager of the corporation had so directed by letter; that her husband informed her by letter from Omaha Saturday, August 14, 1937, that he would be in and out of Omaha all week making lists of customers and opening up territory; that he called her by telephone Thursday, August 19, 1937, and directed her to come to Omaha on a night train Saturday, saying they could look for an apartment Sunday; that before she left Grand Island, the manager of the Koehler Hotel, where she and her husband resided, informed her that her husband had been killed; that she went to the scene of the accident and there saw the supplies and equipment used by him in his salesmanship, which were always in his car when on duty in his territory. Minute details of the testimony outlined appear in the record. The evidence shows conclusively that employee was traveling on the highway toward Omaha in his own car, driven by him-

self, on a trip from Columbus, when the fatal accident occurred.

An officer of the corporation admitted on the witness-stand that a new assignment of territory and a change of residence and of headquarters to Omaha had been subjects of conversation and correspondence, but denied that an agreement to that effect had been concluded, owing to the refusal of employee to abandon Ord and other parts of his Grand Island district. The existing contract had not been changed in writing, but there was testimony tending to prove that a former oral understanding as to new territory had been reduced to writing at a later date.

In support of the defense that employee on his own initiative left his line of duty under his employment for purposes of his own and was pursuing those purposes at the time of the accident, the corporation adduced evidence of the following facts: It was the duty of employee to make weekly route sheets on Sunday or Monday advising the corporation where he could be contacted. Sunday, August 15, 1937, he reported a route sheet stating he would be working in and around Omaha until Thursday night when he would start for Ord. His register of places and dates indicated: Friday, Ord, care of Ord Quiz; Saturday, Greeley and Madison; Sunday, Norfolk, care of Norfolk Hotel. Thursday, August 19, 1937, he sent the following telegram from Omaha to E. D. Greedy, General Manager of the corporation:

"Letter regarding territory received today. Answering tonight. Desirous of leaving here tomorrow morning for Columbus and Ord. Due to unusual expenses explained in my letter finances are low. Please send my check today to reach me care Castle Hotel, Omaha, Friday morning. Large order at Ord."

As requested, a check for $40 was sent to employee at Omaha. The evidence shows that he was in Columbus about noon Saturday, August 21, 1937, and at that hour called upon a young woman named Maryann Theewen, a friend, at her room in the Meridian Hotel. He had known her for

about three years. She had a sister in Omaha and they arranged for a trip together in his car to Omaha in the afternoon with the understanding that they would return to Columbus Monday morning and bring the sister with them. This friend of employee was called to the witness-stand by plaintiff and her testimony tends to prove the following facts: She and employee had lunch together Saturday afternoon, August 21, 1937, at the Oxford Café, Columbus, talked and smoked there for perhaps an hour. She had one bottle of beer. Then they started for Omaha, but stopped at the Night and Day Café, Columbus, where he telephoned to a customer in Ord, saying he was sorry he would be unable to be there Saturday, but would see him Monday. They again started for Omaha and drove to Schuyler, but stopped at the Gateway Café, where beer was sold; went on to North Bend, where employee drank a glass of beer. At Fremont they both drank beer.

The evidence shows further that employee, at Fremont, in a café, offered to bet that his car would be wrecked on the way to Omaha. They arrived at Johnson's corner, where employee's car collided with a truck about 6:30 the same afternoon. They had been approximately four hours on their way from Columbus to Fremont, a distance of 50 miles. There is no evidence that he transacted any business for his employer on the trip or that he used the supplies or equipment in his car for any purpose during the afternoon. He did not report any orders to the corporation during the week he had spent in Omaha. He had not been directed by his employer to turn back for Omaha on his way to Ord. The only proper finding on the controlling question presented by plaintiff herself is that employee, on his own initiative, left his line of duty under his employment for purposes of his own and pursued those purposes to his injury and death. The injury of plaintiff, therefore, was not compensable under the workmen's compensation law and the compensation court and the district court did not err in so finding.

AFFIRMED.

SARAH BATTH, INTERVENER, APPELLEE, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.
290 N. W. 902

FILED MARCH 15, 1940. No. 30699.

1. **Appeal.** "When a law action is tried to the court, findings of fact have the same effect as findings of a jury and will not be set aside unless clearly wrong." *Linch v. Berggren*, 135 Neb. 530, 282 N. W. 528.
2. **Death.** "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." *Holdrege v. Livingston*, 79 Neb. 238, 112 N. W. 341.
3. **Appeal.** The trial being had to the district court without the intervention of a jury, the trial court is presumed to have rejected and disregarded all incompetent and improper proof, and the only question presented by the record is whether its findings and judgment are predicated upon sufficient and pertinent evidence.
4. **Evidence** examined, and *held* ample to support the findings and judgment of the trial court.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Harley G. Moorhead and *Emmet S. Brumbaugh*, for appellant.

Abrahams, McGrath & Frenzer and *Monsky, Grodinsky, Marer & Cohen, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This is an action at law upon four policies of life insurance, in which the assured was William Batth. Batth disappeared from Omaha, Nebraska, where he had previously resided, in 1926. The petition of plaintiff in intervention alleges, in substance, in addition to the due issuance of the policies in suit, and the full payment of premiums thereon,

that on or about the 26th day of September, 1926, William Batth left his home in Omaha, Nebraska; that since said date plaintiff has not heard from him; that diligent search has been made for him without success; that by virtue of his unexplained absence for a period of more than seven years the death of said assured is established. To this petition the defendant company filed its answer, in effect taking issue with the allegations of the petition so far as the alleged unexplained absence of William Batth was concerned. A jury was thereupon waived by the parties, a trial to the court was had, and evidence was adduced by each of the parties in support of the various contentions. On consideration of this proof, there was a finding and judgment entered by the court in favor of plaintiff and against defendant as prayed, and from the judgment of the district court overruling its motion for a new trial, the defendant company appeals.

As to the law of the case, we are quite agreed that, when a jury is waived by the parties, and a law action is tried to the court, its findings of fact have the same effect as the findings of a jury and will not be set aside unless clearly wrong. *Linch v. Berggren,* 135 Neb. 530, 282 N. W. 528; *Bank of Roca v. Meyer,* 135 Neb. 128, 280 N. W. 449; *Hole v. Hamp,* 134 Neb. 259, 278 N. W. 480; *Nelson v. Nelson,* 133 Neb. 458, 275 N. W. 829.

The real issue to be determined in this appeal is the applicability of the principle early adopted by this court in the case of *Holdrege v. Livingston,* 79 Neb. 238, 112 N. W. 341, in the following language: "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." See, also, *Fredrikson v. Massachusetts Mutual Life Ins. Co.,* 126 Neb. 240, 252 N. W. 802; *Munson v. New England Mutual Life Ins. Co.,* 126 Neb. 775, 254 N. W. 496; *Wells v. Equitable Life Assurance Society,* 130 Neb. 722, 266 N. W. 597.

It also follows that, in the instant case, the trial being had to the district court without the intervention of a jury, the trial court is presumed to have rejected and disregarded all incompetent and improper proof, and the only question presented by the record is whether its findings and judgment are predicated upon sufficient and pertinent evidence. *Bolin v. Fines,* 60 Neb. 443, 83 N. W. 740.

In this connection, it is to be observed that, in so far as the weight of evidence is dependent upon the credibility of the witnesses from whom it is derived, where conclusions supported thereby are or may be conflicting, the trial court, as to witnesses testifying in its presence, has an undoubted advantage in evaluating the testimony so received.

On the question of whether the record in the instant case adequately supports the presumption of death arising from more than seven years unexplained absence from his home, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him, there can be no doubt but that William Batth left Omaha in the fall of 1926, and, excepting one letter in April, 1927, from Sioux City, Iowa, addressed to a friend in Omaha, wherein he stated that if he could get back his job he wanted to come back (to Omaha), nothing has ever been heard from him up to the time of the trial in the district court in November, 1938, a period of more than eleven years. Prior to his disappearance he had lived in Omaha and Council Bluffs, Iowa, since at least in 1913. On January 13, 1920, he was married to Sarah Batth. To this union two children were born. The family then lived at 2208 North 17th street, and from thence they moved to 2717 Miami street, where they remained about seven years. From the last address the family moved to 2208 North 30th street where, at the time of the trial in the district court, they had resided for seventeen years. Premiums had been paid by Sarah Batth on the policies in suit up to May 29, 1934. The record discloses that in July, 1926, Sarah Batth instituted divorce proceedings against her husband, in which an order for alimony was entered on July 19, 1926. On this

order the Union Pacific Railway Company, by whom William Batth was then employed, was "garnished." However, this matter was compromised by the parties and the garnishment proceedings were dismissed on the 9th day of August, 1926.

Mrs. Batth testified as follows: "Q. When did you last see Mr. Batth? A. It was the 26th day of September, 1926. Q. And where did you see him? A. When he called me and told me to come down, he was going to get the boy some new clothes, overcoat and shoes. Q. And did you go down-town? A. Yes; I did. Q. And where did you meet him? A. I met him about 15th and Douglas. Q. And where did you go? A. We went to a clothing company by the name of Beddeo's. * * * Q. Did he buy some clothes for the boy? A. Yes; he did. Q. Who paid for them. A. Mr. Batth. * * * Q. Now, have you seen him since that date? A. No; I haven't." She never heard from Batth thereafter, nor anything in connection with him, except for a newspaper clipping containing an account of the death of a William Batth at Sioux City, Iowa. The evidence indicates that William Batth had an abiding affection for his children.

John Barker, who first met William Batth in 1913, testifies that they were friendly until insured's disappearance in 1926, which witness explains in this manner, viz.: "Yes; (we were) just the same as brothers; he had no relations here and I didn't; we were taken up together, just like brothers." This witness also testifies that he saw William Batth just before he left Omaha in 1926; that he (Batth) "had got laid off the night that he left here. * * * He told me he had lost his job and he was going to Sioux City to see if he couldn't get work up there; he had been working there before." In April, 1927, witness received a letter from William Batth from Sioux City, and the substance of this letter was, "If he (Batth) could get his job back, he wanted to come back." Further, "A year after Hoover got elected," the witness "come back from the east," and saw a newspaper clipping which reported the death of a William Batth at Sioux City, Iowa.

With the exception of the letter in April, 1927, and the newspaper clipping referred to, William Batth was never thereafter heard from.

The record also discloses that Mrs. Batth secured the making of an extensive search by a Mr. Williams, wholly without results.

True, in opposition to this proof, we have the testimony of a witness introduced by the defendant, as to a conversation claimed to have been had between the witness and William Batth some 30 days prior to Batth's departure in 1926, in which the latter expressed the intention that he was going to quit his employment to keep from paying alimony to his wife, and was going to Oklahoma where he had an uncle living, "and was going to not write or keep relationship with anybody in Omaha, wasn't going to write to any one or let any one in Omaha know where he was." Further, that Batth "quit" his employment and left some thirty days thereafter. Incidentally, the records of Batth's employer, assuming their competency, disclose that William Batth did not "quit" his employment, but that he was "discharged" by his employer.

At most, the evidence of defendant's witness amounts to conflicting proof, the probative force of which is to be largely determined as a question of credibility of witnesses. The trial court, by its findings and judgment, determined this question adversely to the defendant. We find no reason in this record for overthrowing this judgment.

Viewing the evidence as an entirety, in the light of the judgment of the trial court, we find that the case presented is one clearly entitled to the benefit of the presumption of death after more than seven years of unexplained absence. The proof is ample to support the judgment of the district court, which is

AFFIRMED.

PETER REDWELSKI, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.
290 N. W. 904

FILED MARCH 15, 1940. No. 30745.

Trial. Where the evidence was insufficient to sustain a judgment in favor of the plaintiff, who was injured in a collision while driving his automobile, it was the duty of the trial court to sustain a motion directing a verdict for defendant at the close of plaintiff's evidence.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Gordon Diesing, for appellant.

Kennedy, Holland, DeLacy & Svoboda, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an action for personal injuries sustained by the plaintiff, who was driving his own car and collided with a repair truck owned by the street railway company. At the close of the plaintiff's case, the trial court sustained defendant's motion for a directed verdict in its favor, and dismissed the plaintiff's action.

The assignments of error set out that the trial court was in error in refusing to submit the case to the jury, and that the dismissal of the case is contrary to the evidence and the law; that the court erred in passing upon the credibility of the witnesses, which is the sole duty of the jury, and thereby invaded the province of the jury.

This is a companion case to *Blank v. Omaha & C. B. Street R. Co., ante*, p. 632, 290 N. W. 464, which case was presented first to this court, Blank being a guest of the plaintiff at the time of the accident.

The accident happened at about 8 o'clock on the evening of February 26, 1938. The plaintiff was chief engineer of the Schulze Baking Company, and left his home in his 1934

Chevrolet car to make a trip to the bakery to give directions about heating the ovens. It was a dark, cloudy night, but his headlights, adjusted for city driving, would shine about 50 feet ahead of his car. The trolley wire had broken, and was looped around a stalled street car, and a repair truck, with a tower from which workmen could reach the trolley, had arrived, and turned around in the intersection of Woolworth avenue and Twenty-fourth street, and headed back north up Twenty-fourth street, and was lengthwise of the street car tracks and parallel therewith, its left wheels being to the west of the west rail of the south-bound track. This truck had been engaged there for about 15 minutes. After its headlights were turned off, a man with a flashlight stood in front of the truck and gave orders to the repair crew on the tower of the truck, and directed traffic.

The plaintiff testified that he had full control of his car, was looking straight ahead, and that when his headlights disclosed the truck ahead of him he was scared and frightened, applied his brakes, and just then the truck's headlights flashed on and blinded him; that he turned his car to the right to avoid a head-on collision, and the left wheel and fender of the Chevrolet hit the left wheel and fender of the truck. Plaintiff testified that his brakes were in good condition, and also his lights. Plaintiff was knocked unconscious by the collision, and remained in a hospital for 16 days and six or seven weeks in his home with a fractured skull.

At the corner of this intersection of Twenty-fourth street and Woolworth avenue, there was a filling station on the southeast corner and a grocery store on the southwest corner. Der Merkley testified that he helped out at this filling station on the corner; that the tower repair truck and also the street car which was standing there, with the broken trolley wire around it, were both painted yellow. He testified that there was a light at the top of each of the three pumps at the filling station, and four lights around the building, and one floodlight on a pole out by the sidewalk, and all were lighted at the time of the accident; that

the arc light on the southwest corner was burning. He could see the men working on top of the tower of the truck; he could see the man 10 feet ahead of the truck when it was 15 or 20 feet north of the intersection, or a distance of 56 feet from where the witness stood. He looked up the street from the door of the filling station and could see the truck standing there. This witness also said there was a dim light in the grocery store on the southwest corner, which was disputed by other witnesses.

Mitchell Vosik testified that he was in charge of the filling station on the evening of the accident; that the street car was stopped on the west side of the street in front of the Woolworth grocery run by Nussrallah; that the broken trolley wire was looped over the east end of the street car, and the north end of the trolley wire was lying in the street; that it threw up blue flames and crackled; that the repair truck came, and headed north under the wire, moved very slowly, with a man on the ground giving orders to the men up on top.

Witness Floyd Johnson testified that he was night engineer at the Bond Bakery, and was a friend of the plaintiff; that he had traveled south on Twenty-fourth street, and when he arrived at the middle of the block between Poppleton and Woolworth avenues he saw a man jump out from the side of the curb with a flashlight, signaling him to turn to the left; he was 35 or 40 feet from the truck when his headlights picked up the truck. He saw the man with a flashlight 100 or 125 feet away from him; he could not tell the color of the truck; he could not see that it was a truck until he went by it.

There was plenty of room for plaintiff's Chevrolet to go on the west side of this repair truck, but instead of that it appeared to come down the south-bound track, and although plaintiff claimed his brakes were in good order, and that his speed was only 25 miles an hour, yet he drove into the truck at a speed sufficient to damage both motor vehicles, and he received serious personal injuries.

The evidence of the plaintiff clearly discloses that this

corner and the objects there were so well lighted that several witnesses testified to all that was being done there, and the plaintiff himself testified that he saw this truck when he was at least 50 feet away, and that his brakes had been tested by the city and were in good working order; that his windshield was clear, and that he could have stopped his car within 35 to 40 feet. The testimony further shows that he could have avoided the accident if he had turned his car one or two feet farther to the west, and could have gone around the standing truck in safety.

At the conclusion of the plaintiff's testimony, defendant moved the court for an order dismissing the plaintiff's cause of action, for the reason that the said plaintiff has not proved sufficient facts to constitute a cause of action against the defendant, and for the further reason that by the plaintiff's testimony in this case the testimony shows that the plaintiff was guilty of negligence sufficient to bar the plaintiff from any recovery against the defendant. This motion was argued to the court, taken under advisement, and the next day the court discharged the jury and sustained the motion, the evidence clearly supporting the court in this ruling.

The first syllabus in *Hendren v. Hill,* 131 Neb. 163, 267 N. W. 340, reads as follows: "It is the duty of an automobile driver, in driving a car in the night-time, to keep such an outlook ahead that he will see an obstruction as soon as it is illuminated by his lights, and it is his duty to have his car under such control that he can stop to avoid a collision with an object within the area lighted by his lamps."

It may be admitted that, if reasonable men would draw different conclusions from the evidence, then the question of negligence is for the jury. *Hardung v. Sheldon,* 133 Neb. 427, 275 N. W. 586.

However, this court is committed to the doctrine by many decisions that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his headlights. *Roth v.*

Blomquist, 117 Neb. 444, 220 N. W. 572; *Anderson v. Lee*, 130 Neb. 258, 264 N. W. 666. Annotations on this subject will be found in 87 A. L. R. 900 and 97 A. L. R. 546.

In the case at bar, it must be held that the evidence is insufficient to sustain a judgment in favor of the plaintiff, and that the trial court was right in discharging the jury and dismissing the petition. *Most v. Cedar County*, 126 Neb. 54, 252 N. W. 465.

In our opinion, the trial court properly directed a verdict for the defendant at the close of plaintiff's evidence, and such judgment is hereby affirmed.

AFFIRMED.

SIMMONS, C. J., and CARTER, J., concur in the result.

WILLIAM R. WOOD, APPELLANT, V. CHARLES H. BURKHARDT ET AL., APPELLEES.

291 N. W. 98

FILED MARCH 15, 1940. No. 30785.

Record examined, and held to warrant only $740 rent as an offset. As thus modified, decree affirmed.

APPEAL from the district court for Cheyenne county: J. LEONARD TEWELL, JUDGE. *Affirmed as modified.*

Golden P. Kratz and *C. S. Wortman*, for appellant.

R. P. Kepler, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

In a foreclosure action upon a house and lot in Sidney, Nebraska, a counterclaim for rent was filed by the defendants for an offset in the amount of $2,095.20. District judge found $2,483.18 due on the mortgage, and decreed foreclosure, and allowed $1,233.18 as the offset. Plaintiff appealed.

Plaintiff filed petition for the foreclosure of a mortgage, dated June 10, 1925, due in five years, signed by Elizabeth Burkhardt, who has since died, and the defendant Charles H. Burkhardt, her husband. The mortgage was in the

amount of $1,600, for 7 per cent. interest until maturity and 10 per cent. thereafter. The mortgage was secured on lot 10, block 1, Clarkson's addition to Sidney, Cheyenne county, Nebraska.

The petition recites that three payments, totaling $350, were made upon the principal, and four payments made on the interest; that the mortgagors permitted the taxes to become delinquent for the years 1934, 1935, and 1936, and after they were advertised the plaintiff purchased a treasurer's tax certificate for said taxes, paying therefor the sum of $237.10. Foreclosure is brought for $1,250, balance of the principal on the note, with 10 per cent. interest, and upon the tax certificate, together with $73.75 subsequent taxes paid for the year 1937, and that, upon failure of the defendants to pay the sums found due, with interest, the property be sold. Later a supplemental petition was filed, setting up that the plaintiff had paid $17.76 as the premium on an insurance policy, which additional sum, with 10 per cent. interest from January 7, 1939, he demands to be paid as a part of the mortgage foreclosure.

The answer filed by Charles H. Burkhardt and the children of his deceased wife, as defendants, admits the giving of the mortgage, denies the amount due thereon is correctly stated in plaintiff's petition, and for a counterclaim states that the plaintiff lived in the premises and occupied a room in the basement, which was supplied with heat, light and water, and that the reasonable value of the rental was $7.50 a month from July 1, 1920, to October 17, 1938, and that the rental due therefor is $1,661.45. Defendants further allege that, immediately after the death of the wife, plaintiff was placed in possession of one additional room, with storage space in a third room, with heat, light, and water, which he continued to use from December 23, 1933, to the 17th day of October, 1938, and that the space so occupied was worth $7.50 a month in addition to the rental for the first room hereinbefore set out, and that for such additional space he owes the full sum of $433.75, or in all the plaintiff is indebted for room rent in the sum of $2,095.20, for which

amount defendants pray judgment, together with 6 per cent. interest from October 17, 1938, and costs. The reply was a general denial.

The decree entered by the trial court found that the amount due upon said mortgage and upon said tax sale certificate, and the premium on the insurance policy purchased, with interest on the several items, amounted to the full sum of $2,483.18. The court further found that the amount due from the plaintiff as rent for the rooms occupied by him in the mortgaged premises is $1,233.18, which should be set off and deducted from the amount due on the note and mortgage, and directed that in default of the payment of the balance of $1,250, the difference between the two, the property be sold.

The errors relied upon for reversal by the plaintiff were based upon the improper admission of evidence and improper refusal of evidence offered by plaintiff, and the argument was devoted to the fact that the allowance made on the counterclaim for rent was greatly excessive under the evidence.

There appears to be no dispute on any legal proposition between the parties. The evidence shows that Mrs. Burkhardt endeavored to take care of the payments due on the note and mortgage so long as she lived, but that after her death nothing more was paid, and the taxes were allowed to become delinquent. The property stood jointly in the name of Mr. and Mrs. Burkhardt, and she was his second wife.

There is nothing in the decree which gives any clue whatever as to how the court arrived at the offset of $1,233.18 allowed for rent of the premises occupied by Mr. Wood, and therefore it is necessary to examine the entire evidence in relation to that matter. This appears to be an ordinary one-story house, with full basement. Plaintiff occupied the northeast room in the basement, size 10 by 14 feet, and after Mrs. Burkhardt died Mr. Burkhardt moved down into the basement too, so he could rent the entire upstairs, and they built beaver-board walls to make a small room, about

8 by 10 feet, in the southeast corner in the basement, similar to the one occupied by Mr. Wood. This left a larger room between these two rooms, into which the defendant moved his furniture from upstairs. This third room in the basement was occupied by the tenants of the basement jointly, as there was a stove and cupboards and dishes available to either, although it is not shown that plaintiff made much use of the middle room, and he had a key to the other bedroom, and kept a trunk and other things in there at times. The whole upstairs of the house and the west half of the basement were rented by Burkhardt for $20 a month. Mr. Burkhardt on the witness-stand said he asked $15 a month for the two rooms occupied by the plaintiff after the wife died.

We have no clue whatever to the method by which the trial judge arrived at the amount of $1,233.18 rent as an offset to be credited upon the amount due plaintiff on the mortgage. However, the trial court finds in its decree that plaintiff was not indebted to the defendants for anything prior to December 22, 1933, which was the date of the death of the wife, Elizabeth Burkhardt.

Plaintiff occupied the rooms in the basement up to October 17, 1938, which would be a period of approximately four years and ten months, and without considering any interest for these unpaid rents due monthly, it would amount to an allowance of over $21 a month for rent, which is too much when the entire upstairs of this house rented for but $20 a month.

The court is convinced that $740, including interest to March 15, 1939, the date of the decree, would be ample rent for the accommodations used by the plaintiff in the basement.

This court finds that plaintiff is indebted to the defendants for rental on that portion of the basement rooms occupied by plaintiff in the sum of $740, which amount should be set off against the amount found due on plaintiff's note and mortgage. As thus modified, decree is affirmed.

AFFIRMED AS MODIFIED.

EFFIE M. LUND, APPELLEE, V. ELIZABETH WOODWARD ET AL., APPELLEES: WILBURN W. EVANS ET AL., APPELLANTS.
291 N. W. 90

FILED MARCH 15, 1940. No. 30744.

1. **Deeds**: SETTING ASIDE: BURDEN OF PROOF. In a suit to set aside a conveyance of real property for want of mental capacity on the part of a grantor, the burden of proof is upon the party alleging it to establish that the mind of the grantor was so weak or unbalanced when the conveyance was executed that he could not understand and comprehend the purport and effect of what he was doing.
2. ———: ———: UNDUE INFLUENCE. Undue influence sufficient to avoid a conveyance of real property is such an unlawful and fraudulent influence which controls the will of the grantor.

APPEAL from the district court for Wayne county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

Huber D. Addison and *Sidney T. Frum,* for appellants.

Harry E. Siman, Fred S. Berry, Burr R. Davis and *McKenzie & Dugan, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a suit brought by Effie M. Lund to obtain a partition of a quarter-section of Wayne county land of which she claims to be the owner in fee simple of a one-fifth interest. The appeal is prosecuted from a decree ordering a partition of the land.

The record shows that in 1890 Frank O. Hildur married Mary E. Evans, a widow with five children, one of which is the plaintiff in this case. At the time of her marriage to Hildur, Mary E. Hildur was the owner of the land involved in this suit. In 1893 she conveyed the east half of the quarter to her husband, Frank O. Hildur. On July 18, 1935, she conveyed the west half to her husband and her children or their representatives, as the case may be, reserving to herself a life estate in the property. On December 17,

1937, Frank O. Hildur deeded all of his interest in said land to Mary E. Hildur for life with a remainder over to her children or their representatives, as the case may be. By virtue of these two deeds, if valid, the plaintiff, Effie M. Lund, and the defendants, Elizabeth Woodward, Wilburn W. Evans and Leona Pickerel, each became the owner of an undivided one-fifth interest in the land, and Addie F. Boileau, Wilburn Hauser, Samuel A. Hauser and Ella Hanson each became the owner of one-twentieth interest therein, all subject to the life estate of Mary E. Hildur. The life estate was terminated by the death of Mary E. Hildur on March 9, 1938.

During the course of the probate of the estate of Mary E. Hildur, claims were filed against the estate in excess of $2,000. There are no assets in the estate except the interest Mary E. Hildur may have had in the real estate involved here. The will of Mary E. Hildur left her estate, except for some small legacies, to Wilburn W. Evans, her son. The decision of the case therefore rests upon the validity of the deed of Mary E. Hildur to Frank O. Hildur dated July 18, 1935, and the deed of Frank O. Hildur to Mary E. Hildur and her heirs dated December 17, 1937.

It is contended that Mary E. Hildur was incompetent on July 18, 1935, the date she executed a deed to the west half of the quarter-section to her husband and children, subject to a life estate in herself. The evidence shows that Mary E. Hildur was 95 years of age when the deed was executed. It also shows that a guardian was appointed for her on or after July 20, 1935. Defendants called lay witnesses who testified in substance to Mary E. Hildur's physical handicaps and to a general decline of her mental faculties, especially as to a tendency toward forgetfulness. From this evidence several lay witnesses gave as their opinions that Mary E. Hildur was incompetent on the date the deed was given. Her attending physician was the only medical expert who testified and he did not state that he thought she was incompetent. Other lay witnesses were called by the plaintiff, who testified to long associations with Mary E. Hildur

up until the time of her death, and gave it as their opinion that she was not incompetent on July 18, 1935. There can be little doubt that Mary E. Hildur was weakened physically and mentally because of her advanced years. That she should become forgetful is more or less natural. This is not, however, sufficient to show that at the time of the execution of the deed she was incapable of a reasonable comprehension and understanding of what she was doing. Unless it was established by defendants that she lacked such an understanding, the conveyance will be upheld. *Blochowitz v. Blochowitz*, 122 Neb. 385, 240 N. W. 586.

There is no presumption that a person of advanced years is incapable of transacting business. The burden is upon the plaintiff to establish that fact. While great age is an important and pertinent circumstance to be considered in connection with the other evidence going to the question of mental competence, it cannot be treated as controlling. The law recognizes the right of the aged to control and dispose of their own property and their right to choose the persons who shall be the recipients of their bounty. It has long been recognized, and the world is full of proof, that the ability to think and reason clearly may alone survive the passing of youth and middle age. The evidence of defendants, in our opinion, even if undisputed, was not sufficient to deprive Mary E. Hildur of that right by a finding that she was incompetent on July 18, 1935, when the deed was executed and delivered. See *Leonard v. Shane*, 182 Ia. 1134, 166 N. W. 373. The record is barren of proof of duress or fraud being practiced upon Mary E. Hildur. The allegations of the answer in that respect were not therefore established.

It is next contended that the deed given by Frank O. Hildur to Mary E. Hildur on December 17, 1937, was procured by fraud, duress and mistake. The evidence shows that Frank O. Hildur had held the title to the east half of the quarter-section involved here since 1893. He also acquired title to one-fourth of the west half subject to the life estate of Mary E. Hildur, by the deed of July 18, 1935, heretofore discussed in this opinion. It is apparent that

some of the children of Mary E. Hildur were demanding that this real estate should be conveyed back to Mary E. Hildur and her heirs in view of her advanced age. With this in view, the guardian of Mary E. Hildur held numerous conferences with Frank O. Hildur with reference to the rights of Mary E. Hildur in the land, with the result that Hildur offered to deed a life estate in the land to Mary E. Hildur, and the remainder to her heirs in the proportions hereinbefore set out. The evidence shows that Hildur was urged by the lawyers handling the matter for the guardian and the heirs of Mary E. Hildur to get legal advice of his own choosing in order that he would thoroughly understand what he was doing. The deed was read to him a number of times and he read it himself. At the time the guardian submitted the offer to the county judge of Wayne county for approval, the county judge carefully examined Hildur with reference to it and urged him to consult his own legal counsel. The answer of Hildur was that he understood the offer thoroughly and that it was just as he wanted it. The offer was thereupon approved by the county court and the deed drawn, executed and delivered in accordance therewith. The evidence of Hildur that he thought he was conveying the whole title to Mary E. Hildur does not seem the least impressive to us after a consideration of all the circumstances. The efforts of counsel in attempting to preclude any future attempts to invalidate the conveyance by explaining its effect to Hildur, in making a full and complete disclosure to the county judge of Wayne county at the time it was submitted to him, and in urging Hildur to consult his own attorney to make certain that a complete understanding had been reached, not only show exemplary professional conduct on the part of the lawyers involved, but also preclude Hildur from claiming that he was in any way defrauded or subjected to duress and coercion. The evidence not only shows that no mistake was made, but that Hildur insisted that the offer and the deed made pursuant thereto be in the exact form in which they now appear. We necessarily conclude that the deed from Frank O. Hildur to Mary E. Hildur

under date of December 17, 1937, is in all respects valid as against the defenses set out in the answer of the defendants.

The decree of the trial court ordering a partition of the lands involved was in all respects correct and is

AFFIRMED.

BERTRAND HENDERSON, APPELLEE, V. GLEN R. WILSON ET AL., APPELLEES: BOLUS J. BOLUS, TRUSTEE, APPELLANT.
291 N. W. 96

FILED MARCH 15, 1940. No. 30873.

1. **Workmen's Compensation:** APPEAL. In an appeal from an award of the compensation court, after a rehearing before the whole court, the filing of the petition and transcript in the district court within the fourteen-day period fixed by the statute lodges jurisdiction of the case in the district court.
2. ———: ———. No præcipe need be filed nor a copy of the petition served in the district court to give it jurisdiction of a compensation case appealed from an award of the whole compensation court on rehearing.
3. ———: ———. The compensation law imposes on the clerk of the district court the duty of issuing a copy of the petition for service on the adverse party within seven days in an appeal from an award of the compensation court sitting *en banc* on rehearing. The failure of the clerk of the district court to so do does not deprive a litigant of his right of appeal.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

Bolus J. Bolus, pro se.

Hamer, Worlock, Randall & Tye, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a proceeding under the workmen's compensation law in which the trial court dismissed the appeal from the

compensation court on the ground that jurisdiction was never obtained. It is from this order that an appeal was taken to this court.

It appears that plaintiff filed his application in the compensation court to obtain an award of benefits for injuries suffered while in the employ of defendants, the owners and trustees of the Wilson Freight Line. After a trial before one of the three judges of the compensation court, an award to plaintiff was entered. Upon a rehearing before the three judges of the compensation court, plaintiff was again awarded compensation. From this award defendant Bolus appealed to the district court.

The record shows that the final award of the compensation court was entered on July 3, 1939. On July 11, 1939, there was filed in the compensation court a notice of election to appeal. On July 13, 1939, appellant filed his petition praying for a reversal and modification of the award made by the compensation court. Also, on July 13, 1939, appellant filed a præcipe for summons. Summons was issued on July 21, 1939, and returned showing service thereof on July 22, 1939. On the record the trial court sustained a motion to dismiss the appeal.

It is the contention of appellee that, in an appeal from an award made by the three judges of the compensation court, a copy of the petition filed in the district court must be served in the manner that a summons is served in the first instance. The applicable part of the statute provides: "Within seven days after the filing of such petition on appeal, a copy thereof shall be served upon the adverse party in the same manner as summons is served as provided in section 13, subdivision (2) hereof and return of service shall be made within five days thereafter." Comp. St. Supp. 1939, sec. 48-174.

An appeal from an award of the compensation court sitting *en banc* is complete when a petition and transcript are filed in the district court within the fourteen days allowed by the statute. Comp. St. Supp. 1939, sec. 48-174. The duty of serving a copy of the petition upon the adverse

party within seven days after the filing of the petition is imposed on the clerk of the district court. The requirement of a præcipe has no application to a proceeding under the compensation law. *McIntosh v. Standard Oil Co.*, 121 Neb. 92, 236 N. W. 152. It necessarily follows that, inasmuch as the defendant met all the requirements of the compensation law by filing his petition and transcript in due time, the district court obtained jurisdiction, and the failure of the clerk of the district court to carry out the duties enjoined by the compensation law, over which this defendant had no control, does not deprive defendant of his right of review in the district court. *McIntosh v. Standard Oil Co., supra*; *Hansen v. Paxton & Vierling Iron Works*, 135 Neb. 867, 284 N. W. 352.

The right of appeal is a substantial one to be sustained if possible. Technical refinements of interpretation will not be indulged in to defeat an appeal. It is only when the clearly expressed language of statutory requirements for appeal have not been met that a court will dismiss an appeal for want of jurisdiction.

We think the trial court was in error in dismissing the appeal in the instant case.

REVERSED AND REMANDED.

WALTER C. HAMPTON, APPELLEE, V. HERMAN J. WESTOVER, APPELLANT.

291 N. W. 93

FILED MARCH 15, 1940. No. 30771.

Judgment: EVIDENCE. A judgment of dismissal rendered in a criminal prosecution cannot be given in evidence in a purely civil action to establish the truth of the facts upon which it was rendered.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Seymour L. Smith, Harold C. Linahan, W. W. Wenstrand, Edward Sklenicka and *Louis T. Carnazzo*, for appellant.

George Evens and *Mossman, Anderson & Meissner, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

The plaintiff brought this action to recover damages from the defendants for injuries received by him arising out of a claimed assault and battery by the defendant Herman J. Westover, a policeman of the city of Omaha. The jury returned a verdict for the plaintiff in the sum of $400. A remittitur of $100 was requested and filed, leaving the judgment in the amount of $300, and from this judgment defendant Herman J. Westover appeals.

The plaintiff claims that while he was employed on a Public Works project on May 28, 1937, at about 2 o'clock in the afternoon, and while he was on duty, defendant Westover, acting in the course and scope of his employment, endeavoring to execute and perform his duties as a police officer, came upon private grounds where the plaintiff was peacefully performing his duty and arrested him, and then and there, without any provocation and without any justification, intentionally, wilfully and maliciously struck, beat, assaulted and maimed the plaintiff by striking him on the head and knocking him over and down the side of a steep, stony terrace, causing injuries. For the purposes of this appeal, it is not necessary to detail the facts as disclosed by the record.

In paragraph 7 of plaintiff's amended petition, plaintiff alleged, in substance, that after he was placed under arrest and after defendant Westover had assaulted him, Westover sent for a cruiser car and officers, ordered the plaintiff to be taken to the police station, and at 9 o'clock in the morning of May 29, 1937, plaintiff was taken before a police judge and charged with resisting arrest, to which charge he pleaded not guilty. The matter then proceeded to trial. Defendant Westover appeared at the trial, testifying against the plaintiff, and after the evidence was adduced the court

entered judgment, dismissing the charge of resisting arrest. A motion was made to require the plaintiff to strike paragraph 7 from his amended petition, for the reason that the same was redundant, scandalous and irrelevant. This motion was overruled by the court. In the overruling of this motion the defendant contends the court erred.

During the trial of the instant case, two exhibits were placed in evidence, designated as 1 and 2. Exhibit 2 charged the plaintiff with resisting arrest. This exhibit shows the filing mark and the prefix "Dis." The evidence shows that a hearing was had and that defendant Westover testified at the hearing. Objection was made to exhibit 2 for the reason that "it is incompetent, irrelevant, immaterial and has no bearing on the issues in this case. The only bearing that it might have would be a question of fact to be adduced by evidence produced before this court and the jury." Mr. Evens, counsel for plaintiff, stated during the course of the objections and in conversation with Mr. Linahan, representing the defendant, as follows: "I don't want to mislead the jury. This is just the way it is, but it says dismissed." Mr. Linahan said: "That is right." Mr. Evens replied: "And you are admitting that is the true findings?" Mr. Linahan stated: "We will presume it is." The plaintiff was asked this question: "After that was dismissed, you left the police station, Mr. Hampton? A. Yes; I did." So, for the purposes of this case, we assume that there was an order of dismissal on the charge of resisting arrest which is tantamount to a judgment of acquittal. The defendant contends that the court erred when it allowed evidence to be introduced that plaintiff was dismissed on the charge of resisting arrest.

The instructions given by the trial court, in defining the issues, did not in any manner state the substance of allegation 7 contained in plaintiff's amended petition. We will confine ourselves solely to the competency of the evidence of the dismissal of plaintiff in the police court of Omaha, on the charge of resisting arrest, and its pertinence to the instant case.

The general rule is that, in the absence of a statutory provision to the contrary, a judgment of acquittal rendered in a criminal prosecution may not be given in evidence in a subsequent civil action. This rule prevails where the judgment is offered to establish the truth of facts upon which it was rendered. It prevails where the judgment rendered in the criminal action is offered in the civil action for the purpose of proving its own existence where such existence is a material fact, in which case the judgment is conclusive as to the fact of its rendition. See 20 Am. Jur. 854, sec. 1011.

The rule supported by the great weight of authority is to the effect that a judgment of acquittal in a criminal prosecution cannot be given in evidence in a purely civil action to establish the truth of the facts upon which it was rendered. Annotation, 31 A. L. R. 262. See, also, Annotation, 57 A. L. R. 504.

Many and various reasons for the rule as to admissibility have been assigned, including dissimilarity of object, issues, procedure, degree and elements of proof, parties to the action, etc., and many cases define the foregoing. Primarily, the rule rests upon a reasoning that the two proceedings are not ordinarily between the same parties. In distinguishing between cases of a criminal nature and those of a civil nature involving the same transaction, different rules apply as to the competency of witnesses and as to the weight of testimony. The issue in a criminal proceeding is not necessarily the same as in a civil action, either as to scope or as to its attendant results. The parties are necessarily different. The civil action is prosecuted by one individual. The other action is maintained by the state or municipality. Whether such reasoning is entirely sound, we are not sufficiently convinced to be dogmatic about it. Inasmuch, however, as the principle has been recognized so often and frequently announced in many jurisdictions as an unqualified canon of the law of evidence, we feel that it is more in the interest of exact justice, if not of expediency, to err in its recognition, and to apply it here, than to repudiate it.

A more pertinent case, and one which substantially supports defendant's contention, is the case of *Lillie v. Modern Woodmen of America*, 89 Neb. 1, 130 N. W. 1004. In that case the plaintiff sued the insurance company on a policy of life insurance. The company defended on the ground that the plaintiff had murdered the insured and was therefore, under the terms of the policy, precluded from recovering the benefits thereof. Apparently, the actual facts were that the plaintiff had murdered the insured. The defendant insurance company attempted to introduce into the civil action a certified copy of the record of conviction as substantive evidence. The court held: "Evidence of the commission of the crime would depend upon the proof of the fact of the criminal act. A certified transcript of the record of conviction of the beneficiary is not admissible as substantive evidence of the facts upon which the prosecution was founded, nor of the fact of the murder of the assured by the beneficiary." The same rule would apply to the transcript of a judgment disclosing the acquittal of a party or a dismissal of a criminal proceeding against him.

We conclude that the admissibility of the evidence of which the defendant complains in this case constituted prejudicial error. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

MYRTLE E. SWANSON, APPELLANT, V. ARTHUR E. SWANSON, APPELLEE.

290 N. W. 908

FILED MARCH 15, 1940. No. 30696.

1. **Divorce.** With the granting of an absolute divorce, the trial court may enter decree in regard to property acquired during marriage by joint efforts of parties as justice and equity demand.
2. ———. In awarding custody of a child, the primary concern of the court in its sound discretion is the best interest and welfare of the child, having due regard of the rights of the parents.
3. **Record** examined *de novo* and decree affirmed as modified.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed as modified.*

Crofoot, Fraser, Connolly & Stryker and *Bert L. Dickason,* for appellant.

Leon, White & Lipp, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and FALLOON, District Judge.

FALLOON, District Judge.

This action was brought by the plaintiff, Myrtle E. Swanson, for separate maintenance, custody of the three minor children, ownership of certain property, support money and attorney fees. The defendant, Arthur E. Swanson, answered and cross-petitioned for an absolute divorce, care and custody of the three children and for determination of the title to certain property. Trial was had, taking some eleven days, producing a voluminous transcript of the evidence.

The trial court found against the plaintiff generally, that the allegations of her petition were untrue and not supported by the evidence, and found further generally for the defendant, that the allegations of his answer and cross-petition were true and supported by the evidence. The trial court further found that the plaintiff had been guilty of acts of extreme cruelty towards the defendant so that the legitimate ends of matrimony were destroyed and decreed that the defendant was entitled to an absolute divorce. The trial court further found that the welfare and best interests of the children, ages 14, 11, and 5, required that the defendant was entitled to and should be given the care and custody of the children and that they should be so placed and entrusted, with the right of visitation at reasonable times by the plaintiff, subject to further order of the trial court. The trial court further found the defendant was a fit and proper person to have such care and custody of the children, which was made immediate. The trial court further awarded the plaintiff permanent alimony in the sum of $14,400 payable at monthly rate of $100, but in event of remarriage of

plaintiff, from such time the remaining amount was halved and payable at monthly rate of $50. The trial court decreed that the defendant was to have all personal property, including the household goods, but that plaintiff was entitled to immediate possession of her personal effects. The defendant was also decreed to be the owner of the home residence and also the farm property. The alimony judgment was decreed a lien on the farm property and in addition the defendant was ordered to deposit some $7,000 life insurance policies with the clerk of the trial court as security for the payment of said judgment, but the residence was left absolutely free from said alimony lien. The trial court also awarded plaintiff's attorneys $1,500 in addition to the $100 heretofore allowed and paid. Defendant was taxed all costs except those incurred in connection with the employment by plaintiff of the three investigating detectives.

Both sides filed motions for new trial, which were overruled, and both sides have appealed to this court. This necessitates a trial *de novo* upon the record by this court.

The record discloses that the trial judge was justified in granting an absolute divorce to the defendant and in denying the separate maintenance request of the plaintiff. The testimony discloses that the plaintiff was easily disturbed, that she is of a highly nervous type, that she attempted suicide, that many times she threatened suicide, that she was given to tantrums and violent exhibitions of temperament which she did not attempt to control, making the home life of the parties and their children unbearable and not conducive to the true objects of matrimony or the raising of a family; that the plaintiff knew what she was doing, but was emotionally unstable, and that she failed to cooperate when adjustment was sought is borne out by the testimony not only of the doctors and specialists who treated her, but by the record generally. In other words, she was a badly maladjusted individual. The record discloses many false, vicious and unsubstantiated accusations of defendant by plaintiff which were unjustified and would constitute extreme cruelty within the meaning of the statute.

That parents cannot get along together is unfortunate, for there is no reason to doubt that all parents in their own way love their children and a separation creates some heartaches. To go into details in this opinion will serve no good purpose. The trial court is vested with sound discretion in determining whether a divorce shall be granted and generally an absolute divorce is to be preferred. Unjustifiable conduct which destroys the legitimate objects of matrimony warrants such a decree. A careful analysis of the whole record, without the advantage that the trial court had in observing the witnesses, and their appearance and conduct in the courtroom, warrants the absolute divorce that the trial court awarded. It is the only proper solution. In any event, this question rests in the sound discretion of the trial court and this discretion has not been abused.

To determine who should have the care and custody of the children, the court will always consider their best interests and welfare. There is no duty more delicate or responsible given to any court. At times it is most difficult, but if the decree of the trial court is justified by the evidence, its discretion will ordinarily not be disturbed.

The record discloses that the plaintiff at times was hysterical, not too careful with her language before her children, and given to frequent outbursts of temper and her emotions. She was highly nervous and at times very unstable. She was quite normal when everything went smoothly, but easily changed from one extreme to another. The uncontradicted testimony of the physicians and psychiatrists points out that this mental state of the plaintiff was not conducive to a proper home life. Her attitude before the children was not favorable to their normal development and was beginning to show in their lives. The trial judge had the best opportunity to judge what was for the best interests and welfare of these three minor children and he placed them in the custody of the father, subject to his further order. The record discloses no better solution. The welfare of these children demands the highest consideration of the court and not the desires of the parents.

It is not necessary to set out in detail nor to condense the testimony in this case, as it would serve no useful purpose, but might be embarrassing to the parties concerned, and especially the children, in the years to come. Neither is it necessary to set out the decisions of this court as to the propositions involved in the final determination of this case. Both sides have exhaustively furnished citations which have been carefully considered.

The net worth of the defendant according to the evidence was about $40,000 and his income according to his tax returns for 1937 and 1938 would average better than $1,000 a month. His present salary is $576 a month, to which should be added his commissions, dividends and rentals. The plaintiff furnished $1,000 when the first bungalow was built in 1922, about two years after their marriage. She also bought some articles in the household. The defendant had some property when married, but the testimony is not complete enough to draw an accurate conclusion in regard to this property. The home and farm properties were bought mainly through the means and efforts of the defendant, though taken in the names of both plaintiff and defendant. With these two pieces of real estate, the household goods and Cook Paint & Varnish Company stock make up the property of the parties. There is also evidence of an estate of the deceased father of plaintiff in which plaintiff has an interest. It was proper that the trial court assign this property to the defendant, as was just and equitable, and award the plaintiff alimony. The alimony of $14,400 to the plaintiff was just, and in view of all the property and income, it was proper that the payments be made as the court indicated. This court deems it inequitable that a reduction in case of remarriage by plaintiff should be made. There is no restriction on remarriage put on the defendant and there should be none on plaintiff, under all the circumstances. Her health has not been the best and this conditional reduction should not attach. The defendant at the time of the trial was 49 years of age, while plaintiff was 41 years of age. Both have had some ill health.

The trial court further in its decree exempted the residence property from the alimony lien. There appears to be no valid reason for this exemption.

The decree of the trial court will be affirmed in all particulars, with the exceptions that it should be and hereby is modified to remove the reduction in permanent alimony in case of remarriage of plaintiff and also to eliminate the exemption of the residence property from the lien of the alimony judgment, and to provide that all real estate of the defendant is subject to said alimony lien. The temporary alimony on appeal and advancements allowed by this court are to be properly credited. Plaintiff's attorneys allowed for services in this court $350 to be taxed with defendant's costs, otherwise each party to pay own costs of appeal.

AFFIRMED AS MODIFIED.

STATE. EX. REL. WILLIAM A. BURKETT, RELATOR, V. HARRY R. SWANSON, SECRETARY OF STATE, RESPONDENT.

291 N. W. 481

FILED MARCH 20, 1940. No. 30955.

1. **Elections.** An election to a public office, secured by a candidate by means of offers to the voters to perform the duties of the office for less than the legal salary or fees, constitutes a species of bribery which will invalidate an election.
2. ———. A person becomes a candidate for an office when he announces that he will seek election to the office.
3. ———. A candidate who has become disqualified to hold the office he seeks is necessarily ineligible to run for the office.

Original proceeding in mandamus by the state, on the relation of William A. Burkett, against Harry R. Swanson, secretary of state. *Writ denied.*

L. R. Doyle and *Malcolm Baldrige,* for relator.

Walter R. Johnson, Attorney General, and *Robert Nelson,* for respondent.

Heard before CARTER, J.

The record in this case discloses that the relator, William A. Burkett, completed his filing for nomination as the republican candidate for congress in the first district on the 24th day of February, 1940. On the same day, and in connection with his filing, he issued a statement to the press to the effect that he would serve as congressman, in the event of his election, without pay so long as the federal budget remained unbalanced. The statement appears to have been carried in the Nebraska State Journal and the Lincoln Daily Star, newspapers of general circulation in the first congressional district. Relator testifies that he made the statement without knowledge of its legal effect, and offered to unconditionally repudiate it in the event it was held to be disqualifying. The secretary of state canceled relator's filing on the ground that said statement disqualified relator for the office. This action was thereupon brought to compel the secretary of state to accept relator's filing and cause his name to appear on the ballot as a candidate for congress.

It has been generally held that an election to a public office, secured by a candidate by means of offers to the voters to perform the duties of the office for less than the legal salary or fees, constitutes a species of bribery which will invalidate an election. This has been so generally held to be the law that a citation of authority is hardly necessary. Cases in point are: *State v. Elting*, 29 Kan. 397; *State v. Collier*, 72 Mo. 13; and the cases cited in the annotation appearing in 106 A. L. R. 493. Promises made by a candidate to accept less than the stipulated salary in the event of his election involve a pecuniary consideration offered by the candidate in order to secure election in which the test of fitness for the office is not an element. Such promises and statements are condemned generally as violations of the corrupt practices act. Comp. St. 1929, ch. 32, art. 20.

Relator contends that he was not a candidate when the statements were made, and that he could not be a candidate until the ten-day period for filing objections had expired. Such a construction would defeat the whole purpose

of the corrupt practices act. To say that a person is not a candidate until ten days after he files, when the law requires objections to candidates to be made within ten days after the filing, is to distort the plain import of the law and destroy it wholly by construction. In my opinion, a person becomes a candidate for an office when he announces that he will seek election to the office. From that time on he is a candidate within the meaning of the corrupt practices act, and must comply with the provisions of that act. *Leonard v. Commonwealth,* 112 Pa. St. 607, 4 Atl. 220; *Adams v. Lansdon,* 18 Idaho, 483, 110 Pac. 280; *Norris v. United States,* 86 Fed. (2d) 379. To permit violations of the corrupt practices act on the eve of filing and thereby secure the benefit of promises generally held to be subversive to the public interest would amount to a circumvention of the statute. The intention of the legislature is clear and it becomes the duty of the courts to make it effective in the absence of constitutional prohibitions. There can be no question, therefore, that relator was a candidate within the purview of the corrupt practices act when he made the statement in question.

Relator contends that the corrupt practices act of this state has no application to a person who is a candidate for congress, a federal office. The federal corrupt practices act specifically subjects candidates for federal office to the laws of the state unless they be inconsistent with the federal law. 2 U. S. C. A. ch. 8. No inconsistency making the state law inapplicable has been pointed out.

Finally, the relator contends that he made the statements in good faith and without intention of violating any law. We doubt not that this statement is true, but it can avail the relator nothing. Want of knowledge of the law does not justify a plea of good faith. The corrupt practices act prohibits certain acts and conduct on the part of the candidates. The gist of the wrong was relator's offer to serve for less than the salary fixed by law. To permit ignorance of the law which he violated as a defense, im-

munity from punishment would result in almost every case. It is the violation of the law by the commission of the prohibited act that is condemned. The intent or good faith of the wrong-doer is not an element in the offense, nor a defense to the objections filed, when the wrongful act is established. A want of improper motive does not alleviate the subversive result prohibited by the state. An enlightened public policy requires that candidates for public office in this country be elected on the basis of fitness for the office and not on that of bargain and sale. To permit elections to go to the highest bidder would open the doors of our public offices to the worst type of corruptive influences. Our elections must express the free, intelligent, and unbiased judgment and choice of the electors, uninfluenced by pecuniary offers of candidates. if free government is to continue to exist. The good faith of the relator and his willingness to purge himself by a withdrawal of the statement cannot therefore be treated as a defense.

The point is made that the authorities cited are cases involving election contests after the candidates violating the corrupt practices act had been elected to the offices. While this is true, it is no doubt due to the fact that the wrongful acts were not committed until the election campaign was under way. In the instant case, the wrongful act was committed at a time when it could be decided before an election was held. The law does not require vain things to be done, and if it be established that a person has disqualified himself from holding the office for which he filed, he has necessarily become ineligible for the office. This being true, the secretary of state very properly decided that relator's name should not be placed on the ballot.

For these reasons the relator is not entitled to a writ of mandamus.

WRIT DENIED.

OTHA DAVIS, APPELLANT, V. JOSEPH O'GRADY, WARDEN, APPELLEE.

291 N. W. 82

FILED MARCH 22, 1940. No. 30759.

1. **Criminal Law.** The habitual criminal law of this state (Comp. St. 1929, secs. 29-2217, 29-2218) does not set out a distinct criminal offense, but provides that the repetition of criminal conduct aggravates the guilt and justifies heavier penalties.
2. **Constitutional Law.** Section 29-2217, Comp. St. 1929, of such law does not contravene sections 3, 9, or 12, of article I of the Constitution of Nebraska.
3. **Habeas Corpus.** "Habeas corpus is a collateral, not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant." *Hulbert v. Fenton*, 115 Neb. 818, 215 N. W. 104.
4. ———. The judgment or sentence of a court of record in a criminal case, when challenged by habeas corpus, is supported by the usual presumptions of validity and regularity. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void.
5. ———. Where an information charges distinct offenses in two or more counts, and where a defendant pleads "guilty" thereto, generally, he cannot complain in a habeas corpus proceeding of a sentence thereon which imposes a penalty applicable to either offense without designating on which count it is based. Under these circumstances, a sentence and judgment upon an information containing several counts need not designate upon which count it is based.
6. ———. We are committed to the doctrine that habeas corpus is never allowed as a substitute for an appeal or proceeding in error.
7. **Criminal Law.** "The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him." 16 C. J. 821.
8. ———. "A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by section 11, article I of the Constitution." *McCarty v. Hopkins*, 61 Neb. 550, 85 N. W. 540.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed.*

Otha Davis, pro se.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

Heard before SIMMONS, C. J., ROSE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS, District Judge.

PER CURIAM.

This is an appeal from a final order made in the district court for Lancaster county, upon a petition for a writ of habeas corpus presented thereto by Otha Davis, against Joseph O'Grady, warden of the Nebraska state penitentiary. Such order denied the issuance of the writ against the defendant, or any relief as in said petition prayed, for the reason "that the petition does not state a cause of action in favor of the petitioner or relator."

Included in relator's petition is a copy of an information filed against him in the district court for Howard county, Nebraska, by the duly elected, qualified, and acting county attorney of such county. It contained two counts. In the first count, in appropriate terms, Davis is charged with the crime of stealing, on or about the 4th day of November, 1936, 52 bushels and 10 pounds of wheat of the value of $56.85, the personal property of Mary Sack and Julius Iwanski. In the second count he is charged, in appropriate terms, with the crime of stealing, on or about the 25th day of November, 1936, 56 bushels and 10 pounds of wheat of the value of $64.03, the personal property of Mads Madsen. It is also alleged in each count of such information that the relator herein had twice, prior to each of the thefts charged therein, been convicted of theft, and had in each instance been sentenced to, and served a term in, the Nebraska state penitentiary; these allegations merely establishing his status as an habitual criminal on the dates of the commission of the offenses set forth in this information. It further appears in relator's petition that, after the filing of said information, the following proceedings were had in the district court for Howard county, Nebraska, viz.:

"Judgment.

"And, now, on this 15th day of December, 1936, the defendant being present in court in the custody of the deputy sheriff, and announced he was ready to plead to the information. Whereupon the information was read to the defendant by Charles Dobry, County Attorney of said county, and said defendant entered a plea of guilty. Statement of the defendant was taken. Defendant was thereupon asked if he has anything further to say why sentence should not be pronounced upon him, and he said he had not.

"It is therefore considered and adjudged by the court that the defendant be and he hereby is sentenced to the State Penitentiary at Lancaster, in Lancaster county, Nebraska, at hard labor, Sundays and Holidays excepted, for a period of ten (10) years, solitary confinement to be no part of this sentence.

"Edwin P. Clements, District Judge."

It further appears that the relator is now being held in the Nebraska state penitentiary in accordance with the foregoing sentence.

The relator challenges the validity of the habitual criminal statute of the state of Nebraska, section 29-2217, Comp. St. 1929, as in conflict with section 3, art. I, section 9, art. I, section 12, art. I, of the Constitution of Nebraska, and with article V and article VIII of the amendments to the Constitution of the United States. He also contends that the pretended judgment and sentence is null and void, in that it does not specify the offense of which petitioner was convicted, as required by section 20-1310, Comp. St. 1929; and as a final reason the relator alleges that he was not represented by counsel in the trial of his case.

This court is committed to the doctrines, viz.:

The legislature may enact an habitual criminal law punishing habitual offenders.

The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the guilt and justifies heavier penalties.

The fact that a defendant has been guilty of a second

felony does not make him guilty under the habitual criminal law of an offense for which he may be separately sentenced, but increases the punishment for the last felony.

"Habitual criminality" is, under the habitual criminal law, a state rather than a crime, and warrants greater punishment because of past conduct.

In the discussion of this question, Mr. Justice Hughes of the supreme court of the United States, in *Graham v. State of West Virginia,* 224 U. S. 616, 32 S. Ct. 583, 56 L. Ed. 917, employed the following language, viz.:

"The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts of similar import in many states. This legislation has uniformly been sustained in the state courts. *Ross's Case,* 2 Pick. (Mass.) 165, 170; *Plumbly v. Commonwealth,* 2 Met. (Mass.) 413, 415."

In *Kuwitzky v. O'Grady,* 135 Neb. 466, 282 N. W. 396, this court approved the following pronouncements, viz.:

"An habitual criminal statute is sound in principle and sustained by reason. The legislature may well enact such a law to permit law enforcement officers to take into consideration the persistence of an offender in his criminal course. That the defendant has been guilty of a second felony does not make him guilty of an offense for which he may be separately sentenced, but, upon proof that the habitual criminal statute applies to his case, he may have his punishment for the last felony of which he has been convicted increased as provided by law. 8 R. C. L. 271, secs. 284, 285; *Mundon v. State,* 196 Wis. 469, 220 N. W. 650; *State v. Zywicki,* 175 Minn. 508, 221 N. W. 900. Our Nebraska court has said: 'Where, under a prosecution for felony, the state seeks to have the accused punished as an

habitual criminal under section 10177, Comp. St. 1922, it is proper to allege in the information and prove upon the trial that the accused has been previously convicted as provided in said section.' *Taylor v. State*, 114 Neb. 257, 207 N. W. 207. See, also, *Booth v. State*, 122 Neb. 544, 240 N. W. 753.

"Provisions for increasing the punishment for habitual criminals are found in the laws of nearly every state. In a few states the law may be so phrased as to require the filing of a supplemental information to present an issue of fact to be determined by a jury, first, as to the identity of the defendant, and, second, as to his former conviction and the execution of the sentence. In other states it presents a question of fact for the purpose of increasing the length of the sentence which may be imposed upon conviction of the felony. The two annotations, of great length, found in 58 A. L. R. 20, and 82 A. L. R. 345, give an exhaustive discussion of the various phases of the question, with citations from the various states.

"The federal courts have often been called upon to pass upon these laws when applications have been made for writs of habeas corpus.

"In a recent case from the circuit court of appeals for the seventh circuit, the court used this language: 'Habitual criminality is a state, not a crime. * * * Habitual criminal statutes, such as that of Indiana, do not create or define a new or independent crime, but they prescribe circumstances wherein one found guilty of a specific crime may be more severely penalized because of his previous criminalities as they are alleged and found. This was definitely decided in *Barr v. State*, 205 Ind. 481, 187 N. E. 259. In *McDonald v. Massachusetts*, 180 U. S. 311, 21 S. Ct. 389, 390, 45 L. Ed. 542, the court, in considering a statute imposing greater punishment because of prior convictions for crimes, said: "The allegations of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only." ' *Goodman v. Kunkle*, 72 Fed. (2d) 334."

It is obvious that relator's contentions as to the invalidity

of the Nebraska habitual criminal statute cannot be sustained, and its validity must be upheld.

Nor, do we find relator's contention, that the judgment or sentence is null and void because it does not specify the offense for which relator was convicted, sustainable.

"Habeas corpus is a collateral, not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant." *Hulbert v. Fenton,* 115 Neb. 818, 215 N. W. 104. See, also, *Alexander v. O'Grady, ante,* p. 645, 290 N. W. 718.

The judgment or sentence of a court of record in a criminal case is thus supported by the usual presumptions of validity and regularity when thus attacked. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void. *Hulbert v. Fenton, supra; Michaelson v. Beemer,* 72 Neb. 761, 101 N. W. 1007; *In re Carbino,* 117 Neb. 107, 219 N. W. 846.

The relator cites no statute of this state requiring the judgment or sentence to specify the offense of which a person is convicted, and we have been unable to find any.

As applied to questions involved in habeas corpus proceedings, the true rule appears to be, viz.:

"Where an indictment charges distinct offenses in two or more counts it has been held that defendant cannot complain of a sentence on a general verdict which imposes punishment applicable to either offense without designating on which count it is based, because, it being impossible to say on which count the sentence applied, it would be held to apply to all." 16 C. J. 1282.

So also, "Upon a conviction of a defendant upon several counts charging distinct crimes, each complete in itself without reference to the other, the court may pass a separate and cumulative sentence on each count, or it may treat the conviction as for one crime, the highest charged, and may impose one legally appropriate penalty." 23 Standard Ency. of Procedure, 455.

Again, "A sentence and judgment upon an indictment containing several counts need not designate upon which

count it is based, unless statute requires it." 23 Standard Ency. of Procedure, 456.

We need not consider the question before us as though presented on appeal or by error. We are committed to the doctrine that habeas corpus is never allowed as a substitute for appeal or proceeding in error. *Hulbert v. Fenton, supra; Michaelson v. Beemer, supra.*

As to the failure of the trial court to provide relator with the services of an attorney, the rule appears to be, viz.:

"The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him." 16 C. J. 821.

So also, this court is committed to the view that, "A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by section 11, article I of the Constitution." *McCarty v. Hopkins,* 61 Neb. 550, 85 N. W. 540. See, also, *Smythe v. State,* 124 Neb. 267, 246 N. W. 461.

It follows, therefore, that the final order of the district court for Lancaster county denying relief to the relator was correct, and it is

AFFIRMED.

O. H. MEYER, APPELLANT, V. ADOLF J. PLATT ET AL., APPELLEES.

291 N. W. 86

FILED MARCH 22, 1940. No. 30777.

1. **Homestead.** Generally, where a homestead right of exemption has once attached to real property, that homestead property may be exchanged for another homestead and the right of exemption may follow and attach to the new homestead.
2. ———. The protection provided by section 40-116, Comp. St. 1929, for the proceeds of the sale of a homestead applies to property received in exchange for the homestead, not exceeding in value the amount of the exemption.
3. ———. The fact that an owner of an interest in real estate

denies his title will not deprive him of the benefit of the homestead exemption laws.

4. ———. A formal declaration that certain land has been selected as a homestead is not a necessary element in the establishment of the homestead right.

5. **Creditors' Suit.** Where other remedies are inadequate, an equity court has the power to take the unexempt property of a debtor, wherever found and in whatever condition it may be, and apply it to the payment of the debts of the owner.

APPEAL from the district court for Knox county: ADOLPH E. WENKE, JUDGE. *Reversed, with directions.*

Spillman & Ptak, for appellant.

Hutton & Mueting, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This is an equity action brought to subject land in Knox county to the lien of a judgment obtained by the plaintiff against the defendant Platt. The record title of the land is in the name of the defendant Else Hahn.

Plaintiff's petition alleges the recovery of a money judgment against the defendant Platt, the return of an execution unsatisfied, the insolvency of Platt; that the defendant Platt on January 7, 1938, purchased 160 acres of land in Knox county, and that, without consideration, and for the purpose of hindering and defrauding the plaintiff and other creditors, Platt "took the record title" of the real estate in the name of the defendant Hahn. Plaintiff prays that the property be found to be the property of Platt, that the premises be ordered sold as required by law and the proceeds thereof applied to the payment of plaintiff's judgment, and for equitable relief.

The defendants, answering jointly, deny generally the allegations of plaintiff's petition, and allege that (1) in February, 1932, Hulda Platt, wife of the defendant Platt, purchased certain land in Stanton county, which became and was their homestead from the time of purchase until the spring of 1938, that Platt had no interest in or to said

premises; that on January 7, 1938, Hulda Platt traded the Stanton county land for the Knox county land (involved herein); that Hulda Platt, being in ill health, agreed in writing with her daughter (the defendant Else Hahn) that Else Hahn should support the said Hulda during her lifetime and be responsible for her funeral expenses, and that Hulda Platt "placed" the title to the Knox county land in the name of Else Hahn for the consideration above given; that Platt never had or claimed any legal or equitable interest in the land; that Platt did not own the Stanton county land and does not own the Knox county land; that "the interest placed in the name of Else Hahn did not belong to Adolf J. Platt, but to Hulda Platt;" (2) that the equity owned by Hulda Platt and "by her turned over" to Else Hahn did not exceed $2,000, and that the same was a homestead not subject to fraudulent alienation in any event; (3) that the note upon which judgment was had was given September 13, 1932, at which time Platt was not the owner of any real estate; that real estate of Platt together with a note and cash of Hulda Platt had been exchanged for the Stanton county land and title thereto placed in the name of Hulda Platt, prior to the signing of the note upon which the judgment was had; that the bank knew on September 13, 1932, that Hulda Platt was the owner of the Stanton county land; that the transfer of the Stanton county land to Hulda Platt was more than five years prior to the bringing of this action or the securing of the judgment against Platt, and that this action is barred by the statute of limitations. Defendants pray that the action be dismissed. The reply is a general denial.

The case was tried upon the issues presented, and at the close of plaintiff's case, the defendants moved for a dismissal of plaintiff's action. The trial court sustained the motion. Plaintiff appeals from that decision.

The case comes to this court for trial *de novo* (Comp. St. 1929, sec. 20-1925) subject to the rule that:

"When defendant moves to dismiss plaintiff's action at the close of plaintiff's evidence, the defendant thereupon

admits the plaintiff's testimony to be true, together with every conclusion which may fairly and reasonably be drawn therefrom.

"The court must thereupon determine, as a question of law, whether plaintiff's evidence is sufficient to support a judgment for the plaintiff." *Schroeder v. Bartlett,* 129 Neb. 645, 262 N. W. 447.

The ultimate question to be determined is: Does the defendant Platt own the Knox county land or an interest therein? This requires a review of the evidence.

The plaintiff called as his witnesses, among others, the defendants Platt and Hahn. The testimony of the plaintiff's witnesses fairly and reasonably establishes the following facts.

The defendant Hahn is the daughter of the defendant Platt and Hulda Platt. Prior to October 30, 1931, the defendant Platt became indebted to the First National Bank of Madison. This debt was evidenced by the usual promissory note. This note was renewed in September, 1932, and subsequently became the property of the plaintiff. Judgment was recovered thereon against the defendant on July 13, 1938; a transcript thereof was filed with the clerk of the district court of Knox county August 6, 1938; execution was issued and was returned unsatisfied. The judgment has not been paid.

On or before September 12, 1931, the defendant Platt became the owner of a tract of land in Platte county. The Platte county land, and a lease with the notes for cash rent thereon, were conveyed to one Filter in March, 1932, in exchange for a 320-acre tract in Stanton county. The lease and the cash rent notes were in the name of the defendant Platt and were assigned to Filter by Platt. The Platte county land was not the homestead of the Platts.

The exchange contract provided that the Stanton county land should be conveyed subject to a $13,000 mortgage, and that as a part of the purchase price the Platts should give to Filter a second mortgage thereon for $3,500. When the deed conveying the Stanton county land from Filter to Platt

was being prepared, Platt ordered his attorney to "put that property in my wife's name right away." Concurrently therewith, the Platts mortgaged the land to Filter to secure the promissory note of the defendant Platt for $3,500. The consideration for the deed from Filter to Mrs. Platt all moved from the defendant Platt.

The Platts entered into possesssion of the Stanton county land and occupied the same as their homestead from the spring of 1932 until about March 1, 1938. During the years 1932 to 1934, the defendant Platt leased the land and collected the rents, and thereafter farmed the land, and at all times exercised rights of ownership therein and referred to the land and the crops thereon as "his."

On January 7, 1938, Platt traded the Stanton county land for the land in Knox county involved in this action. The deed conveying the Knox county land recited a consideration of $4,000, and in that deed, the defendant Else Hahn was named as grantee. No consideration moved from the defendant Hahn to the grantor for said conveyance. About March 1, 1938, the defendant Platt with one daughter moved to the Knox county land and farmed the same. His wife, Hulda, afflicted with a fatal illness, and one other daughter lived with the defendant Hahn at Madison, Nebraska. So far as the record shows, the defendant Platt was residing on the Knox county land at the time of the trial.

Platt testified that he worked for his daughter in 1938, operating the farm without pay as "manager and worker." However, Mrs. Platt had a lease from the defendant Hahn for the premises, and Mrs. Hahn had her mother's note for cash rent of the land.

Platt painted and repaired the buildings, fences, etc., and testified that Mrs. Hahn bought the paint, but it was charged to him and he paid for it out of "her" crop.

Shortly after the conveyance of January 7, 1938, the defendant Platt told his nephew that "he made a good trade and he signed the farm over from Hulda to Else and got a deed back from Else and when she gets smart he wants to

put that deed on record," and that he had the Knox county land placed in Else Hahn's name. Platte referred to the corn raised on the Knox county land as "his corn." In the spring of 1938, the defendant Platt tried to get a loan on the Knox county land "to pay off the interest of his daughter Else Hahn and pay some taxes and make repairs on the improvements." He tried to sell "my place" that was "in the name of Else Hahn."

January 8, 1938, the day after "they made the deal," Hulda Platt told the defendant Hahn about "this deal," and the deed, and "she told me it was made to me to take care of her because she was very ill at that time, to take care of her and take care of her doctor bills and such things as long as she lived," and that they discussed the consideration for the deed the first time on January 8, 1938 (the day after the deed was made placing the title in her name). The defendant Hahn further testified that the Knox county land was "filed" in her name.

The value of the Stanton county land is not shown. The value of the Knox county land is shown to be from $3,200 to $4,000.

The plaintiff has submitted his evidence and rested. The defendants by their motion have submitted the matter to the court for determination. This court, having jurisdiction of the persons and subject-matter, will afford complete relief and determine finally the controversy between the contending parties upon the record which they have made.

The trial court found that the Stanton county land was "in fact the property" of Platt and sustained the defendants' motion to dismiss upon the theory that the Stanton county land was the homestead of the Platts, that their equity therein did not exceed $2,000 in value, that it could be conveyed free of judgment liens, and that the indirect conveyance to the defendant Hahn was no different than if the Platts had conveyed the Stanton county land to the daughter (defendant Hahn) and she in turn had exchanged it for the Knox county land.

The Stanton county land was the homestead of the defendant Platt and his wife, Hulda. It is true that there were 320 acres in the Stanton county land and that the homestead exemption attached to but 160 acres. The land was heavily encumbered. The Platts would have had the right to have segregated 160 acres as a homestead and to have required that the remaining 160 acres be first sold to satisfy liens thereon, removing so far as possible the liens against the 160 acres which they could have claimed as a homestead, and in which they could claim the statutory $2,000 exemption from sale to satisfy judgment creditors. So, as a practical proposition, the Platts had an exemption of $2,000 in the Stanton county land so far as a judgment creditor was concerned. See *Smith v. Neufeld,* 57 Neb. 660, 78 N. W. 278.

The homestead exemption which Platt had in the Stanton county land attached to the Knox county land. "It is a general rule that a homestead once acquired may be exchanged for another, and, when that is done, the homestead privileges and rights attach to the new as they formerly did to the old homestead." 13 R. C. L. 588, sec. 52. See 29 C. J. 837. By section 40-116, Comp. St. 1929, if the homestead be conveyed by the claimant, the proceeds of the sale, not exceeding the amount of the exemption, shall be entitled, for six months thereafter, to the same protection which the law gives to the homestead and the sale and disposition of one homestead shall not be held to prevent the selection or purchase of another. See *Prugh v. Portsmouth Savings Bank,* 48 Neb. 414, 67 N. W. 309. Property received in exchange not exceeding in value the amount of the exemption is protected by the statute. See *Derby v. Weyrich,* 8 Neb. 174; *Dargan v. Williams,* 66 Neb. 1, 91 N. W. 862; *Scheel v. Lackner,* 4 Neb. (Unof.) 221, 93 N. W. 741; *Witt v. Teat,* 167 S. W. (Tex. Civ. App.) 302; *Corey v. Plummer,* 48 Neb. 481, 67 N. W. 445.

Following the exchange, Platt removed to the Knox county land, lived thereon with one of his children, and improved the land and buildings. His wife Hulda, because of her ill-

ness, which was fatal, did not reside there with him, but lived with the defendant Hahn. The fact that by his answer he disclaimed ownership of the Knox county land and testified that the defendant Hahn owned the land will not deprive him of the benefit of the exemption laws. *State v. Carson*, 27 Neb. 501, 43 N. W. 361; 22 Am. Jur. 107, sec. 140; 25 C. J. 122. A formal declaration by Platt that he had selected the Knox county land as a homestead is not necessary. *Foltz v. Maxwell*, 100 Neb. 713, 161 N. W. 254.

The Platts could have conveyed their equity, of not exceeding $2,000 in value, in the Stanton or Knox county land to the defendant Hahn free from the existing debts of Platt. *Bank of Bladen v. David*, 53 Neb. 608, 74 N. W. 42. However, they did not do so. The Stanton county land was not conveyed in fee to the defendant Hahn. Title to the Knox county land was "placed" in the defendant Hahn as security to assure the payment of certain expenses of the last illness and death of Hulda Platt. Hulda Platt was not the owner of the Stanton county land. Whatever interest she had therein was limited to the homestead exemption.

Transactions of this character between close relatives are presumptively fraudulent as to existing creditors, and in litigation between creditors and the parties thereto, the burden is on them to establish the good faith of the transaction by a preponderance of the evidence. *Riggs v. Hroch*, 133 Neb. 260, 274 N. W. 598.

The defendant Hahn has not established ownership of the Knox county property or claim thereto over and above the homestead exemption. Beyond that exemption, the property belongs to Platt. Whatever claim the defendant Hahn may have against the $2,000 of exempt value is not before us and is not determined.

Had Platt taken the title to the Knox county land in his own name, it would have been subject to the lien of the plaintiff's judgment junior to the homestead exemption.

Should an equity court hold it subject to the judgment under the circumstances here presented?

"It has always been one of the powers possessed by courts

of equity to compel the application of a debtor's unexempt property to the payment of his debts when the creditor had no other means of redress. * * * When all other remedies have failed, a court of equity will, at the suit of a creditor, take the unexempt property of a debtor wherever found, in whatever condition it may be, and cause it to be applied towards the payment of his debt." *Arlington State Bank v. Paulsen*, 57 Neb. 717, 734, 78 N. W. 303. See *Millard v. Parsell*, 57 Neb. 178, 77 N. W. 390; 15 C. J. 1401; 14 Am. Jur. 707, sec. 60, note 17. Fraud is not an element to be proved by the plaintiff in such a case. *Weckerly v. Taylor*, 74 Neb. 84, 103 N. W. 1065; *Cochran v. Cochran*, 62 Neb. 450, 87 N. W. 152.

The record establishes the following facts: (1) Platt owned the Platte county land which was exchanged for the Stanton county land. (2) Although the title to the Stanton county land was placed in the name of Hulda Platt (the wife), it was in fact the property of Platt, and he was (as the trial court found) the equitable owner thereof. (3) The Stanton county land became the homestead of the Platts and the statutory homestead exemption attached thereto. (4) Platt likewise, by the exchange, became the equitable owner of the Knox county land. (5) Platt's right of homestead exemption attached thereto. (6) The defendant Hahn held title thereto not as owner of the fee, but under claim of title as security for money advanced for the care of Hulda Platt. (7) This claim, if valid, attaches to the homestead exemption, and not to any excess value therein above $2,000, for the reason that no consideration for the Knox county land moved to Platt from either his wife or daughter. (8) Whatever value there may be in the Knox county land above $2,000 belongs to Platt and is subject to the satisfaction of the plaintiff's judgment.

The cause is reversed and remanded to the trial court, with instructions to enter a decree in accord with this opinion.

REVERSED.

JOHN WILBERT DILL ET AL., APPELLANTS, V. HOWARD W. HAMILTON ET AL., APPELLEES.

291 N. W. 62

FILED MARCH 22, 1940. No. 30577.

1. **Action.** The relief grantable in a proceeding for a declaratory judgment extends to the construction or validity of a statute, where there is a justiciable, determinable controversy between the parties in respect to rights or penalties thereunder. Comp. St. 1929, sec. 20-21,141.
2. ———. Relief in a proceeding for a declaratory judgment in a justiciable case may depend on the construction or validity of a statute.
3. ———. Plaintiffs are not required to violate a penal statute as a condition of having it construed or its validity determined in a proceeding for a declaratory judgment.
4. ———. Jurisdiction of a court to pronounce a declaratory judgment is not lacking merely because the construction or validity of a statute authorizing a fine and an imprisonment is necessary to a decision.
5. **Criminal Law.** A statute authorizing imprisonment for violation of its provisions imposes no restrictions on conduct except those specifically enumerated in the legislative act.
6. **Theaters and Shows.** The act to prohibit "all public exhibitions of hypnotism, mesmerism, animal magnetism, or so-called psychical forces, for gain," does not prohibit spiritualistic seances, unless they are public and open and for gain. Laws 1911, ch. 182, sec. 1; Comp. St. 1929, sec. 28-1111.
7. **Constitutional Law.** The making of a public exhibition of religious worship in the form of a seance, for gain, on the stage or at a carnival, fair, circus, or show is not a religious liberty guaranteed by the Constitution.
8. **Theaters and Shows.** The police power to prohibit public exhibitions for money-making purposes or for gain extends to harmful, immoral or indecent performances, though conducted in the name of religion, and violators of such prohibitions are subject to statutory penalties therefor.
9. ———. A guaranty of $15 to remunerate a medium for conducting a spiritualistic seance as a religious ceremony in the worship of God and the creation of the fund by voluntary contributions of communicants of the Spiritualistic Church do not amount to "gain" within the meaning of the statute forbidding public seances for gain.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Roland Max Anderson, for appellants.

Robert B. Waring and *John C. Gewacke, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS, District Judge.

ROSE, J.

Under the declaratory judgment act, plaintiffs, alleging they are officers or members and communicants of the Spiritualist Church, applied to the district court for Fillmore county for a judgment declaring their right to worship God according to their religious beliefs, tenets of faith, ceremonies and rituals, including spiritualistic seances, and also declaring the law to be such as to prevent defendants, who are prosecuting, executive and judicial officers, from interfering with the religious freedom and the devotional exercises of plaintiffs.

The petition contains allegations disclosing incorporation of the Spiritualist Church, its membership, tenets of religious faith, ceremonies and rituals, interference therewith by defendants and threats of future prosecutions for violations of the statute forbidding public exhibitions of religious seances for gain.

Defendants assailed the petition by demurrer which was sustained by the district court and the proceeding dismissed. Plaintiffs appealed.

The demurrer challenges the sufficiency of the petition to state a justiciable case for a declaratory judgment. The determination of the issue thus raised depends on the power conferred upon the courts by the declaratory-judgment act, on the meaning and validity of the act to prohibit all public exhibitions of psychical forces or seances conducted by a spiritualistic medium for gain, and on the allegations of the petition. Declaratory judgments are authorized by the following provisions of statute:

"The supreme court and courts of general chancery and common-law jurisdiction shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." Laws 1929, ch. 75, sec. 1; Comp. St. 1929, sec. 20-21,140.

"Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder." Laws 1929, ch. 75, sec. 2; Comp. St. 1929, sec. 20-21,141.

"The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Laws 1929, ch. 75, sec. 6; Comp. St. 1929, sec. 20-21,145.

The statute under which the present controversy arose provides:

"Any person or persons who shall hereafter take part in, practice, assist, or become a subject in giving a public, open exhibition or seance or show of hypnotism, mesmerism, animal magnetism or so-called psychical forces for gain shall be deemed guilty of a misdemeanor." Laws 1911, ch. 182, sec. 1; Comp. St. 1929, sec. 28-1111.

Violations of the act subjects the violators upon conviction to fine or imprisonment or both. Plaintiffs allege and contend that they are threatened by defendants with prosecutions for conducting spiritualistic seances as religious exercises authorized by their established mode of worship,

that defendants construe the act to authorize such prosecutions, and that so construed it is unconstitutional. The petition alleges further than John Wilbert Dill, one of the plaintiffs, is an ordained spiritualistic medium and minister of the Gospel; that he was formerly prosecuted, convicted and fined for alleged violation of the penal statute quoted and paid the fine to avoid imprisonment. Other members of the church are also plaintiffs herein, but no attempt is now made to substitute this proceeding for a new trial in the criminal prosecution or for an appeal or for another action. The former prosecution of Dill is not material to the proceeding at bar except perhaps to indicate a controversy and the necessity for a declaratory judgment. The relief grantable in a proceeding for a declaratory judgment extends by the very terms of the legislative act to the construction or validity of a statute, where there is a justiciable, determinable controversy between the parties in respect to "rights, status or other legal relations thereunder." Plaintiffs, seeking a declaratory judgment, are not required in advance to violate a penal statute as a condition of having it construed or its validity determined. "Declaratory judgment proceedings," says a text, "have frequently been employed to determine questions as to the construction or validity of statutes." 16 Am. Jur. 296, sec. 24. Another writer on the same subject, citing cases, says:

"The danger of a criminal penalty attached by law to the performance of an act affords those affected the necessary legal interest in a judgment raising the issue of validity, immunity, or status." Borchard, Declaratory Judgments, p. 47.

The supreme court of Nebraska by unanimous opinion adopted the following views expressed by the supreme court of Kansas:

"It is hardly conceivable that any fundamental principle of our government, beyond legislative control, prevents two disputants, each of whom sincerely believes in the rightfulness of his own claim, but each of whom wishes to abide by the law whatever it may be determined to be, from obtain-

ing an adjudication of their controversy in the courts without one or the other first doing something that is illegal (in the case of the present defendant criminal) if he is mistaken in his view of the law." *Lynn v. Kearney County,* 121 Neb. 122, 236 N. W. 192; *State v. Grove,* 109 Kan. 619, 201 Pac. 82.

Jurisdiction of a court to render a declaratory judgment is not, therefore, lacking merely because the construction or validity of a penal statute is necessary to a decision. In view of the conclusions of law reached in connection with the facts stated in the petition and admitted by the demurrer, the petition is not demurrable. The ruling below to the contrary is erroneous.

Does the act prohibiting "all public exhibitions of hypnotism, mesmerism, animal magnetism, or so-called psychical forces, for gain," deprive plaintiffs of religious rights guaranteed by the federal and state Constitutions? The language quoted is from the title of the act and is not legislation but indicates the subject of legislation. Alleged illegal interference with religious seances conducted by a spiritualistic medium is the subject of controversy. The prohibitions of the act itself are in this form:

"Any person or persons who shall hereafter take part in, practice, assist, or become a subject in giving a public, open exhibition or seance or show of hypnotism, mesmerism, animal magnetism or so-called psychical forces for gain shall be deemed guilty of a misdemeanor." Laws 1911, ch. 182, sec. 1.

Plaintiffs allege in substance that defendants so construe the act "as to deprive the plaintiffs as members and officers of the Spiritualistic Church of their constitutional rights to freedom of religious worship;" that the Spiritualist Church is a religious society organized, existing and doing business for sectarian and religious worship of Almighty God in accordance with the divine word of the Holy Bible; that seances are among the rites and ceremonies of the Spiritualist Church; that one form of worship is designated by the ordinance and canons of the church as a "seance;" that "A

medium is one whose organism is sensitive to vibration from the spirit world and through whose instrumentality intelligences in that world are able to convey messages and produce the phenomena of spiritualism;" that a seance constitutes one of the most formal and solemn religious services of the Spiritualist Church; that the remuneration of a spiritualistic medium for conducting a religious seance was the authorized, guaranteed, fixed sum of $15 to be raised by voluntary contributions of local communicants in attendance at religious meetings.

A statute authorizing imprisonment for violations of its provisions imposes no restrictions on conduct except those specifically enumerated in the legislative act. The act to prohibit "all public exhibitions of hypnotism, mesmerism, animal magnetism, or so-called psychical forces, for gain," does not prohibit spiritualistic seances, unless they are public and open and for gain. Laws 1911, ch. 182, sec. 1; Comp. St. 1929, sec. 28-1111. The words "psychical forces" as used by the lawmakers apply to a seance conducted by a spiritualistic medium, but his act as such does not violate the statute unless it is "public" and "open" and "for gain." Spiritualistic seances are not of themselves denounced by the lawmakers as criminal. The making of a public exhibition of religious worship in the form of a seance for gain on the stage or at a carnival, fair, circus, or show is not a religious liberty guaranteed by the Constitution. The police power to prohibit public exhibitions for money-making purposes or "for gain" extends to harmful, immoral, or indecent performances, though conducted in the name of religion. These are evils against which the statute is directed. Persons or members of any organization or society committing such offenses are amenable to the law and subject to prosecution and punishment. Plaintiffs, however, disavow any intention to commit such offenses. The act to prohibit "all public exhibitions of hypnotism, mesmerism, animal magnetism, or so-called psychical forces, for gain," does not prohibit spiritualistic seances, unless they are public and open and for gain. Laws 1911, ch. 182, sec.

1; Comp. St. 1929, sec. 28-1111. The statute as herein construed is a valid exercise of police power.

With the truth of the allegations of the petition admitted by the demurrer, a guaranty of $15 to remunerate a medium for conducting a spiritualistic seance as a religious ceremony in the worship of God and the creation of the fund by voluntary contributions of communicants of the Spiritualist Church do not amount to "gain" or a violation of law within the meaning of the statute forbidding public seances for gain.

The district court erred in sustaining the demurrer and in dismissing the proceeding, and for those errors the judgment is reversed. Defendants, however, are permitted to plead further, if so advised, but if they fail to do so, the district court, in that event, is instructed to enter a declaratory judgment conforming to the views herein expressed.

REVERSED.

PAINE, J., dissenting.

This is a difficult case. It was first argued to this court on March 20, 1939, and no opinion being adopted by a vote of four members of the court, it was ordered reargued on January 17, 1940, and has been given careful and patient study by the members of this court.

From the decision now adopted, I respectfully dissent, for in my opinion it is simply an attempt to appeal in a criminal case by use of the declaratory judgment law. Mr. Dill was arrested, and pleaded not guilty in the county court. Trial was had. Witnesses were called by each side, and he was found guilty and fined $25 and costs, and, deciding not to appeal to the district court, paid his fine and costs.

In the statutes of Nebraska, we find the declaratory judgment law in the chapter entitled, "Civil Procedure, District Court," and several of the sections relating thereto are set out in the main opinion.

In the outstanding text on the declaratory judgment law, it may be admitted that the one sentence set out in the main opinion can be found on page 47 in Borchard that appears to indicate that the validity of the criminal penalty may be

tested by the declaratory judgment act, but I maintain that the general trend of this author is against the proposition. Let us examine other references:

"The declaratory action is not a substitute for a new trial or an appeal from a former judgment deciding identical issues or issues which the court believes were passed upon." Borchard, Declaratory Judgments, 181. But, on page 562, we find this paragraph: "Far more interesting are the cases in which the plaintiff, threatened with criminal penalty, * * * demands the construction or interpretation of the statute to the end of establishing his privilege or freedom from the threatened sanction."

This statement in Borchard's text would appear to sustain the position of plaintiff in the case at bar. However, a careful examination of each of the cases given in the text as the authority upon which the author bases these statements does not support the theory. The cases are as follows:

"*Fraser v. Campion,* 29 N. Z. 1009 (1910) (that private burial ground was 'burial ground' within statute, otherwise deed would be void as contrary to rule against perpetuities);

"*Budge v. Bayly,* 31 N. Z. (1911) (whether lease had been validly renewed under statute—lessor v. lessee);

"*Grubner v. Wright,* (1921) N. Z. 394 (whether defendant could purchase Crown leasehold for son).

"*Lindsey v. Drane,* 154 Tenn. 458, 285 S. W. 705 (1926) (to impound trespassing animals or enforce lien for damages);

"*In re Joel's Lease; Berwick v. Baird,* (1930) 2 Ch. 359 (that defendant's lease did not constitute statutory 'holding' and that no notice necessary to terminate it);

"*Wesleyan & Gen. Ass'ce Soc. v. Attorney-General,* (1933) Ch. 591 (whether, under statute, profits from industrial insurance could be applied for benefit of ordinary life policyholders);

"*Loyal Marlborough Lodge v. Rogers,* 29 N. Z. 141 (1909) (plaintiff's privilege of buying in property sold by him as mortgagee);

"*University of New Zealand v. Solicitor-General,* (1917)

N. Z. 353 (method of university administration under statutes);

"*Rowley v. Canterbury Slaughtermen's Indus. Union of Workers,* (1918) N. Z. 684 (meaning of 'same industry' for determination of question whether two unions were privileged to unite);

"*Heel v. O'Neill,* (1933) N. Z. 319 (effect of Expenditure Adjustment Act on lease between plaintiff and defendant, former asserting defendant's no-right to make deductions from rent)."

Can it be said that any one of these cases will support a finding that relief will be granted under declaratory judgment law against a conviction for a violation of a criminal law?

From an examination of these citations, does it not appear that they are in accord with the statement in *Sheldon v. Powell,* 99 Fla. 782, 128 So. 258, to the effect that the application of the declaratory judgment act is held restricted to suits in equity by those interested under deeds, wills, contracts, or other written instruments?

In England and the British Dominions, declaratory judgments have been in effect for a much longer time than in the United States. We find in British reports many guiding precedents for the exercise of court's discretion. In *Russian Commercial & Industrial Bank v. British Bank,* 90 L. J. K. B. n. s. 1089, it was said by the House of Lords: "The question in what cases the jurisdiction to give a declaratory judgment should be exercised has been considered in a number of cases which were called to our attention by counsel for the appellants. It should be exercised *'sparingly'* * * * 'with *care* and *jealousy'* * * * *'with extreme caution.'*" (Italics mine.) See 34 Law Notes, 48 (June, 1930).

In annotations, 68 A. L. R. 110, and 114 A. L. R. 1361, the illustrative cases on declaratory judgments cover matters relating to estates and trusts, validity of instruments, such as wills, contracts, leases, insurance policies, bills of sale, mortgages, deeds of trust, and assignments, covering the same matters set out in section 20-21,141, Comp. St. 1929.

No case is cited like the one at bar, wherein a person, who has been tried and found guilty, decided to close up the matter and pay his fine, rather than appeal to the district court, in which he could have been tried on the charge by a jury, but who, on the other hand, thereafter attempted to test out the question by bringing a declaratory judgment action, threatening to commit the same acts a second time, and desiring to find out in advance from the supreme court whether he could again be found guilty.

It is also well settled here, as in England, that relief by declaration of right or a declaratory judgment is discretionary with the court, and the power of the court in this regard will be exercised with caution.

Many courts have held that, the trial court having exercised its discretion and decided not to give relief under this declaratory judgment law, the supreme court should not reverse the trial court unless this court can find that its ruling was an abuse of its discretion, which has not been shown in this case.

May I call attention to another insurmountable obstacle which faces this court in attempting to determine and limit in advance what a criminal statute of our state would or would not cover. I refer to the fact that in this case the state of Nebraska was not made a party.

Section 20-21,150, Comp. St. 1929, specifically requires: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

Section 20-21,152, Comp. St. 1929 (of the declaratory judgment act), defines "person" as including, among others, municipal or other corporations, but does not specifically include the state of Nebraska, and the state is not ordinarily bound by any act unless especially mentioned therein. For this court has said in *State v. Boone County,* 78 Neb. 271, 110 N. W. 629: "In this country it is generally held that the sovereign power is not bound by general words in a statute, but only when included expressly or by necessary implication."

All criminal prosecutions in this state are brought in the name of the state of Nebraska, and in the case at bar the state of Nebraska is not made a party, but only the county judge, county attorney, and sheriff of one of the 93 counties of Nebraska. We note that there appears in the transcript an acknowledgment by the attorney general of service, and receipt of copies, and notice of the proceedings, but in my opinion this does not in any way make the state of Nebraska a party to this case. See *Anstine v. State, ante,* p. 148, 288 N. W. 525.

"The presumption of a legislative intent to exclude the state from the operation of a statute is based on the fact that laws are ordinarily made for the government of citizens and not of the state, and the probability that, if the legislative power intended to divest the sovereign power of any right, privilege, title or interest, it would say so in express words. Where an act contains no words to express such an intent, it will be presumed that the intent does not exist." 25 R. C. L. 784, sec. 32.

"Declaratory judgments act is applicable only where there is a present, actual controversy, and only where justiciable issues are presented and all persons are made parties to the proceeding." *Dobson v. Ocean Accident & Guarantee Corporation,* 124 Neb. 652, 247 N. W. 789, in which the judgment was refused because the city was not made a party to the proceeding, and would not be concluded by any judgment in the action. See, also, 12 Neb. Law Bulletin, 262; *Smithberger v. Banning,* 130 Neb. 354, 265 N. W. 10.

Therefore, I submit the question: If an action to limit by interpretation one of our criminal laws would lie under the declaratory judgment act, would not the state, instead of one of 93 county attorneys, be an absolutely necessary party?

A declaratory judgment should be denied in all cases where it is evident that it is designed to take the place of an appeal. If all parties are not joined, it is proper to dismiss an application for a declaratory judgment because it failed in its essential purpose.

"More often, however, the court dismisses the proceed-

ing, on the ground that some designated necessary party or parties should have been heard, not only for the information of the court but because such a party might be affected by, even though not bound by, the decision; and in so conclusive a proceeding it would be neither just nor proper to render a judgment without hearing and binding such interested person." Borchard, Declaratory Judgments, 104.

There is a difference of opinion as to the nature of declaratory judgment proceedings. It has been held that they are equitable in nature. *Town of Manchester v. Town of Townshend,* 109 Vt. 65, 192 Atl. 22, 110 A. L. R. 811.

In other cases, the declaratory judgment act is regarded as a step to obliterate the twilight zone between law and equity, even though it has been held that a court of equity may not declare a purely legal right. 87 A. L. R. 1245; 16 Am. Jur. 289, sec. 15.

In a recent opinion by this court, it was unanimously held: "The declaratory judgment law is not substitute for new trial or appeal, nor does it operate to supersede former adjudications or proper proceedings already pending in a court having jurisdiction of parties and subject-matter." *Phelps County v. City of Holdrege,* 133 Neb. 139, 274 N. W. 483.

"The purpose of the declaratory judgment act was to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated had been properly adjudicated. In other words, it was never intended as a substitute for a new trial, or other steps that the Code requires to be taken in the same action, or for an appeal to this court. In the circumstances, the court below should have dismissed the proceeding and not have proceeded to adjudicate the rights of the parties." *Back's Guardian v. Bardo,* 234 Ky. 211, 27 S. W. (2d) 960.

In *State v. General American Life Ins. Co.,* 132 Neb. 520, 272 N. W. 555, we determined that the state of Nebraska might seek relief under the declaratory judgment act, but that is easily distinguished from the case at bar.

Section 20-21,145, Comp. St. 1929, reads: "The court

may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

Our Constitution reposes in the constitutional jury the ultimate and final right of determining facts in cases involving the punishment of crimes, and provides that the right thereto shall remain inviolate, and that all persons accused of a crime shall be entitled to a speedy public trial in the county where the offense is alleged to have been committed, with full right of appeal to this court.

Courts of equity and tribunals vested with powers of decision under the declaratory judgment act may not expressly, or by necessary implication, usurp power in violation of the constitutional guaranties of jury trials, and attempt to set up acts which will, or will not, render one guilty under a criminal law.

In my opinion, it would not be proper to enter a declaratory judgment in the case at bar, and the trial court was right in sustaining the demurrer and dismissing the petition.

STATE. EX REL. WILLIAM H. WRIGHT, ATTORNEY GENERAL, PLAINTIFF, V. GEORGE E. HINCKLE, DEFENDANT.
291 N. W. 68

FILED MARCH 22, 1940. No. 30016.

1. **Contempt.** "Where a contempt proceeding is instituted by information and a rule to show cause, it is the duty of the defendant to file an answer if he desires to traverse the facts charged. Failing on sufficient opportunity to so do, the court may treat the facts alleged in the information as confessed." *Nebraska Children's Home Society v. State*, 57 Neb. 765, 78 N. W. 267.
2. **Attorney and Client.** "The supreme court possesses the inherent power to punish for contempt any person assuming to practice law within the state without having been duly licensed so to do." *State v. Barlow*, 131 Neb. 294, 268 N. W. 95.

3. ———. The practice of law includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in court.
4. ———. Record examined and *held* sufficient, under the circumstances, to support a judgment of guilty of contempt of court, in violation of section 20-2121, Comp. St. 1929.

Original action for contempt by the state, on the relation of the attorney general, against George E. Hinckle. *Defendant held guilty of contempt.*

Walter R. Johnson, Attorney General, and *Rush C. Clarke,* for plaintiff.

George E. Hinckle, pro se.

Heard before ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

On September 21, 1936, application for leave to file information, affidavit and motion for citation for contempt of court was filed in the supreme court of Nebraska by William H. Wright, then attorney general, against the defendant, George E. Hinckle, and others. On the same day leave was granted by the court to file the aforesaid instruments and the same were filed. The prayer of the information was that this court make and enter an order, directing the defendants to appear before this court and make answer, if any there be, on the 26th day of October, 1936, and show cause by such answer why defendants should not be punished for contempt of court for the commission of the offenses set forth in the information. The record does not contain an answer by defendants.

On February 24, 1940, the state of Nebraska filed a motion in this court, supported by an affidavit, praying the court that an attachment or warrant be issued for the apprehension and arrest of defendant George E. Hinckle, and that he be brought before the court, at a time to be fixed by the court, to show cause, if any there be, why he should not be punished for contempt, as prayed in said original infor-

mation. February 24, 1940, the court ordered the arrest of defendant George E. Hinckle, and that he be brought before the court, to be dealt with according to law. In furtherance of this procedure, the court made a finding that there was danger that defendant Hinckle would depart the jurisdiction of the court before the expiration of the time fixed by the court when he may appear and show cause why he should not be punished for contempt, as prayed in the original information; ordered the arrest of the defendant; fixed the amount of his bail in the sum of $1,000; ordered that in default thereof said defendant be committed to the county jail of Lancaster county; and directed the defendant to appear before this court and make answer, if any there be, on the 11th day of March, 1940, at 9 o'clock a. m., and then and there show cause, if any there be, why he should not be punished for contempt of this court for the commission of the offenses, and every one thereof, set forth in the original information.

On March 12, 1940, at 9 o'clock a. m., the supreme court convened in regular session for the purpose of the further hearing of this cause. Rush C. Clarke, assistant attorney general, appeared for and in behalf of the state; defendant Hinckle did not appear by an attorney, did not file a written answer in this cause and was found to be in default of answer, but was personally present. After being first duly sworn, he voluntarily made a statement to the court, which was reduced to writing, and became a part of the record in this case.

This is an original action for contempt for the illegal practice of law by the defendant, George E. Hinckle, and others. The case proceeded as against defendant Hinckle.

We believe that it would unnecessarily lengthen this opinion to set forth each of the 17 charges separately, and we are content with the statement that each charge is in detail, specific and conclusive as to constitute an offense as claimed. The substance of the charge and charges is that this defendant wilfully, knowingly, contumaciously, unlawfully and intentionally engaged in the practice of law

without a license so to do, and pretended to practice law as such attorney, in violation of chapter 7, Compiled Statutes of Nebraska for 1929, section 7-101 of which reads in part: "No person shall be admitted to practice as an attorney or counselor at law, or commence, conduct, or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings, or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the supreme court of this state;" that this defendant engaged in "ambulance chasing," in direct contempt of this court, and did engage in the practice of stirring up strife and litigation, without respect for and in direct contempt of the power, dignity and authority of this court to regulate the conduct and practice of law in this state, and the due administration of justice therein, and of all other lawfully created courts of this state.

Defendant Hinckle admits the truth of the original information and the separate counts stated therein by failing to answer and deny the same, after having received due and proper notice.

This court, in *Nebraska Children's Home Society v. State*, 57 Neb. 765, 78 N. W. 267, held: "Where a contempt proceeding is instituted by information and a rule to show cause, it is the duty of the defendant to file an answer if he desires to traverse the facts charged. Failing on sufficient opportunity to so do, the court may treat the facts alleged in the information as confessed."

In defendant Hinckle's voluntary statement to the court, he admitted that for a long period of time he had been engaged in "ambulance chasing," and offered in mitigation thereof the fact that he was required to earn a livelihood and was ignorant of the seriousness of the offense, but he stated that he thought the practice was wrong, and he detailed some of his experiences which are not pertinent to this particular case.

" 'Ambulance chasing' is generally used to designate the

activities of those laymen who acquaint themselves with the occurrence of accidents and approach the injured persons or their representatives with a view toward soliciting employment for an attorney at law in the conduct of litigation arising from the accident." Annotation, 73 A. L. R. 401.

In the case of *Matter of Rothbard,* 225 App. Div. 266, 232 N. Y. Supp. 582, it was said: " 'Ambulance chasing' with its evils has been a matter of common knowledge for many years. The laymen, who were a part of it, were instrumental in stirring up litigation upon claims without merit, in falsely enlarging the amount of damages and in committing subornation of perjury. They procured retainers when the injured person was unable to appreciate his rights. * * * All in all, it became a low order of business, intolerable in the practice of a noble profession. Attorneys who associated with such men have been dull, indeed, not to understand what was going on, even if they did not actively participate. * * * As a result of these methods, * * * there developed an unwholesome business; relentless search for material gain had displaced love of duty; interest of client was subordinated to self-interest; sordid gain, instead of duty to state and client, motivated interest and activity." All of the things mentioned under this definition of "ambulance chasing" are included in the original information to which the defendant did not answer.

In *State v. Barlow,* 131 Neb. 294, 268 N. W. 95, this court held: "The supreme court is vested with the sole power to admit persons to the practice of law in this state and to fix the qualifications for admission to the bar" (Const. art. II, sec. 1; art. V, secs. 1, 25), and "possesses the inherent power to punish for contempt any person assuming to practice law within the state without having been duly licensed so to do." See, also, *State v. Daugherty,* 136 Neb. 490, 286 N. W. 783.

The practice of law is not confined to performing services in a proceeding, but also includes preparation of legal instruments. 7 C. J. S. 703. "In a larger sense, it includes legal advice and counsel, and the preparation of legal in-

struments and contracts by which legal rights are secured, although such matter may or may not be pending in a court. To 'practice law' is to carry on the business of an attorney at law; to do or practice that which an attorney or counselor at law is authorized to do and practice; to exercise the calling or profession of the law, usually for the purpose of gaining a livelihood, * * * to make it one's business to act for * * * others in legal formalities, negotiations or proceedings." 7 C. J. S. 703.

"One who confers with clients, advises them as to their legal rights, and then takes the business to an attorney and arranges with him to look after it in court is engaged in the practice of law." *State v. Perkins,* 138 Kan. 899, 908, 28 Pac. (2d) 765. See, also, *Depew v. Wichita Association of Credit Men,* 142 Kan. 403, 49 Pac. (2d) 1041.

"The practice of law in which laymen may not engage is not limited to practice in court proceedings, but comprehends all the activities of a lawyer in advising and assisting others in all matters of law, both in and out of court." *Rhode Island Bar Ass'n v. Automobile Service Ass'n,* 100 A. L. R. 226 (55 R. I. 122, 179 Atl. 139).

An all-embracing definition of the term "practice of law" would involve great difficulty. In the instant case, the practice of law would include consultation with persons receiving injury and damage by virtue of an automobile accident, apprising them of their rights and of the legal liability of other parties; advising them in procuring the services of certain counsel; arranging for taking a contract for a retainer, fixing the amount thereof, and advising such persons as to the cost to them in bringing and instituting the action, and also as to the amount of recovery. Mere nomenclature is unimportant.

"Where the application of legal knowledge and technique is required, the activity constitutes such practice * * * it is the character of the act and not the place where it is performed which is the decisive factor." *Shortz v. Farrell,* 327 Pa. St. 81, 193 Atl. 20.

In re Ripley, 109 Vt. 83, 191 Atl. 918, the court, in quoting

from *People v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N. E. 901, said: "Practicing as an attorney or counselor at law, according to the laws and customs of our courts, is the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill."

The case at bar is the outgrowth of and is connected with previous cases involving attorneys for whom the defendant acted, and by whom he was employed. This court, in the exercise of its powers, disciplined such attorneys and, in passing judgment, treated the matter as an admonition to those engaged in such unethical practices and imposed a nominal punishment. We think this defendant is entitled to the same consideration.

We conclude that the defendant was guilty of the illegal practice of law, within the contemplation of section 7-101, Comp. St. 1929, and in view of the authorities herein cited. We further conclude that the defendant is guilty of a wilful attempt to obstruct and hinder the due administration of justice in proceedings had or proceedings pending before the courts of this state, in violation of section 20-2121, Comp. St. 1929.

The duly licensed, qualified, experienced practitioner, possessing high moral character and integrity, honestly abiding by the canon of ethics of a noble profession, and the public requiring their services are entitled, at the hands of the court, to a judgment that such nefarious practices, carried on by the defendant in this case, be stamped out and ended.

For the reasons given, and in consideration of all of the facts, the defendant, George E. Hinckle, is adjudged to be guilty of contempt of court and sentenced to the county jail of Lancaster county, Nebraska, for a period of 30 days; and time served in said jail since the date of arrest shall be made a part hereof and included in this sentence. The punishment imposed in the instant case is not to be considered as commensurate with the gravity of the offense in future cases of like character.

JUDGMENT ACCORDINGLY.

STATE, EX REL. CHARLES SMRHA, APPELLEE, V. COSMOPOLITAN OLD LINE LIFE INSURANCE COMPANY ET AL., APPELLEES: HERMAN F. GARTNER, INTERVENER, APPELLANT.

291 N. W. 72

FILED MARCH 22, 1940. No. 30626.

1. **Insurance.** A contract designated as a benefit thrift certificate, containing a savings feature and, in addition thereto, renewable term insurance for a period of 10 years, the terminal age of the contract, such insurance at all times being in excess of the amount of premium paid; the application attached to the certificate setting forth the place of birth, age, occupation, nationality, sex, marital status and beneficiary designation, and containing a proviso that the applicant agrees that the certificate issued on such application shall not take effect until the first payment has been received by the company during the good health of the applicant; the insurance, as shown in the contract, to be paid to a designated beneficiary upon death of the insured, on proper proof thereof, as required by the contract, and, in addition, the contract containing cash and loan values and a limitation upon the expense per unit during the life of the contract for payment of expenses of supervision and management of the company, and providing for options at the terminal age thereof for the paid-up policy of insurance on the life of the insured, based upon Experience Table of Mortality, with interest at 3½ per cent., without any charge for expense, is an insurance contract, within the meaning of the law of Nebraska governing such contracts.
2. ———. Term insurance is insurance for the term or period for which a premium has been paid, with the right to continue it from term to term upon payment of a proper premium; and where a contract contains both a thrift, or saving, feature and an insurance feature, the premium paid not being segregated but paying for both features of the contract, the fund created by the premium payments would be liable for all the company's obligation, such as death benefits, surrender value and thrift terminal settlements, the company recognizing the premium as covering all of such items.
3. ———. Where a life insurance company attempts to set up property rights and benefits out of the premium which it collects on its integrated obligation, the terms and conditions of such rights and benefits are required to be in accord with the provisions of section 44-602, Comp. St. 1929, and subdivision 11 of said section applies, thus granting to the certificate-holder

three years from the date of default therein in which to reinstate the contract, upon evidence of insurability satisfactory to the company and payment of arrears of premiums, with interest.

4. ———. Section 44-602, Comp. St. 1929, with reference to term insurance, contained in the contract under consideration, provides for setting up of benefits and conditions therein prescribed applicable to such contract, and any cash value which said contract may have is, by such statute, permitted to be used for extended insurance. Then, if such insurance shall be in force and the original contract shall not have been surrendered to the company and canceled, the contract may be reinstated within three years from such default, upon evidence of insurability satisfactory to the company and payment of arrears of premiums, with interest. These requirements govern the duty and obligation of the company, even though the provisions of the contract do not comply therewith.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL and JEFFERSON H. BROADY, JUDGES. *Reversed.*

Frank A. Peterson, for appellant.

John S. Logan, Perry, Van Pelt & Marti, C. J. Campbell and *Max Kier, contra.*

Heard before ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS and WENKE, District Judges.

MESSMORE, J.

This case has been presented and argued to this court on three occasions. See *State v. Cosmopolitan Old Line Life Ins. Co.,* 136 Neb. 833, 287 N. W. 654.

The Lincoln Liberty Life Insurance Company, on April 19, 1938, filed application in the district court for Lancaster county, setting forth that the department of insurance of the state of Nebraska took possession of the property, records and effects of the Cosmopolitan Old Line Life Insurance Company (hereinafter referred to as the Cosmopolitan Company); that on December 12, 1936, the court directed the department to conduct the business of the company and

retain possession of its property, records and effects until the further order of the court; that on February 15, 1938, said court ordered the department of insurance and its director to liquidate the assets of the Cosmopolitan Company, and, pursuant to such order, the director of the department of insurance was authorized to enter into a reinsurance and servicing contract with the Lincoln Liberty Life Insurance Company, which contract was entered into on March 1, 1938, and became effective by order of the court on March 30, 1938; that on March 31, 1938, the insurance department was directed, as liquidator, to turn over to the Lincoln Liberty Life Insurance Company the property, records and effects of the Cosmopolitan Company, except the sum of $10,000, reserved for legal expenses; that, in compliance with said order, the transfer was made as directed by the court. The purpose of the application was to have the court consider the rights of certificate-holders, make specific findings and determine whether such certificate-holders should have the right and privilege to reinstate their certificates, and, if so, upon what terms and conditions.

A petition in intervention was filed on April 30, 1938, by Herman F. Gartner, for himself and all other certificate-holders similarly situated, setting forth the same historical subject-matter as appears in the application of the Lincoln Liberty Life Insurance Company, and, in addition thereto, the following pertinent facts: From 1926 to December 12, 1936, the Cosmopolitan Company issued to its members contracts, with combined savings and insurance features, described as thrift certificates, which provided for monthly payments of $1 per unit, a unit representing a payment of $120 over a 10-year period, or quarterly payments of $3 per unit, or semiannual payments of $6 per unit, or annual payments of $12 per unit, payable in advance. On December 12, 1932, intervener Gartner purchased 12 thrift units, providing for a payment of $120 on each unit by instalments over a period of ten years. He made payments to the Cosmopolitan Company for two years and eight months, totaling the sum of $384, and paying until August 12, 1935.

The increasing benefit thrift certificates contained the following language:

"In case the member fails to make his regular payments as prescribed on the face of this certificate, and in advance, he shall have thirty days grace from the date the payment became due, during which period this certificate shall remain in good standing. The unpaid amounts completing the current year's payments shall be deducted from any settlement under this contract.

"If the member fails to make the payments, prior to the expiration of the thirty-day grace period, this certificate shall automatically lapse; provided, that in case the lapsed member desires to reinstate this certificate he may do so within two years from the date the last payment became due by paying an amount equal to all overdue payments plus six per cent. compound annual interest thereon."

Intervener Gartner further alleged that, by reason of the department of insurance taking possession and control of the property, records and effects of the Cosmopolitan Company, he did not, and could not, pay his premiums and reinstate his certificate during said period from December 12, 1936, to August 12, 1937, and did not, and could not, procure the loan or cash surrender value of his certificate; that doubt, uncertainty and confusion existed as to the legal rights and status of the company; that intervener had no satisfactory assurance that the company or the insurance department could lawfully reinstate the certificate, and uncertainty existed as to the safety of his investment and the ability of the company to carry out the terms of the certificate contract; that on August 11, 1937, the date on which the two-year reinstatement period expired, intervener had a loan or cash value, under the terms of the certificate, of $103.58; that under the strict terms of the certificate this amount was lost to him. Intervener prayed that the court determine that he and all other certificate-holders similarly situated have not forfeited their rights under their certificates, and that they shall have a reinstatement period equal to the time that was left to them for reinstatement

subsequent to the 12th day of December, 1936, and for such other relief as may be just and equitable.

George J. Wagner filed a petition in intervention and answer to the petition in intervention of Herman F. Gartner, denying the right of Gartner and certificate-holders similarly situated to reinstatement; alleged that in April, 1932, he purchased from the Cosmopolitan Company five units similar in all respects to the units purchased by Gartner. The crux of his contention follows: The certificate in question contains the following specific provisions under paragraph 5 thereof:

"The Company agrees to extend special services to all members as follows: * * *

"(b) To pay to the holder hereof at the terminal age of this certificate, or to any one designated by a court of competent jurisdiction to act for him, or to any person, firm or corporation designated by any one so authorized in his settlement application, the same day his application for settlement is received except not earlier than the terminal age date, a sum of money computed as follows: (as evidenced by the table appearing in the certificate which need not be here set out.) * * *

"3. His proportionate share of the money left in the fund by reason of lapse of other holders of such certificates, together with the interest accumulations thereon, compounded annually, plus," etc.

The answer further alleged that the intervener Wagner paid premiums as required by the certificate, has kept the same in full force and effect, and is entitled to its benefits, as disclosed by the preceding paragraph herein.

The department of insurance and director thereof, as liquidators of the Cosmopolitan Company, filed answer to the petition in intervention of Herman F. Gartner, admitting the material allegations of fact contained in such petition, and alleging that, after the department of insurance had taken over the property, records and effects of the Cosmopolitan Company, the department received an order from the district court for Lancaster county, then exercising

jurisdiction over the proceeding, directing and restricting the operation and management of the Cosmopolitan Company. This order was copied into the answer and authorized the insurance department to examine, adjust and pay all proper death claims and annuities under the contracts of said company due and owing it, and the remaining unpaid thrift contracts, which matured December 1, 1936, upon the same basis as established by the company; to receive all authorized payments tendered by contract holders or debtors, and to take the necessary steps to collect and receipt for all interest and principal payments on any investments, contracts or choses in action now held for the benefit of the company; in general, to do any and all things needful for the proper conduct of the company. This order was unappealed from and became and was the directing law of the case.

The decree of the district court of October 17, 1938, declared that by the terms of the certificate of intervener Herman F. Gartner the certificate lapsed and was without force and effect at the expiration of 30 days of grace, following the date of August 12, 1935. The court further found that the reinstatement period of the certificate expired August 12, 1937, and it became null and void, and the intervener was without right to reinstate the same; further, that during the reinstatement period from August 12, 1935, to August 12, 1937, intervener Gartner was possessed of the right and privilege of reinstating his certificate by making payment to the Cosmopolitan Company as provided by the terms of the certificate; that the department of insurance conducted the business of the Cosmopolitan Company from December 12, 1936, until the order of liquidation made on February 15, 1938. Intervener Gartner appealed.

The record discloses, in addition, the following: Intervener Gartner did not make application for a loan during the period the company was under the charge and direction of the insurance department. Death losses and annuities were paid, as well as premiums on contracts accepted. No loans were made to certificate-holders, but applications were

received and filed. Any loans made would have to be by authority of the court, as stated by the department of insurance. After the department had taken over the business of the company, intervener Gartner was permitted to pay in the amount of $72 in three instalments of $24 each, thereby, presumably, paying on his contract to August 12, 1935. The department refused to make loans to the owners of thrift certificates as provided by the terms thereof.

The question with which we are directly concerned is whether or not the contract in the instant case is an insurance contract, within the meaning of the law of this state governing such contracts.

A careful examination of the contract discloses the following insurance features incorporated therein: The first page of the certificate binds the company "for and in consideration of the warranties contained in the application herefor * * * and of the payment to the Company of the monthly premium specified in the margin hereof," to pay to his wife, the beneficiary. The application attached to the certificate executed by Gartner sets forth his place of birth, age, occupation, nationality, sex, marital status and beneficiary designation; containing the following provision: "I agree that the certificate issued hereon shall not take effect until the first payment has been received by the company during my good health." The amounts to be paid are designated as monthly, quarterly, semiannual or annual payments, thus making payment of premiums optional and not strictly monthly. The contract designates that the company "agrees to pay to Hulda Look Gartner, beneficiary, related to the member as wife, upon satisfactory proof of death of the member while this certificate is in full force and effect, twelve times the amount shown by column (4) of the Table of Values herein to be insured on the date of member's death, less any indebtedness hereon, in cash in one lump sum, or such optional settlement provided for herein as the member shall have last specified in written notice to the Company, * * * ." Section 11 of the contract provides for the filing of proofs of death and designates how the proofs shall be made,

and refers to column 4 of the table of values, determining the amount of insurance per unit for each year of the contract.

Section 6 contains language as follows: "The following table shows the cash value, loan value, and the amount of insurance protection under this certificate, each while this certificate is in good standing and before the expiration of the grace period. Amounts shown are per unit of this certificate as specified on the face hereof; hence multiplied by the number of units hereof." Column 1 contains the year, first, second, third, etc.; column 2 the annual premium; column 3 the amount paid per unit each year; column 4 amount insured; column 5 cash or loan value. Column 4 shows an increase in amount insured over amount paid each year. Under "General Provisions," after the word "Basis," appears this language: "1. This certificate is based upon renewable term insurance for a period of ten years." Under "Expense Limited:" "3. The Company agrees that not more than $28.00 per unit shall be allotted during the life of this contract to the General Fund for payment of all expenses of supervision and management." Under "Options: Terminal Age Settlement:" "Option One: Conditioned upon satisfaction of the Company of insurability of the applicant, a paid-up policy of insurance on the life of applicant, for an amount equal to One Thousand Dollars ($1,000.00) per unit of the certificate to be surrendered, for a period which the amount of the cash settlement would buy as a single premium under the American Experience Table of Mortality and three and one-half per cent. interest, without any charge for expense (loading); or,—

"Option Two: Conditioned upon satisfaction of the Company of insurability of the applicant, a paid-up policy of insurance on the life of applicant, for the period of his life and for an amount which the cash settlement would buy as a single premium under the American Experience Table of Mortality and three and one-half per cent. interest, without any charge for expense (loading)."

There is no denial that this contract carries insurance

features as hereinbefore set out. The contention is that the insurance features are incidental to the contract; that the true function of the contract is evidenced by section 5 thereof, in substance as follows:

"The Company agrees to extend special service to all members as follows:

"(a) To act as trustee for all holders of this class of certificates, as a whole, for their payments as specified on the face of their respective certificates, after deducting that proportion of the payments allotted for expense of supervision and management and the net premium on the amount of insurance in force the current year under each respective certificate, which resultant amount, together with interest accumulations thereon, shall be the basis for the fund known as the Cumulative Endowment Fund, which shall constitute the Surplus of the Association belonging to the holders of this class of certificates;

"(b) To pay to the holder hereof at the terminal age of this certificate," etc. (under endowment accumulations).

"1. The entire amount he has placed in the Cumulative Endowment Fund, plus,—

"2. His proportionate share of the net interest earnings on said fund compounded annually, plus,—

"3. His proportionate share of the money left in the fund by reason of lapse of other holders of such certificates, together with the interest accumulations thereon, compounded annually, plus,—

"4. His proportionate share of all surplus interest earned on the funds of such members who withdraw before arriving at their terminal age, plus,—

"5. His proportionate share of all withdrawal values forfeited by beneficiaries who upon death of such member surrender the certificates for insured settlements, plus,—

"6. His proportionate share of all interest earnings compounded annually on all such withdrawal values forfeited by beneficiaries.

"7. Also a participation in any saving in expense of supervision and management as determined by the Board of Directors.

"Payable in cash in one lump sum if no other option stated."

The foregoing provisions of the contract refer to the thrift or savings feature incorporated therein and the advantage of lapsations to those who complete the contractual obligation. The insurance benefits provided by the certificate are in the amount of $15 a year per unit and increase $15 yearly.

" 'Term insurance' * * * is insurance for the term or period for which a premium has been paid, with the right to continue it from term to term upon payment of the proper premium." 37 C. J. 362.

The contention of appellee is: There is no reserve created on term insurance; no medical examination is required of the certificate-holder; no evidence of insurability is requested; the price per unit of the certificate does not vary according to the age of the certificate-holder, and the customary requirements of an insurance policy in such respects are missing. It is contended that the real purpose of the contract is to provide an attractive and desirable means of investing money over a period of years.

The appellee relies upon the case of *Howie v. Cosmopolitan Old Line Life Ins. Co.*, 132 Neb. 367, 272 N. W. 207, quoting at length the language of this court in reference to the same kind of a contract. However, a careful reading of the *Howie* case is at once convincing that the cause was brought upon the theory that the plaintiff could recover at law the cash value of her policy. The plaintiff in that case purchased a certificate of membership for two units in the Cosmopolitan Old Line Life Insurance Company October 29, 1926, and paid monthly premiums thereon from that date to and including July 29, 1931. Nothing was claimed under the reinstatement provision in the policy. The table of values provided that at the fifth year, if the certificate was in good standing, and before the expiration of the grace period, the owner of the certificate might withdraw $39.70 for each unit. Plaintiff sued for $79.40 and made no demand upon the defendant for payment of the cash value,

as evidenced by the contract, until February 21, 1935.

The right to reinstate the policy within two years, as provided in the contract in the instant case, was not involved in the *Howie* case; nor the question, whether or not the contract was an insurance contract, within the meaning of the law of this state and subject to subdivision 11, sec. 44-602, Comp. St. 1929, which would give to the contract-holder the period of three years within which to reinstate an insurance contract. The plaintiff had been in default almost four years. It was unnecessary, in any event, for the court to determine the kind of contract involved. The question was not an issue in the case. The court in the *Howie* case affirmed an order of the district court entering judgment for the defendant company on the pleadings and dismissing the action.

Appellee refers to the case of *Whaley v. Matthews,* 134 Neb. 875, 280 N. W. 159. It is true the opinion in that case did discuss the provisions of the contract as they applied to a holder at terminal age of the certificate and how the money was to be computed. The report disclosed that in the last three years about $65,000 came from the cumulative endowment fund, and the additional excess payment of $90,000 came from the general fund. The bulk of the business of the company consisted of thrift units. It was said in the opinion: "As a result of the alleged unwarranted action of the company in taking money from these two funds to pay substantial bonuses to already matured thrift certificates, those funds have been depleted so that it is claimed to have jeopardized payments of certificates to mature later;" the opinion stating that it was proper, under the circumstances, for the insurance department to step in and take over the control of the company. The court determined the duty of trustees, misapplication of funds of mutual companies, the liability of a director of the corporation and the relation a director bears to the stockholders. The court, in no event, determined the question presented in the instant case, and the holding therein would not be disturbed by an interpretation of the contract here involved.

The appellee's contention, therefore, develops this proposition: From each year's certificate payment the company bought enough insurance on the life of the certificate-holder to provide the amount of insurance for the particular year, as stipulated in the table of values, paragraph 6 of the contract. Other than this net deduction, coupled with a proportionate share of management and supervision, the entire remainder went into the trust fund. To provide extended insurance and cash surrender values would have required that the company violate the express terms of its contract with reference to the cumulative endowment fund. The carrying out of the conditions of the thrift certificate to intervener, as well as to other certificate-holders, required that only the net cost of the insurance during the particular year be deducted from the contract payment; that is, the intervener Gartner must claim, in order to be entitled to reinstatement, that the amount which he contributed to the cumulative endowment fund should be applied to the purchase of extended insurance. Such purchase, if made by the company, could only have been at the expense of the intervener's contribution to the cumulative endowment fund.

Our attention is directed to paragraph 16 of the contract, on the theory that the distribution of surplus, as well as the loan and insurance values provided therein, is based upon premiums, rather than upon the American Experience Table of Mortality.

Analyzing the contention of the appellee, it follows that there can be no extended insurance, cash or loan value, where, upon date of default, the policy does not possess any reserve or net value. The insurance features are separate and distinct from the savings feature of the contract, and were added as a further inducement to facilitate the sale of such certificates. Therefore, the contract provided for term insurance only. No reserve was built up after default in payment of premiums. There was no value remaining in the contract to purchase extended insurance or maintain the contract. The period of reinstatement must be limited

to the privileges expressed in the contract. The cash values thereunder arise by virtue of payments made to secure investment advantages. Cash values, not being accretions under the insurance feature of the contract and not being a part of the insurance reserve, are subject only to the stipulations of the contract providing for lapsation and forfeiture. With the foregoing contention and general summary thereof we cannot agree.

It is clear that the Cosmopolitan Old Line Life Insurance Company is a mutual reserve company. Section 44-101, Comp. St. 1929, defines insurance as follows: " 'Insurance' is a contract whereby one party called the 'insurer,' for a consideration undertakes to pay money or its equivalent, or to do an act valuable to another party called the 'insured' or to his 'beneficiary' upon the happening of the hazard or peril insured against, whereby the party insured or his beneficiary suffers loss or injury,"—in the instant case in the event of death of the insured.

Section 44-306, Comp. St. 1929, reads: "All domestic insurance companies, and insurance agent, solicitor, broker, surveyor or adjuster doing business in this state, and all insurance business transacted in whole or in part within or outside of this state, the subject and matter of which is located wholly or in part in this state, shall be subject to and be governed by this article, and the records of such insurance company, agent, solicitor, broker, surveyor or adjuster doing business in this state shall be subject to inspection and examination of the department of trade and commerce." A reading of the contract involved herein indicates clearly the adaptability thereto of the section of the statute quoted.

Recognizing that the insurance feature designated by the contract is 10-year term insurance, we believe there is a reserve value, although not stated in the policy, but the cash and loan values are made up from the value of the policy, including any profits, savings in load expense, and mortality, and other items which are included in the premium of every policy, whether term or otherwise. Term

policies, such as the 10-year term policy here considered, do have a cash value, as evidenced by the table of values shown in the contract, and the reserves are, by necessity, kept in force by each policy, so that obligations under such policies can be met when due. In a mutual company, such as the Cosmopolitan Company, appellee herein, the profits of the contract containing an insurance feature, as herein discussed and considered, belong equitably to the policyholders, and no reason exists why cash, loan and surrender values cannot be maintained on such policies, depending on the loading in the premiums charged, on savings, on mortality, and other profits. Such a cash value has been placed on these policies.

We refer to section 44-401, Comp. St. 1929, as amended by chapter 96, Laws 1935, which defines life insurance as insurance "upon lives of persons, including endowments and annuities, and every insurance pertaining thereto and disability benefits." The contract in the instant case falls within this definition. We also refer to section 44-602, Comp. St. 1929, which requires that every policy of life insurance, "except policies of industrial insurance or where the premiums are payable monthly or oftener," shall contain, among other things, provisions for nonforfeitable loan and surrender values and for extended insurance. Subdivision 11 of such section requires a provision in the policy that "if, in event of default in premium payments, the value of the policy shall be applied to the purchase of other insurance, and if such insurance shall be in force and the original policy shall not have been surrendered to the company and canceled, the policy may be reinstated *within three years* from such default, upon evidence of insurability satisfactory to the company and payment of arrears of premiums with interest." (Italics ours.)

The insurance obligation in the contract, together with the thrift feature thereof, was paid for by the same premium. The fund credited by the premium payments would be liable for all of the company's obligations, such as death benefits, surrender value and thrift terminal settlements; in

other words, the premium covered both insurance and thrift features, and the company so recognized. When the company attempted to set up property rights and benefits out of the premium which it collected on its integrated obligation, the terms and conditions of such rights and benefits were required to be in accord with the provisions of section 44-602, Comp. St. 1929. Said section, with reference to term insurance, as disclosed by Gartner's contract, provides for the setting up of the benefits and conditions therein prescribed which are applicable to such contract. Loan and surrender values cannot be set up with a forfeiture provision, and any cash value which a policy may have may be permitted to be used for extended insurance, and if such insurance shall be in force, and the original policy shall not have been surrendered to the company and canceled, the policy may be reinstated within three years from such default, upon evidence of insurability satisfactory to the company and payment of arrears of premiums, with interest. These requirements govern the duty and obligation of the company, even though the provisions of the policy did not comply with them. See Comp. St. 1929, sec. 44-602.

Intervener Gartner was entitled to have any cash value which the company had credited as of August 12, 1935, out of the premiums of his contract, applied to the purchase of other insurance in the amount then in force under the policy; to have his original contract reinstated upon evidence of insurability satisfactory to the company and payment of arrears of premiums, with interest. If the surrender value would not have purchased extended insurance, required to reinstate the contract, as shown by the evidence in this case, or if Gartner was no longer a desirable risk, then the opportunity should be accorded the company to show such facts.

Our former opinion, reported in 136 Neb. 833, 287 N. W. 654, is vacated; the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED.

ELLIS, District Judge, concurs in the result.

JOHNSEN, J., concurring separately.

To me, the controlling question in this case is one of public policy. Shall an insurance company be permitted to collect premiums on a life insurance obligation, create cash values out of the money collected, and then confiscate or forfeit such rights on a premium default? I think not. The law abhors forfeitures generally, and in the case of insurance contracts they are quite intolerable.

The fact that the contract in this case was labeled a "thrift certificate" and combined a savings and insurance feature should not enable the company to dodge the statutes regulating the conduct of life insurance business or escape the rules of construction applicable to such contracts. Whether the company subsequently chose to make separate allocations on its records for thrift benefits and insurance costs is of no importance here. No such apportionment was made in the contract itself. The certificate-holder had no insurance protection except upon payment of the premium as an entirety. Since the insurance obligation rested upon the consideration of payment of the whole premium, it remained an insurance premium throughout. Any cash or surrender values created out of it were cash or surrender values derived from insurance premiums and could not be confiscated or forfeited by any contractual provision in conflict with the insurance statutes or rules of law applicable to insurance contracts. Not being forfeitable, such values were available for the purchase of extended insurance, with the accompanying right to reinstatement of the contract recognized by the statute.

The contention is made—and is accepted in the dissenting opinion herein—that no reserve was set up in connection with the insurance feature of the contract and that there was nothing therefore that could be used for the purchase of extended insurance. As to the allocations made by the company on its records, I find no evidence in the record. It is quite inconceivable to me, however, that a company would assume a ten-year insurance risk without creating a reserve against the hazard. The point, however, is quite immaterial

here, because, as I have already stated, the question is not what the company did on its records, but what it did in its contract. The contract sets up specific cash or surrender values out of premiums collected. These values were rights which could not be forfeited by any attempted apportionment or private bookkeeping on the part of the company.

I have previously expressed my views more fully in the dissenting opinion in *State v. Cosmopolitan Old Line Life Ins. Co.*, 136 Neb. 833, 839, 287 N. W. 654, 657, and I shall not repeat them here. The general public policy involved is to me more vital than the number of certificate-holders who may be affected by the present litigation.

PAINE, J., dissenting.

I respectfully dissent from the last opinion adopted by a majority of the court. This is a most difficult case. It was first argued to this court on April 4, 1939, with five judges sitting, two of our number being disqualified.

The court failing to adopt an opinion by the vote of four of the five judges sitting, it was reargued on June 8, 1939, with District Judges Lightner and Landis sitting as members of the court, and an opinion was adopted, and released September 29, 1939, which is found in 136 Neb. 833, 287 N. W. 654, in which two members dissented, and in which opinion a full discussion of the case will be found.

This opinion held: "A court of equity cannot grant relief against the clearly expressed condition contained in a valid 'benefit thrift certificate' issued by an insurance company, which provides that reinstatement of a lapsed certificate can only be had by the payment of past-due monthly instalments, with interest, within two years from the date the last payment became due."

Later a rehearing was granted, and the third argument occurred December 4, 1939, and the decision of the case hinges on whether the contract is to be considered as a thrift certificate or a life insurance policy, or contract. Let us examine the exhibits. On December 12, 1932, Dr. Gartner signed an instrument, at the top of which, printed in large capital letters, were the words, "Application for Thrift

Certificate." On examination of the instrument he purchased, we find on the outside it is "No. 67136," "Units Twelve," "*Increasing Benefit Thrift Certificate,*" issued to Herman F. Gartner, and on the inside the largest letters at the top of this contract, except for the name of the company, are the words, "Thrift Certificate." It seems rather surprising that, when intervener Gartner signed a written application for a "thrift certificate," and received a "thrift certificate," and is now bringing action on the "thrift certificate," this court should find that he applied for, and received, and now holds, an *insurance* contract.

This thrift certificate did not agree to pay a certain specified sum of money at the termination of the ten-year period, but undertook to pay him the $120 he would have paid in on each unit, with interest on the sums paid in, and, as in all "thrift" certificates, agreed to pay him the distributive share of the money forfeited by unfortunate certificate-holders who had lapsed in making their payments, together with the interest accumulations thereon, being those who had allowed the two-year period of reinstatement provided in the certificate to go by without reinstating their contracts, and also to pay him "his proportionate share of all withdrawal values *forfeited by beneficiaries* who upon death of such member surrender the certificates for insured settlements," together with "his proportionate share of all interest earnings compounded annually on all such withdrawal values *forfeited by beneficiaries.*"

Can it be argued that the owners of these lapsed thrift certificates, written on a plan which has been forbidden in many jurisdictions, and which are no longer written in Nebraska, are entitled to all the protection given, under our law, to the holders of *bona fide* life insurance policies?

It should be clear that, if the holder of a certificate calling for certain thrift certificate units died, his beneficiary could continue to make payments on the thrift certificate, but if the beneficiary needed funds and selected to accept the so-called "life insurance" settlement, the beneficiary would thereby forfeit comparatively large sums of money,

as hereinabove set out. It would be abhorrent in a life insurance policy to read that a beneficiary who wanted payment in cash would be compelled to forfeit a portion of the principal and also interest accumulations. There is no question that the insurance department would forbid the writing of such an insurance policy.

The basic idea from its very inception had been to sell thrift contracts in which the benefits from lapsed certificates profited those who continued to pay. Of this there should be no doubt. The fact that the plan was amended, and an attempt made to promote sales of these thrift certificates by adding a very slight, yearly renewable, term insurance feature, without planning for any reserve to protect it, and in which the beneficiary could in no event draw more than $150 on a unit in which the owner of such unit had paid in the full sum of $120 over a period of ten years, does not, in my opinion, exempt a certificate-holder from being bound by the two-year provision of the contract which he applied for and received. To permit him, after he has failed to reinstate within the two years provided in his contract, to now avail himself of the provision of law which governs and protects *bona fide* life insurance policyholders, and to reinstate under certain conditions within three years, as set out in section 44-602, Comp. St. 1929, is in my opinion unjust and inequitable.

This litigation is carried on between two interveners. Dr. Gartner represents that small group which owns 1,876 certificates, representing 6,709 units, who have discontinued their payments, and have permitted their certificates to lapse under the terms of their contracts, and have not reinstated the same within the two years provided by their contracts. On the other hand, Dr. George J. Wagner, the appellee-intervener, represents in a way a large body of 7,824 certificate-holders, who have met every required payment according to the terms of their contracts, and now hold 40,708 units. It has always been my understanding of the law that, where there is no uncertainty as to the meaning of a contract, it will be enforced as made by the parties.

I believe that the decision of the trial court was right. The case was tried in the district court before J. H. Broady and E. B. Chappell, district judges, who rendered their decree, holding:

"(7) That intervener, Herman F. Gartner, failed to reinstate his said certificates within the time and in the manner provided by their express terms and that he lost all his rights thereunder and that his petition is without equity and should be dismissed.

"It is, therefore, by the court ordered, adjudged and decreed that intervener, Herman F. Gartner, and all other holders of certificates in Cosmopolitan Old Line Life Insurance Company similarly situated, who have permitted the reinstatement period of their said lapsed certificates to expire by failure to make payments as required by the terms of their said certificates, have lost all rights under their said certificates and that their said certificates are null and void and that said petition of said intervener, Herman F. Gartner, on behalf of himself and all other certificate-holders similarly situated, is without equity and should be and the same hereby is dismissed. Objections of George J. Wagner sustained."

Now, to the contrary of this holding, the effect of the majority opinion now adopted, as I view it, is to permit the few holders of lapsed thrift contracts to escape the two-year limit to reinstate, as provided by the contracts they purchased, and to allow them an extra year to reinstate, to the end that they can take from the faithful and diligent contract-holders who kept up every payment comparatively large sums of money specifically due the latter under the exact terms of their thrift contracts.

ALFRED SHELLENBARGER ET AL., APPELLANTS, V. ARTIE H. SHELLENBARGER, APPELLEE.

291 N. W. 95

FILED MARCH 22, 1940. No. 30803.

1. **Costs.** Where plaintiff's action is for a recovery of money only, costs shall be allowed of course to the plaintiff upon a judgment in his favor, as contemplated by section 20-1708, Comp. St. 1929.
2. **Cases Distinguished.** The cases of *Moore v. Darrow*, 11 Neb. 462, 9 N. W. 637; *Rosenbaum v. Dunston*, 16 Neb. 111, 19 N. W. 610; *Wilde v. Boldt*, 16 Neb. 539, 20 N. W. 849, and cases of like holding, decided under the language of section 621 of the original Code, Gen. St. 1873, distinguished.

APPEAL from the district court for Richardson county: VIRGIL FALLOON, JUDGE. *Reversed.*

Harold L. Gurske, for appellants.

Armstrong & McKnight, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

The plaintiffs brought this action in the county court of Richardson county to recover a money judgment in the amount of $502.18, with interest. The defendant, by cross-petition, alleged an offset to plaintiffs' amended petition, and prayed judgment against plaintiffs in the sum of $15.97. The county court entered judgment in favor of the plaintiffs for $200, and defendant appealed to the district court. The district court tried the cause on the original pleadings filed in the county court and returned a judgment in favor of the plaintiffs and against the defendant in the sum of $112.05, and further ordered and decreed that plaintiffs pay the costs of appeal and costs in the district court in the sum of $39.20, and that each party pay his own costs incurred in the trial of the cause in the county court. The plaintiffs filed a motion in the district court to retax costs.

Whitall v. Cressman, 18 Neb. 508, 26 N. W. 245. This motion was overruled June 27, 1939. Plaintiffs appeal.

The plaintiffs properly selected the forum in which to bring this action. Const. art. V, sec. 16. See sections 27-506, 27-502, Comp. St. 1929.

The defendant relies on the cases of *Moore v. Darrow,* 11 Neb. 462, 9 N. W. 637; *Rosenbaum v. Dunston,* 16 Neb. 111, 19 N. W. 610; *Wilde v. Boldt,* 16 Neb. 539, 20 N. W. 849, and cases of like holding. The foregoing cases were decided under the language of section 621 of the original Code, which reads as follows: "If it shall appear that a justice of the peace has jurisdiction of an action, and the same has been brought in any other court, the plaintiff shall not recover costs." Gen. St. 1873, sec. 621. Jurisdiction in such cases is determined by the amount of the recovery and not by the amount claimed. Therefore, the defendant contends the plaintiffs are not entitled to recover costs in the district court; they brought this action in the county court for $502.18 and recovered in the district court a judgment for $112.05; it appears that the justice of the peace had jurisdiction; therefore, the language of section 621 of the Code is pertinent.

With this contention we cannot agree. Section 621 of the original Code was finally amended by section 4, ch. 152, Laws 1923; that part necessary to set out reading as follows: "If it shall appear that a justice of the peace has jurisdiction of an action and the same has been brought in *district court* the plaintiff shall not recover costs." (Italics ours.) The action in the instant case was brought in the county court, the proper forum for such case, and section 621 of the Code as amended in 1923, now section 20-1709, Comp. St. 1929, does not apply.

In addition to the foregoing contention, the defendant relies on section 20-1711, Comp. St. 1929, which reads: "In other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable." This provision of the statute is not applicable in the instant

case, for the reason that the case at bar is an action for the recovery of money only, and section 20-1708, Comp. St. 1929, is pertinent. Said section reads: "Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only."

For the reasons given in this opinion, the cause is reversed, with directions to the district court to enter judgment against the defendant and in favor of the plaintiffs for costs incurred in the district court; that part of the court's judgment, to divide the costs in the county court, is vacated, and the costs allowed of course, within the contemplation of section 20-1708, Comp. St. 1929.

REVERSED.

HELEN WELCH V. PAUL FALK: DAVE FALK ET AL., APPELLANTS: PAGE LUMBER & HARDWARE STORE, INC., APPELLEE.
291 N. W. 488

FILED MARCH 29, 1940. No. 30794.

Homestead. Where a judgment has become a lien against real estate and subsequently a right of homestead attaches thereto, the lien of the judgment is not displaced and remains paramount to the claim of a homestead exemption.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

James P. Marron, for appellants.

Norman Gonderinger, Charles D. Hitch and *W. J. Hammond, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This appeal involves the question of whether or not a judgment is a lien superior to a claim of homestead against the undivided one-seventh interest of the defendant Dave Falk in a half-section of land in Holt county, Nebraska.

The facts recited in this paragraph are not disputed. Matilda Caroline Falk, the owner of the one-half section of land here involved, died September 29, 1933. Each of her seven children, including the defendant, Dave Falk, inherited an undivided one-seventh interest in the property. The probate of her estate has been completed. The defendant, Page Lumber & Hardware Store, Inc. (formerly J. E. Smith Lumber Company), hereinafter called the judgment creditor, on February 26, 1934, obtained a judgment in the county court of Holt county for $971.25 against the defendants Dave Falk and his wife, Joy Falk. On February 27, 1934, this judgment was transcripted to the district court for Holt county, and duly recorded in the judgment records. Several executions were issued (the last on December 2, 1936), which were returned unsatisfied. The judgment has not been paid.

Defendant Dave Falk contends that his interest in the real estate is not subject to the lien of appellee's judgment for the reason that, prior to the recording of the judgment in the district court for Holt county, he, his wife, and family had occupied the premises as a homestead, that such occupancy has continued at all times since, and that his interest is exempt from the judgment lien to the extent of $2,000.

The judgment creditor contends that its judgment is a lien upon the undivided interest of Dave Falk in the premises; that Dave Falk went into possession after its judgment lien attached, and under a lease from the administrator, and that its judgment is superior to the alleged homestead lien.

The lien of the judgment attached to any real estate subject thereto on February 27, 1934. Comp. St. 1929, sec. 27-532; *Work v. Brown,* 38 Neb. 498, 56 N. W. 1082.

The trial court found that Dave Falk and wife had no right of homestead exemption as against the lien of the judgment and entered a decree that the judgment was a lien against the undivided interest of the defendant Falk.

The defendants Dave Falk and his wife filed a motion for a new trial for the reasons that the decision is not sup-

ported by sufficient evidence and is contrary to law. Defendants also alleged newly discovered evidence. The motion for a new trial was overruled, and defendants appeal.

The defendant Dave Falk testified that he was married and the father of two children; that he purchased a house in Page, February 15, 1934, that on February 16 he moved it onto the premises, moved his family thereon February 19, and has resided there since; that he bought and moved the house upon the premises with intent to occupy the same as a home. He offered in evidence a receipt for $40, dated February 15, 1934, reciting "payment on house."

On March 2, 1934, he entered into a written lease with the administrator of his mother's estate, whereby he leased for one year the part of the premises which he occupied and claims as a homestead. He testified that he moved the house onto the premises before he entered into the lease.

Mrs. Falk corroborated her husband as to the dates of purchase of the building, the moving it onto the premises, and the date of occupancy. Four witnesses who assisted in the moving testified for the defendants. One of these corroborated the defendant positively as to dates. Of the other three, one testified that the house was moved "in the spring" —he "would say" "in February;" another, "it was along in February, I would judge;" another, "it was in February, I imagine," that was "what the other folks have said, and that is my recollection." None of the last three testified positively as to dates.

Paul Falk, a brother of the defendant, testified for the judgment creditor that he had a verbal lease, made in February, 1934, with the administrator for the entire half-section; that on or about the 2d or 3d of March, 1934, the administrator, the attorney for the estate, and the defendant called upon him and asked that he surrender a part of the land and allow the defendant to lease it, that the defendant wanted to move away from the land where he was then living, and that "it would protect the heirs." The witness agreed that the defendant could have a part of the land and that the lease would be dated back to March 1.

The defendant was cross-examined as to this conversation, and, while admitting that they "evidently" had the conversation, repeatedly answered that he did not remember either the substance of the conversation or when it took place, and "couldn't say" that he had moved the buildings onto the place at the time of the conversation. The witness Paul Falk positively testified that the defendant moved the buildings onto the land after the conversation, about the middle of March. The witness further testified that both he and the defendant were in possession of the land under leases from the administrator and accounted to him for rents until the estate was closed in 1936.

Mr. Wilbur, vice-president of the judgment creditor, testified that the buildings were not on the premises on February 26, nor for several days thereafter; that he saw the building being moved from Page; that it was after the judgment was entered, probably within thirty days thereafter.

Therefore, there was a clear-cut dispute in the evidence, both as to the time the defendant conceived the plan of moving upon the premises, and as to the time that he actually moved thereon. The trial court heard this testimony, observed the witnesses, their manner of testifying, and obviously resolved the questions of fact in favor of the judgment creditor, and against the defendants. We have carefully reviewed the record and reach the same conclusion.

Where a judgment has become a lien against real estate and subsequently a right of homestead attaches thereto, the lien of the judgment is not displaced and remains paramount to the claim of a homestead exemption. *Bowker v. Collins,* 4 Neb. 494; *Paxton v. Sutton,* 53 Neb. 81, 73 N. W. 221; 3 Neb. Law Bulletin, 148; 29 C. J. 860; 13 R. C. L. 615, sec. 75; *First State Bank of Gackle v. Fischer,* 67 N. Dak. 400, 272 N. W. 752, 110 A. L. R. 878, and cases there cited.

The conclusion here reached makes it unnecessary to determine the contentions of defendants that a homestead may be had in real estate under the facts here existing.

We have examined the showing of newly discovered evi-

dence. It was not discussed in defendant's brief. We will not detail it. Were that evidence before us, it would not change the conclusion here made.

The judgment of the trial court is

AFFIRMED.

JEWEL TEA COMPANY, INC., ET AL., APPELLEES, V. CITY OF GENEVA ET AL., APPELLANTS.
291 N. W. 664

FILED MARCH 29, 1940. No. 30755.

1. **Municipal Corporations.** The only power which a city has to declare the house-to-house solicitation of customers is a nuisance is to find that it interferes with the health, peace, order, and good government of the city.
2. ———. When an ordinance attempts to prevent one from engaging in a lawful and legitimate occupation, such an ordinance can be impeached as unreasonable, unconstitutional and void.
3. **Nuisance.** "The act of soliciting order for sale of goods in and upon private residences without consent of owner or occupant is not a 'public nuisance' and may not be punished as a crime or misdemeanor." *Prior v. White*, 132 Fla. 1, 180 So. 347.
4. **Municipal Corporations.** "The exercise of the police power by a municipal corporation must be directed towards and have a rational relation to protection of a basic interest of society rather than the mere advantage of particular individuals and must be reasonable and free from arbitrariness." *N. J. Good Humor, Inc., v. Board of Commissioners*, 11 Atl. (2d) 113.
5. ———. The ordinance under examination is not regulatory, but preventative and prohibitive as against an act which is innocent in itself, and which does not constitute a public nuisance.
6. ———. "Municipal power encroaching upon individual rights does not exist unless plainly conferred by the city charter or other law." *State v. Wiggenjost*, 130 Neb. 450, 265 N. W. 422.
7. **Constitutional Law.** "A state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, 44 S. Ct. 412, 68 L. Ed. 813.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Waring & Waring, for appellants.

Harry A. Spencer and *Dwight W. Dahlman, contra.*

J. A. C. Kennedy, Yale C. Holland, George L. De Lacy, Edward J. Svoboda, Ralph E. Svoboda, Robert K. Adams, S. J. Leon, Fred S. White and *Louis E. Lipp, amici curiæ.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS, District Judge.

PAINE, J.

A petition was filed, praying for a declaratory judgment that a certain ordinance was void, and asking, among other things, for injunction restraining the enforcement of such ordinance against solicitors and peddlers by the city of Geneva. To this, the city of Geneva and its officers filed an answer, containing several admissions and a general denial. Plaintiffs' demurrer to this answer was sustained by the court, and the city of Geneva and its officers appeal.

The Jewel Tea Company, Inc., the Grand Union Tea Company, Inc., and Larry A. Wadhams filed a petition of 18 pages against the city of Geneva and its mayor and all of its officers, setting up that on January 3, 1938, the city adopted ordinance No. 146, a portion of which reads as follows:

"Section 1. The practice of going in and upon private residences in the city of Geneva, Nebraska, by solicitors, peddlers, hawkers, itinerant merchants, and transient vendors of merchandise, not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences, for the purpose of soliciting orders for the sale of goods, wares and merchandise, and/or peddling or hawking the same, is hereby declared to be a nuisance, and punishable as such nuisance as a misdemeanor."

The ordinance provided that upon conviction for violation the offender should be fined not less than $25 nor more than $100 and costs.

It is further alleged in the petition that Larry A. Wadhams, plaintiff, as agent of the Jewel Tea Company, visits his regular customers in Geneva every two weeks, calling at a specified time of day arranged by agreement with the customer, and that all calls made by said Wadhams are for one or all of the following purposes: (1) To deliver merchandise previously ordered; (2) to take or solicit orders, in accordance with the standing agreement and understanding with each of said customers, for merchandise to be subsequently delivered; or (3) to collect amounts from said customers legally due to the Jewel Tea Company. It is alleged in said petition that plaintiffs do not solicit any orders for any merchandise upon the public streets, nor do plaintiffs hawk or peddle any merchandise of any nature in said city; that there are outstanding balances due the Jewel Tea Company of approximately $100, and that there is $50 due the Grand Union Tea Company, from their customers in said city.

It is further charged, in the fourteenth paragraph of said petition, in effect, that the mayor and city attorney have repeatedly forbade the plaintiffs from carrying on their business in Geneva, and have threatened both the agent and district manager that they, or their representatives, would be arrested and prosecuted for every stop or call made upon their customers in Geneva, and that said plaintiffs must discontinue their business in Geneva, and that said mayor and city attorney intend to put the Jewel Tea Company and Grand Union Tea Company out of business in the city of Geneva.

In paragraph 18 it is alleged: "If the said Jewel Tea Co. is prevented from making the regular calls provided for in the contracts between said company and its customers, said plaintiffs will lose the good will of said customers built up over the past twenty-five (25) years, and substantial and valuable property rights of said plaintiffs will be destroyed;" and similar allegations were made in reference to the Grand Union Tea Company.

It is also alleged in said petition that the defendant city,

through its marshal, on instructions from the mayor, arrested Earl R. Slattery, salesman for the Grand Union Tea Company, on February 1, 1939, at a time when he was calling on a regular customer, and upon trial he was convicted of violating said ordinance No. 146; that the marshal of said city, on instructions of the mayor, also arrested Larry A. Wadhams, plaintiff, on March 28, 1939, while he was calling upon his customers of the Jewel Tea Company, and that his trial is set for hearing April 11, 1939, and the plaintiffs therefore pray that the court issue an order temporarily restraining the defendants and each of them from arresting or prosecuting the said agents of the Jewel Tea Company, or Grand Union Tea Company, for soliciting orders in Geneva, and that the court render a declaratory judgment, decreeing that said ordinance is invalid, void, and unconstitutional, and at the trial make the temporary injunction permanent against the city and its officers.

The defendants filed an answer, admitting that the Jewel Tea Company and the Grand Union Tea Company are duly incorporated, and that the city of Geneva is a city of the second class, and denied each and every other allegation contained in said petition except certain admissions hereinafter made.

The defendants further allege in the answer that on March 28, 1939, the plaintiff Larry A. Wadhams, in violation of the ordinances of the city of Geneva, without having been requested or invited so to do, entered upon the premises of occupants and owners of private residences of the city of Geneva for the purpose of soliciting orders for the sale of goods, wares and merchandise; that a complaint was duly filed against Wadhams; that said action was set for trial, and shortly before trial the petition of the plaintiffs was filed, and defendants allege that the plaintiffs have a complete, full, and adequate remedy in said criminal case now pending in court entitled, "The State of Nebraska, City of Geneva vs. Larry A. Wadhams."

It is further stated that Earl R. Slattery, as alleged in plaintiffs' petition, was an agent or employee of the Grand

Union Tea Company; that he entered upon premises of residents of the city of Geneva to solicit orders for merchandise without having been invited so to do, for which violation of the ordinance he was arrested and found guilty in the police court, and that said Slattery has appealed from his conviction to the district court for Fillmore county, and defendants aver that the plaintiff Grand Union Tea Company has a full, complete, and adequate remedy at law in the criminal case which is now pending in the district court for Fillmore county, entitled "The State of Nebraska, City of Geneva vs. Earl R. Slattery."

It is further alleged that the said Jewel Tea Company and the said Grand Union Tea Company are, in truth and in fact, peddlers of groceries within the city of Geneva, and "that at irregular periods they employ salesmen who drive up and down the streets and alleys of said city with automobiles. That these salesmen follow the practice of canvassing from house to house within said city. That the said salesmen of plaintiffs' companies call upon residents of said city whether invited or uninvited at hours in the day and night time, and that said practice is in truth violation of said ordinance set forth in plaintiffs' petition."

It is further alleged that the petition of plaintiffs does not set forth and allege facts sufficient to require this court to exercise its discretion to enter a declaratory judgment decree, and the defendants, having fully answered plaintiffs' petition, pray that they may go hence without day and recover their costs expended.

To this answer of the city of Geneva and its officers, the plaintiffs filed a general demurrer, which the court sustained, and the defendants declining to plead further, the court found that said defendants and each of them are in default of answer, and that the allegations of plaintiffs' petition are true, and that the plaintiffs are entitled to a permanent injunction from the enforcement of ordinance No. 146, as prayed in said petition, from which order the defendants appeal.

In the briefs prominence is given to the fact that the

ordinance in the case at bar is practically the same as one adopted by the town of Green River, Wyoming, except as to the one clause, "for the purpose of disposing of," which was found in the Green River ordinance, but is not found in the ordinance as set out in the transcript in the instant case. However, for all practical purposes the two ordinances are identical, and we will hereafter refer to the ordinance as the Green River ordinance.

It is necessary to briefly trace the history of this Green River ordinance in the various courts which have considered its validity, especially because its discussion is the major point in the briefs in the case at bar.

Shortly after the town of Green River adopted this ordinance, it was tested in the federal court in the case of *Fuller Brush Co. v. Town of Green River,* 60 Fed. (2d) 613, decided July 15, 1932. Judge Kennedy said the question was difficult to solve, largely on account of the lack of precedent, but held that the ordinance in question was an arbitrary regulation in excess of the police power, not based upon any theory of the protection of the health, safety, morals, or general welfare of the citizens of the community, and was a violation of the constitutional rights of the plaintiff.

This conclusion is very similar to that reached by Judge Carter in holding that "A citizen clearly has the right to engage in any occupation not detrimental to the public health, safety and welfare." *Carolene Products Co. v. Banning,* 131 Neb. 429, 268 N. W. 313.

Upon appeal of the Green River ordinance case to the circuit court of appeals for the tenth circuit, Lewis, J., delivered the opinion, released in 1933, found in 65 Fed. (2d) 112, 88 A. L. R. 177, reversing and dismissing the action, holding that the Green River ordinance was an appropriate exercise of police power, and that it did not operate as an unlawful interference with interstate commerce, and that the police power extends to the prohibition of peddling and selling of goods by itinerant merchants and transient vendors.

Thereafter, under this Green River ordinance, J. L.

Bunger, a salesman for the Fuller Brush Company, was arrested and convicted of a violation of the ordinance, and his conviction in the district court for Sweetwater county, Wyoming, was appealed to the Wyoming supreme court, and the opinion is found in *Town of Green River v. Bunger*, 50 Wyo. 52, 58 Pac. (2d) 456, being released in 1936. The chief justice, in writing the opinion, discussed the decision of the tenth circuit court of appeals, where the ordinance had been upheld as a valid regulation, and affirmed the conviction as a proper exercise of local police regulation in punishing uninvited visitation of private residences by solicitors for the sale of merchandise as a misdemeanor. See, also, *McCormick v. City of Montrose*, 99 Pac. (2d) (Colo.) 969.

But many other courts, after considering this same ordinance, have reached a different conclusion. The town of Bel Air, Maryland, enacted the Green River ordinance. The Jewel Tea Company filed a bill for a writ of injunction to restrain the officers of the town from enforcing the ordinance, to which the town of Bel Air demurred, and the demurrer being sustained, the Jewel Tea Company appealed to the court of appeals of Maryland. The bill alleged that officers of the town not only arrested their agent, Marshall, but had threatened to arrest any agents of the plaintiff if they attempted to serve their regular customers, or to secure new customers. It is said in *Jewel Tea Co. v. Town of Bel Air*, 172 Md. 536, 192 Atl. 417, that municipalities derive whatever powers they possess from the legislature; that they do not have any inherent rights,—they are all delegated, and may be changed, limited, enlarged, or taken away by a successive session of the general assembly; that the only power the town of Bel Air has to declare the solicitation of customers to be a nuisance is to find that it interferes with the health, peace, order, or good government of the town. The court finds that it has no relation thereto, but that it discriminates against the nonresident, and in favor of resident business, and thus violates the Fourteenth Amendment to the Federal Constitution.

In November, 1933, the city council of Orangeburg passed the Green River ordinance, and O. R. Farmer, a solicitor for the Fuller Brush Company, was convicted of violating the ordinance. Upon appeal to the court of general sessions, it was held that the ordinance in question was reasonable and valid as a matter of law, from which decision an appeal was taken to the supreme court of South Carolina. In the opinion (*City of Orangeburg v. Farmer,* 181 S. Car. 143, 186 S. E. 783), it is said that formerly questions of the reasonableness or unreasonableness of an ordinance were up to the legislative body enacting the law, and only when they were in conflict with constitutional statutory inhibitions would the same be declared void, but that, because of changed conditions, the court in the case of *City of Columbia v. Alexander,* 125 S. Car. 530, 119 S. E. 241, 32 A. L. R. 746, held that, where an ordinance attempted to prevent one from engaging in a lawful and legitimate occupation, such an ordinance could be impeached as unreasonable. "It cannot be denied that the enforcement of the ordinance will seriously impair, if not destroy, the defendant's lawful business. Upon its face that appears to have been the purpose of the ordinance."

The opinion in *City of Orangeburg v. Farmer, supra,* states: "The ordinance declares that the mere soliciting of the sale of merchandise in and upon private residences is a nuisance, and levies a penalty upon such facts shown. The penalty is not based upon the conduct of the salesman, nor is the same based upon any valid shown reason of protecting the public health, nor is any other fact required save and except an act which in itself is legitimate. * * * The occupation of soliciting orders from house to house is a lawful one when conducted in a proper manner. * * * Measured by the standards laid down in this court, the ordinance is unreasonable, unconstitutional on this ground, and void."

On April 13, 1937, the town council of Culpeper, Virginia, enacted the Green River ordinance, and the defendant, John H. White, was tried and convicted in the justice court. He appealed to the circuit court, waived a jury, and was tried

upon an agreed statement of facts, in part as follows: J. H. White, a solicitor for the Real Silk Hosiery Mills, Inc., an Illinois corporation, with its executive office located in Indianapolis, Indiana, solicited for the sale of hosiery and lingerie, the customer signing an order, which was mailed to Indianapolis, from which place the merchandise was sent to the customer by parcels post C. O. D. Similar orders had been solicited in the town of Culpeper for more than 15 years. If the customer was a new one, he would call at the customer's private home, present a small token or gift, and ask permission to call and show his samples the next day or later, at which time he would solicit the order. The defendant was at all times courteous, gentlemanly, and considerate, never offensive nor unduly insistent, "nor were any of his acts or practices dangerous, offensive, unhealthy, or unsafe, either as relating to the general public or the person or persons upon whom the defendant called."

Upon appeal to the supreme court in this case of *White v. Town of Culpeper*, 172 Va. 630, 1 S. E. (2d) 269, the court said that the warrant upon which the defendant was tried was procured by the town sergeant, and there was an utter lack of evidence of complaint upon the part of any of the householders of the town. It is said that, if the validity of the ordinance is upheld, it must be upon the ground that the evil at which it is aimed is a public nuisance, for if the visit of the solicitor merely offends the householder it would be a private nuisance, not punishable as a crime, citing 2 Dillon, Municipal Corporations (5th ed.) note to section 684, and several other authorities. The action of the circuit court was reversed, and the defendant discharged from custody.

An earlier case, involving a solicitor for the same company, came up from the city of Richmond, California, to the federal court, which held that an ordinance deprived the company of the liberty of contract and of property without the due process of law. *Real Silk Hosiery Mills v. City of Richmond*, 298 Fed. 126.

An exhaustive discussion of the Green River ordinance

was written in 1938, and is found in *Prior v. White,* 132 Fla. 1, 180 So. 347, which involved the conviction of a solicitor under this ordinance enacted by the city of New Smyrna, Florida. An original habeas corpus proceeding was brought in the supreme court. It was held that an ordinance imposing a penalty for mere solicitation of orders without invitation or request was unreasonable, unfair, and oppressive as applied to a solicitor taking orders for the sale of goods. It was further found:

"3. Unless a householder manifests externally in some way his wish to remain unmolested by the visits of solicitors, the solicitor may take custom and usage as implying consent to call where such custom and usage exist, as regards validity of ordinance declaring mere soliciting of orders for sale of merchandise, without request or invitation of householder, a nuisance and imposing a penalty for violation of ordinance."

"4. The act of soliciting order for sale of goods in and upon private residences without consent of owner or occupant is not a 'public nuisance' and may not be punished as a crime or misdemeanor."

"6. A municipality cannot, by an attempted exercise of its general police powers, prohibit mere soliciting of orders for sale of merchandise in and upon private residences without consent of owner or occupant, except perhaps as to householders who have in some way indicated that solicitation of business or certain designated types of business at their homes is not allowed."

"7. An ordinance declaring mere soliciting orders for sale of goods in and upon private residences without consent of owner or occupant a nuisance and imposing a penalty for violation of ordinance invades solicitor's constitutional rights."

In one of the briefs in the case at bar, our attention is called to the case of *N. J. Good Humor, Inc., v. Board of Commissioners,* 123 N. J. Law, 21, 7 Atl. (2d) 824, decided in June, 1939, as supporting the city of Geneva in the instant case. It appears that an ordinance made it unlawful

to sell ice cream within the municipality from house to house, and conviction for such violation was affirmed. In the opinion it is said that the ordinance prohibiting the peddling of ice cream was not unreasonable, arbitrary, or capricious, but rather a restriction only on the manner or method of sale, and while the one who actually did the selling was immune from arrest as an honorably discharged veteran, his personal immunity did not extend to his employer. But the case did not end there, for seven months later a certiorari was allowed from this decision by the court of errors and appeals of New Jersey, and on January 25, 1940, with three judges dissenting, the former judgment of the supreme court was vacated, and complaint dismissed. See 11 Atl. (2d) 113. In this last opinion it was held that an ordinance prohibiting house-to-house merchandising was not justified under the home rule act as a measure to insure the peace and quiet of a residence community, nor was the ordinance justified as a police regulation of public safety. The court said: "The exercise of the police power by a municipal corporation must be directed towards and have a rational relation to protection of a basic interest of society rather than the mere advantage of particular individuals and must be reasonable and free from arbitrariness."

The latest cases we have been able to find involving the Green River ordinance were released January 30, 1940, and March 12, 1940, and are *City of McAlester v. Grand Union Tea Co.*, 98 Pac. (2d) (Okla.) 924, and *De Berry v. City of La Grange*, 8 S. E. (2d) (Ga. App.) 146. It is said that the federal circuit court of appeals, in *Fuller Brush Co. v. Town of Green River, supra*, held the act to be a nuisance, but did not determine whether the nuisance was public or private. In conclusion, it holds the ordinance is not regulatory, but preventative and prohibitive as against an act innocent in itself, and without surrounding facts and circumstances that would constitute the act a public nuisance, and that substantial and irreparable injury would result from its enforcement.

Because of existing and widespread unemployment, there is doubtless an increase in the number of townspeople who are attempting to support themselves by means of house-to-house solicitation in the sale of hosiery, brushes, ready-to-wear garments, groceries, home-baked products, cosmetics, and magazines, and of farmers in the sale of eggs, butter, poultry, milk, and other farm products. It is argued with considerable support that, when a house-to-house salesman becomes successful in any of these lines, he has thereby established a property right which is protected by the Constitutions of the United States and the state of Nebraska. It is admitted that such house-to-house solicitation may be a petty annoyance to some householders, but this can be prevented by a sign, which is seen in many apartment houses, "No solicitors allowed."

In Nebraska, a city of the second class is given authority by the legislature in section 17-454, Comp. St. 1929, reading in part as follows: "Preserving the Peace, Designation of Nuisances in Residence District. XXV. To prevent and restrain riots, routs, noises, disturbances or disorderly assemblages; to regulate, prevent, restrain or remove nuisances in residential parts of municipalities and to designate what shall be considered a nuisance."

We find nothing in this act which gives the city of Geneva the right to "define" a nuisance, as the legislature used the word "designate," which means to name or point out.

"Municipal power encroaching upon individual rights does not exist unless plainly conferred by the city charter or other law." *State v. Wiggenjost,* 130 Neb. 450, 265 N. W. 422. See, also, *Interstate Power Co. v. City of Ainsworth,* 125 Neb. 419, 250 N. W. 649; *Gray v. City of Omaha,* 80 Neb. 526, 114 N. W. 600.

Somewhat akin to this is the statement in *State v. McMonies,* 75 Neb. 443, 106 N. W. 454: "It is familiar law that the power given a municipality to 'regulate' does not authorize it to suppress or prohibit a trade or business, as the very essence of regulation is the existence of something to

be regulated." See 1 Dillon, Municipal Corporations (4th ed.) sec. 89.

A municipality has no power, under its general authority, to prohibit as a nuisance an occupation which is not a nuisance in fact. *Ex parte Harris,* 97 Tex. Cr. 399, 261 S. W. 1050.

Nor can the police power be exerted arbitrarily to interfere with private business, or to prohibit lawful occupations, or to impose unreasonable or unnecessary restrictions upon them under the guise of protection of the public. *Corporation of Toronto v. Virgo,* 73 Law Times Rep. 449.

In *Jay Burns Baking Co. v. Bryan,* 264 U. S. 504, 44 S. Ct. 412, 68 L. Ed. 813, the supreme court of the United States held invalid a Nebraska statute which involved an unreasonable restriction through the bread weight law, and held: "A state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

Judge Rose said: "To acquire the means of supporting life by honest labor and skill is an inherent right of a law-abiding citizen and municipal restrictions thereon do not exist unless authorized and imposed in plain terms of the law." *State v. Wiggenjost, supra.*

"No doubt one may visit another's place of business from no other motive than curiosity, without incurring liability, unless he is warned away by placard or otherwise. So every man, by implication, invites others to come to his house as they may have proper occasion, either of business, of courtesy, for information, etc. Custom must determine in these cases what the limit is of the implied invitation." 2 Cooley, Torts (4th ed.) 238, sec. 248.

"A mere legislative declaration that a business or occupation, harmless and innocuous in itself, is inimical to the public interest, cannot make it so, nor render a restrictive ordinance valid, unless by reason of surrounding conditions the declaration can be said to accord with the fact, as based upon common observation and human experience." *Yee Gee v. City and County of San Francisco,* 235 Fed. 757.

"But there is no question but that, when a municipal corporation has been authorized by its charter to pass ordinances to remove and prevent nuisances, it may, for the preservation of public health, safety and convenience, provide the manner in which property within its limits shall be used, and prevent a different use of it, by fine and force if necessary. But such ordinances must not be arbitrary or unreasonable, and must clearly be for the preservation of the public health, safety or convenience." 2 Wood, Nuisances (3d ed.) 978, sec. 745.

The ordinance of the city of Geneva, under examination in the case at bar, is both prohibitory and penal in its character. It affects both personal and property rights. The power given such city to "designate" what may be public nuisances cannot be construed as including a power to absolutely prohibit legitimate business which may be pursued as of common right.

A very large number of courts, from states widely scattered, have held that the Green River ordinance is invalid and void, and not a justifiable exercise of the police powers of a city, and therefore deprives persons engaging in such business of their constitutional rights. The act which the ordinance declares to be a public nuisance is, in fact, either no nuisance at all, or in any event only a private nuisance.

In the opinion of the court, there is no aspect of a declaratory judgment in this case, and it has been considered as one seeking injunctive relief only.

Having reached these conclusions, our court accepts the logic and reasoning of the majority of courts which have passed upon this question, and the judgment of the trial court, granting a permanent injunction against the enforcement of ordinance No. 146, is hereby affirmed.

AFFIRMED.

MESSMORE, J., dissenting.

The city of Geneva is a city of the second class, as defined by the law of Nebraska. Section 17-454, Comp. St. 1929, which outlines the powers of municipalities of the class to which the city of Geneva belongs, provides: "To regulate,

prevent, restrain or remove nuisances in residential parts of municipalities and to designate what shall be considered a nuisance." Obviously, the foregoing language, which does not admit of equivocation, is a legislative power granted to the city.

In the case of *Richardson v. Braham,* 125 Neb. 142, 249 N. W. 557, this court said: "Power to act and reasonableness of action are proper tests of the validity of laws, ordinances and regulations." The city, by passing the ordinance in question, obviously intended to exercise the police power of the city, and it is not for this court to interfere with its enforcement unless its unreasonableness or want of necessity for such measure is shown by satisfactory evidence. Under well-established rules, where a municipality enacts an ordinance, pursuant to authority expressly granted, all presumptions are in favor of its validity. When an ordinance is enacted under police power and its validity is to be determined, the court, in determining its validity, will assume that the city council acted with knowledge of the conditions relating to the particular test. The test in appraising the exercise of the municipal power is whether, under the conditions present in the municipality, the exercise of the admitted power to declare nuisances is unreasonable, arbitrary or capricious.

" 'In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police powers should be exercised.' *State v. Withnell,* 91 Neb. 101." *Hawkins v. City of Red Cloud,* 123 Neb. 487, 243 N. W. 431.

Primarily, local authorities are entrusted with the regulation of such matters and not the courts. The reason is obvious. The local authorities know the necessities of local situations. We must assume, then, that the council of the city of Geneva had before them all the facts with reference to the annoyance, disquietude and inconvenience occasioned to householders, caused by uninvited solicitors. I do not

believe that the ordinance here questioned, or its enforcement, directly or indirectly, encroaches upon the plaintiffs' constitutional rights. The ordinance does not prohibit or interfere, in any respect, with plaintiffs' rights or privileges of selling wares, goods and merchandise. Plaintiffs are free to carry on a business of that sort except as to the manner of soliciting orders as specified in the ordinance. Obviously, it could do so in many ways other than by disturbing the residents of the city, as prohibited by the ordinance. The objective sought by the ordinance is to denounce a particular practice of the plaintiff corporation and their solicitors or agents. They go uninvited, against the wishes of at least some of the occupants of the dwellings in the city, in and upon private premises and homes, to there solicit orders for goods, contrary to the express provision of the ordinance.

It has been uniformly held that. while legislative authority may not arbitrarily interfere with private affairs by imposing unusual and unnecessary restrictions upon a lawful business, yet a considerable latitude of discretion must be accorded to the law-making power, and if the legislation operates uniformly upon all persons similarly situated, and it is not shown that it is clearly unreasonable and arbitrary, it cannot be judicially determined to be in contravention of constitutional rights.

In the case of *Town of Green River v. Fuller Brush Co.*, 88 A. L. R. 177 (65 Fed. (2d) 112), it was held: "A municipal ordinance prohibiting, under penalty, solicitors and itinerant venders from making uninvited calls at private residences in pursuit of their occupation, is an appropriate exercise of the police power, and therefore does not deprive such solicitors and venders of their property without due process of law, or deny the equal protection of the laws." See *Town of Green River v. Bunger*, 50 Wyo. 52, 58 Pac. (2d) 456.

The ordinance questioned in the above case affirmed is analogous to the ordinance in the instant case. In order to comprehend the effect of the above holding, and in view of

our previous statements, it might be well to summarize what the city council of Green River obviously had in mind, being acquainted with all of the local conditions, as the reason for enacting the ordinance. The dogged, tenacious and sometimes pugnacious determination with which salesmen have literally thrown themselves through residential portals and at householders, the transient nature of their principal place of business, their lack of financial responsibility in many instances, and an hourly and very general tendency to defraud the unwary, must have borne considerable weight in the minds of those who have been instrumental in putting such regulatory legislation upon the ordinance books of municipalities.

It is true, as stated in the majority opinion, that, due perhaps to economic conditions, more persons are engaged in house-to-house soliciting than ever before in the history of this country. Doubtless, the city council had this fact in mind and recognized that, in the ringing of the door bell or knocking at the door four or five times a day, and often in the evening, without reference to what the householder might be doing, he or she was compelled to answer the bell and listen to a sales talk, without opportunity to compare values, or postpone buying, compelling the householder to buy, against an inner voice of discretion which tells her to wait until she can compare values. I believe that practices of like character have become so general and common as to be of judicial knowledge, and that the frequent ringing of door bells of private residences by venders and solicitors is becoming a nuisance to the occupants of homes. The ordinance in question does not mean that only a merchant, with a fixed place of business, may sell his wares; the legislation is aimed exclusively at the manner in which the goods are sold. The ordinance does not prohibit the sale of merchandise from door to door, but only the uninvited solicitation from door to door. Ordinances like and similar to the one in question have been approved in the following cases: *Town of Green River v. Fuller Brush Co., supra*; *Town of Green River v. Bunger, supra*; *City of Shreveport v. Cun-*

ningham, 190 La. 481, 182 So. 649; *Commonwealth v. Gardner,* 133 Pa. St. 284, 19 Atl. 550.

The validity of the ordinance in question has been challenged in that it contravenes the due process of law. The court has left the phrase undefined, leaving its determination to rest with each individual case as it arises. The test seems to swing, as do so many of our legal tests, with the pendulum of reasonableness. Although it has been intimated that the police power extends only to interests of public health, safety, peace and morals, the more correct view seems to be that it has now grown to include matters of general welfare and convenience. The police power knows no definite limits; it extends to every possible phase of what the courts deem to be the public welfare. It is a general right on the part of the public authority to abridge the rights of individuals and control their conduct, in so far as the same may be made necessary for the securing of the public convenience. Is the scope of this ordinance beyond this modern conception? I believe not. A peddling nuisance ordinance might well be construed to be within the legitimate police-power province, were it to rest alone on the public convenience.

December 11, 1939, the supreme court of Colorado determined a case involving the validity of an ordinance similar to the one in the instant case; adopted the reasoning of *Town of Green River v. Bunger, supra,* and *Town of Green River v. Fuller Brush Co., supra,* with the exception that the Colorado court did not determine the case by declaring such practice of soliciting a nuisance, but upheld the ordinance as a proper exercise of the police power, in harmony with the present trend to extend the police power to permit its exercise for the comfort, convenience and general welfare of society; and specifically held that said ordinance, prohibiting solicitation of retail business at private residences, without the request or invitation of the householders, does not violate due process clauses of state or federal Constitutions; that a city ordinance, prohibiting the soliciting of retail business in private residences, with-

out the request or invitation of the householders, does not constitute regulation of or interference with interstate commerce, within the terms of the federal Constitution. See *McCormick v. City of Montrose*, 99 Pac. (2d) (Colo.) 969.

The validity of the ordinance has been further attacked because it denies equal protection of the laws. Equal protection does not mean that all persons, regardless of circumstances, shall be treated the same. Persons may be grouped into classes. If the classification is reasonable, and if the rights and liabilities associated with each class are uniform within that class, there is no basis for constitutional condemnation on the ground that there is a deprivation of the equal protection of the laws. I need not repeat the reasons for the enactment of the ordinance. Much has been written on the subject, and there is an unwarranted fear that, by sustaining ordinances of this character, we may go far afield in denying persons the right to make a livelihood. Such a statement is capable of more than one construction. One of such constructions would be that a man's home is still his castle, and the mere fact that he has a sidewalk leading up to the door is not an open invitation to solicitors or salesmen who are uninvited. The general conception is that such accommodations are for invited guests.

I have not reviewed the effect of the pleadings and the general demurrer to the answer containing a general denial, as well as statements of fact as to the manner in which plaintiffs solicit business in the city of Geneva, and shall not enlarge on it in this dissent except to say that the demurrer admits the allegations of the answer, that the plaintiffs were violating the ordinance. The allegations of the answer assert that plaintiffs were solicitors and peddlers of merchandise, that they called indiscriminately on householders in the city at irregular intervals, without being invited. In view of the pleadings and under the circumstances, as I view them, I am unable to see a constitutional bar, or other legal reason why the ordinance in question cannot be sustained.

ROSE, J., concurs in the dissent.

GLADYS CARNES, APPELLEE, V. PAUL DEKLOTZ, APPELLANT.
291 N. W. 490

FILED MARCH 29, 1940. No. 30757.

1. **Evidence.** The speed of an automobile is not ordinarily a matter of exclusive expert knowledge and skill, and any witness with a knowledge of time and distance is competent to give an estimate.
2. ———. "Where it appears that a witness had no reasonable time, means, distance or opportunity to formulate a basis for an opinion as to the speed of a car, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other evidence on the subject." *Bergendahl v. Rabeler*, 133 Neb. 699, 276 N. W. 673.
3. **Appeal.** Where there is other evidence in the record sufficient to sustain the finding by the jury of excessive speed, it is ordinarily not error to permit an eyewitness to estimate the speed of an automobile, although the usual foundational requirements have not been in all respects met.
4. **Negligence.** Although a person may have negligently exposed himself or his property to an injury, nevertheless, if the defendant, after discovering his exposed situation, negligently injures him or is guilty of negligence in not discovering his dangerous position in time to avoid the injury, and injury results because thereof, he may still recover.
5. **Appeal.** The verdict of a jury based upon conflicting evidence will not be disturbed unless clearly wrong.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

O. B. Clark, for appellant.

Chambers, Holland & Locke and *T. J. Kiesselbach, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is an action to recover damages for injuries sustained in an automobile collision. From a verdict and judgment for plaintiff for $1,550 the defendant appeals.

The evidence shows that the plaintiff was driving north into the village of Cortland, Nebraska, on highway No. 77, when her automobile collided with that of the defendant

approaching from the north. The accident occurred at the intersection of highway No. 77 with the main street of Cortland. Plaintiff testifies that she intended to turn west into the village, but says she has no recollection as to what happened and is unable to reconstruct the accident because of the injuries which she received. Defendant says that he was driving south on the highway and as he approached the intersection he saw plaintiff's car coming down the highway straddling the center line. When he got within a hundred feet or so of her car, he testifies that plaintiff's car "drifted" over on his side of the highway and that he had no opportunity to avoid the accident. The evidence is quite definite to the effect that plaintiff's car was not traveling in excess of 20 miles per hour. The speed of defendant's car was estimated at various speeds ranging from 25 to 70 miles per hour.

The record further shows that the village of Cortland was engaged in the installation of new water mains and lines, and as a result the entrance to main street from the highway was barricaded, except for a fifteen-foot opening in the center of the street. There were numerous warning signs along the highway, including the red flags ordinarily used to indicate temporary dangers. There is evidence that some of the dirt from the ditching operations had been carried onto the highway pavement by the traffic passing over it which would affect the usual braking efficiency of a car on a paved street. The evidence shows that there were tire burns on the pavement for a distance of 80 feet north of the place of the impact made by defendant's car.

It is the contention of plaintiff that defendant was operating his car at a high and excessive rate of speed through the village of Cortland, and that he failed to have his car under proper control. It is also alleged that defendant had the means at hand to avoid the accident and negligently failed to do so. The defendant denies the allegations of the petition, and alleges that plaintiff negligently turned her car into the path of defendant's car, and that such act was the sole cause of the accident. It was upon these issues that

the cause was submitted to the jury, which resulted in a verdict for the plaintiff.

Defendant complains of error by the trial court in permitting one Douglas to give his opinion as to the speed of defendant's car. His testimony was to the effect that the brakes caused a high squeal which attracted his attention. As he turned around he observed the two cars coming together when only 20 feet apart. From this foundation he estimated the speed of defendant's car at 35 to 40 miles per hour. While the witness had no reasonable time, means, distance or opportunity to formulate a basis for an accurate opinion as to the speed of defendant's car, yet in describing what he saw as the cars came together would require a cursory estimate of speed even if no opportunity to accurately estimate it existed. The impression of the witness as to speed is ofttimes essential to a fair interpretation of his testimony. The vagueness of such an opinion must necessarily go to the weight of his evidence and not to its admissibility. In the final analysis it resolves itself into a question of the sufficiency of the evidence to sustain a verdict, rather than the competency of the witness to testify. There was much evidence in the record bearing upon the rate of speed at which defendant's car was being driven. If the only substantial evidence in the record were that of this witness, we would be inclined to a different view. But, with ample additional evidence in the record to sustain the verdict, we hold that the admission of the witness' cursory opinion as to speed was not error. We have examined the holding in *Bergendahl v. Rabeler*, 133 Neb. 699, 276 N. W. 673, and other cases cited, and we think they are in line with the disposition made in the present case. The applicable rule is: Where it appears that a witness had no reasonable time, means, distance or opportunity to formulate a basis for an opinion as to the speed of a car, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other corroboratory evidence on the subject.

Defendant contends that it was error for this trial court

to submit the issue formulated by the pleadings that plaintiff was operating her car in a careful and prudent manner and that defendant did not keep a proper lookout, for the reason that there was no evidence introduced on the subject. It is the rule, of course, that issues not sustained by competent evidence should not be submitted to the jury. But all the facts and circumstances existing immediately before and at the time of the accident were before the jury in the instant case. Clearly, such evidence is sufficient to warrant the trial court in submitting these issues to the jury even though there may have been no direct evidence offered. Such issues are often determinable only from the circumstances and conditions existing when the accident occurred. We think the court properly submitted these issues to the jury.

There is ample evidence in the record to sustain a finding that either or both of the parties were negligent. We do not deem it necessary to discuss at length the comparative negligence of the parties, in view of the fact that the last clear chance doctrine was invoked by the plaintiff. There is evidence in the record that plaintiff did drive her car onto the left-hand side of the highway and into the path of defendant's car. There is also evidence in the record from which the jury might find that defendant saw plaintiff's car in his path at a time when he could have avoided the accident in the exercise of ordinary care. If the defendant was traveling at the rate of 25 miles per hour, as he testified, the jury certainly had a reasonable basis for invoking the last clear chance doctrine. It is true that the evidence is conflicting, but it is such that the jury's finding thereon is final. The applicable rule is: "Although a party may have negligently exposed himself to an injury, yet, if the defendant after discovering his exposed situation negligently injures him, or is guilty of negligence in not discovering his dangerous position until too late, and the plaintiff is because thereof injured, he may nevertheless recover." *Omaha Street R. Co. v. Martin*, 48 Neb. 65, 66 N. W. 1007; *Wilfong v. Omaha & C. B. Street R. Co.*, 129 Neb. 600, 262 N. W. 537.

There being no error in the instructions, and the evidence being sufficient to sustain the verdict of the jury, the duty is imposed upon this court to affirm the judgment.

AFFIRMED.

LEONARD HILTON, APPELLANT, V. GUY L. CLEMENTS, EXECUTOR, CROSS-APPELLEE: WILLIAM H. BERGER ET AL., APPELLEES.

291 N. W. 483

FILED MARCH 29, 1940. No. 30648.

1. **Fraudulent Transactions.** Transactions between a brother and sister, by which property is transferred by assignment by one who is unable to pay his just debts, should be carefully scrutinized. Such transactions are presumptively fraudulent, and the burden is upon him who asserts the good faith thereof to prove it.
2. ———. The question of fraudulent intent is a question of fact and not of law, when considered in the matter of an assignment charged to be made to hinder and delay creditors.
3. ———. Where the testimony relied upon to show good faith is given by interested relatives, the reasonableness or unreasonableness of their evidence bears considerable weight in arriving at a just conclusion.
4. **Creditors' Suit.** The beginning of a creditors' suit, issuing of process and serving thereof give a specific lien upon the property which it is sought to reach.
5. **Descent and Distribution.** An equitable lien may be impressed upon the unexempt portion of the distributive share of an heir, a judgment debtor, in a decedent's estate, which is in process of administration in the county court.
6. **Creditors' Suit.** The filing of a creditors' bill and service of process, creating a lien upon the equitable assets of a judgment debtor, does not necessarily require the issuance of a restraining order, or undertaking in support thereof, or an injunction.
7. **Judgment.** In a suit in equity, the relief to which the plaintiff is entitled under his petition and proofs may be granted pursuant to his general prayer, where the defendants understand the issues involved and the record discloses that they have full knowledge of the objectives sought by the plaintiff in his petition.

8. ———. "The general rule of equity pleading which is preserved by our Code is that, if there is a prayer for general relief, as well as for special relief, the court may extend the relief specially prayed for and give such other relief as the case warrants, consistent with the general frame and purpose of the petition." *Burnham v. Bennison*, 121 Neb. 291, 236 N. W. 745.
9. **Fraudulent Conveyances.** "Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render all transactions unconscientious." *Wood v. Conrad*, 2 S. Dak. 334, 50 N. W. 95.

APPEAL from the district court for Cass county: WILMER W. WILSON, JUDGE. *Affirmed as modified.*

Harry Grimminger and *Lloyd E. Peterson*, for appellant.

H. G. Wellensiek and *W. A. Robertson*, *contra.*

Guy L. Clements, *pro se.*

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

The plaintiff, a resident of Hall county, Nebraska, recovered a judgment in the district court against William H. Berger, on December 6, 1928, in the amount of $1,515.20, with interest and costs. The judgment was kept in force as a valid existing lien by issuance of execution and return thereon, without property found upon which to levy. The transcript of the judgment was filed in the district court for Cass county on November 28, 1934, and was a valid existing lien on July 19, 1935, when the plaintiff instituted the present action in the nature of a creditors' bill. In this court the plaintiff appears as appellant and cross-appellee; defendants William H. Berger and Flora Zachary as appellees and cross-appellants, and defendant Guy L. Clements as cross-appellee.

The purpose of this action is to set aside an assignment, to sell the property, goods, chattels, rights and credits of

William H. Berger, assignor, and apply the proceeds to the payment of plaintiff's judgment, to restrain and enjoin the executor of the estate of George L. Berger from distributing any property bequeathed to William H. Berger, and for such other and further relief as may be just and equitable. The assignment in question was made on April 26, 1935, by William H. Berger to his sister, Flora Zachary, assigning to her all of his right, title and interest in the cash, notes, mortgages and choses in action, and other property that would come to him out of the estate of his father, George L. Berger. At the time of the execution of the assignment, the estate of George L. Berger was pending in the county court of Cass county, and the property of said estate was in the hands of the executor thereof.

William H. Berger claimed that he was, and had been for many years, indebted to his sister, Flora Zachary. The indebtedness started with a small amount, and no record was kept thereof from and after 1920. Berger at the time of trial was 60 years of age. He had engaged in farming in and near Grand Island, suffered financial reverses and became seriously ill. He testified he was forced from his home. On October 1, 1929, he went to live with his sister in Omaha, Nebraska. She was engaged in keeping roomers and boarders and at times sold merchandise from door to door. He boarded and roomed in her home the greater part of the time. The reasonable value of the services rendered by her in this respect was fixed at $7 a week, and it is further claimed that the sister had advanced to him the sum of $8 a week for traveling and for medicine and doctor's bills for certain physical ailments suffered by him, of which he could not become permanently cured, and which rendered him unfit for work. He further testified that his sister had advanced to him an amount equal to $25 or $30 a week. The sister stated she had also loaned him $500 or $600, which she had received from her mother's estate. Berger was indebted to his father's estate in the amount of $2,690.19, which was deducted from his share thereof. The assignment recited the express consideration for nurs-

ing, care and support furnished by Flora Zachary to William H. Berger, and for services of a like nature in the future. There is nothing in the record to sustain the advancement of funds as claimed, except the statements made by Berger and Flora Zachary. There is no evidence of indebtedness between them, with the exception of a note in the sum of $1,500, in favor of Flora Zachary, dated December 20, 1930, due and payable December 20, 1931, for money advanced to her brother. At the time of the execution of this note William H. Berger agreed orally with Flora Zachary to pay her from any amount constituting the distributive share of his father's estate. This note remained unpaid. In addition to the foregoing evidence, there is testimony to the effect that Berger made the assignment in question for the purpose of defeating any claim that his wife might have for support, and the plaintiff understood that the assignment was made for such purpose, claiming that the executor informed him of the fact.

Where an assignment is made by an heir and beneficiary under a will of all his right, title and interest in and to all of his distributive share of an estate to his sister, in consideration of nursing, care and support, and in consideration of future services of a like character, the effect of the assignment is to put the property of the assignor beyond the reach of a judgment creditor, and the transaction will be closely scrutinized.

It is a rule of law that transactions between relatives, such as a brother and sister, by which property is transferred by assignment by one who is unable to pay his just debts, should be carefully scrutinized. Such transactions are presumptively fraudulent, and the burden is upon him who asserts the good faith thereof to prove it. See *Buckner v. McHugh*, 123 Neb. 396, 401, 243 N. W. 119, citing *Light v. Kennard*, 11 Neb. 129, 7 N. W. 539.

The question of fraudulent intent is a question of fact and not of law, when considered in the matter of an assignment charged to be made to hinder and delay creditors. When the testimony relied upon to show good faith is given

by interested relatives only, the reasonableness or unreasonableness of their evidence has considerable weight in arriving at a just conclusion. The testimony of the brother and sister in the instant case is void of corroboration. The trial court found, and the record warrants the finding, that the assignment in question was fraudulent and void as to the plaintiff, the judgment creditor, and that the assignor and the assignee participated in the fraud.

June 21, 1935, an affidavit in garnishment was filed by plaintiff and garnishee summons issued thereon, served personally on the executor June 22, 1935. Section 20-1026, Comp. St. 1929, provides that, pursuant to a garnishee summons, the garnishee shall appear and answer under oath all questions put to him, touching all property and credits of every description in his possession or under his control, and disclose the amount owing by him to the defendant, whether due or not. The executor claims that he appeared for the purpose of such examination but that no one was present to examine him. He did not file a written answer. Defendant Berger was in Plattsmouth on the day set for hearing claims against his father's estate, to assist the executor in checking the claims, when he heard that the garnishment had issued, and made this assignment. The executor dictated the assignment to a stenographer. He acted in a dual capacity as attorney for and executor of the estate.

On the same day the executor was to appear as directed by the garnishee summons, he filed a final report and petition for final settlement in the county court. He did not inform the county court of the plaintiff's suit, or the nature thereof, or that he was served with process as a party defendant, or that he was served with garnishee summons. Hearing was ordered on the petition for final settlement for August 16, 1935, notice published as required by law, final decree entered August 16, 1935, and the executor, in compliance with the assignment and in accordance with the decree on final settlement, paid over to the assignee, Flora Zachary, the distributive share of William H. Berger in the

estate of George L. Berger, deceased, and receipt thereof was filed in the county court. The executor was discharged October 18, 1935.

The trial court found that the executor did not participate in the fraudulent purpose of the defendants Berger and Zachary, but acted in good faith in closing the estate and making distribution of the assets thereof under the order of the county court. The plaintiff contends that the court erred in making the foregoing finding, for the reason that the executor of the estate of George L. Berger was duly served with summons, advised of the nature of plaintiff's action prior to closing the estate, and that the executor was not acting in good faith in the premises. The court decreed that a lien existed from and after July 23, 1935, on the distributive share of William H. Berger in the hands of the executor.

In 37 C. J. 308, it is said: "Generally speaking, an equitable lien is a right, not recognized at law. and which a court of equity recognizes and enforces as distinct from strictly legal rights, to have a fund or specific property, or the proceeds, applied in full or in part to the payment of a particular debt or demand; a right of a special nature over property which constitutes a charge or encumbrance so that the property itself may be proceeded against in an equitable action, and either sold or sequestered, and its proceeds * * * applied on the debt or demand of the person in whose favor the lien exists."

The plaintiff's petition in the instant case prayed that the property, goods, chattels, rights and credits due the defendant William H. Berger be ordered sold, as required by law, and the proceeds applied on the payment of the plaintiff's judgment.

Plaintiff cites 8 R. C. L. 33, sec. 38, which states, in substance: Where no specific lien has been acquired upon the property before suit, the filing of a creditor's bill in equity to reach personal assets of the debtor, or at least the service of process upon the suit, will operate as a specific lien in the nature of an attachment or equitable levy upon the

property sought to be charged. This principle of law receives support in this state as evidenced by the language contained in *Flint v. Chaloupka*, 72 Neb. 34, 99 N. W. 825, as follows: The beginning of a creditors' action gives a specific lien upon the property which it is *sought to reach*, and continues while the cause is pending.

In the case of *Plummer & Davis v. School District No. 1 of Marianna*, 90 Ark. 236, 118 S. W. 1011, we find this language (p. 240): "The lien obtained on the equitable assets of a debtor by a creditor's suit attaches thereto from the time of the service of process, or * * * on the filing of the bill and suing out of process."

The plaintiff further contends that the distributive share of a debtor in the hands of an administrator or an executor is reached by a creditors' bill. This court in the case of *Fremont Farmers Union Cooperative Ass'n v. Markussen*, 136 Neb. 567, 286 N. W. 784, held: "A creditors' suit may be maintained to impress a lien upon the distributive share of a judgment debtor in a decedent's estate, which is in process of administration in the county court, and to require the administrator or executor to account for it, after order of distribution by the county court, to the clerk of the district court."

The executor's defense is that he was obligated to close the estate, as required by law, and to follow the orders and directions of the county court, to avoid personal liability. The district court cannot, necessarily, make any order that will interfere with the process of administering the estate and making it ready for final distribution. It can, however, implant a lien on such unexempt portion thereof as may be coming to a particular heir and require the administrator to account for it after final order of the county court to the clerk of the district court, or a receiver appointed for that purpose, if the plaintiff so prays or requests, which the plaintiff in the instant case did not do. See *Fremont Farmers Union Cooperative Ass'n v. Markussen, supra.*

The executor for further defense states that no restraining order was issued or undertaking given as required in

the issuance of a restraining order, and that he was not enjoined from disposing of the assets constituting the distributive share of defendant William H. Berger in the estate of George L. Berger, deceased, and in his hands as executor thereof.

The court in *King v. Goodwin*, 130 Ill. 102, 22 N. E. 533, held: "The general rule is, that the filing of a creditor's bill, and service of process, create a lien on the equitable assets of the judgment debtor, without an order for an injunction or the appointment of a receiver. This lien cannot be impaired."

It would further appear from the executor's contention that his defense is to the effect that the prayer of plaintiff's petition is insufficient to impress an equitable lien upon the distributive share of William H. Berger, heir, in the hands of the executor, for the reason that the prayer does not contain language specifically to such effect.

This court, in *Kimmerly v. McMichael*, 83 Neb. 789, 120 N. W. 487, held: "In a suit in equity the relief to which plaintiff is entitled under his petition and proofs may be granted pursuant to his general prayer, where defendants understand the issue and resist his allegations by evidence." And in the body of the opinion, at page 793, the court, in quoting from *Wood v. Speck*, 78 Neb. 435, 110 N. W. 1001, said: " 'Generally, under the rule of equity pleading, if a litigant is not entitled to the relief specifically asked for, he may, nevertheless, recover under the general prayer whatever the proof shows he is entitled to, if consistent with the allegations of his pleading.' "

In the instant case, the evidence of the executor, of course, was taken after he had disposed of the distributive share of William H. Berger, as provided by the assignment by Berger to his sister, Flora Zachary, but such fact would not alter the rule announced in the above case, where it is apparent from the record that the executor understood the issues and had full knowledge of the objectives sought by the plaintiff in his petition. In furtherance of the foregoing rule, this court in *Burnham v. Bennison*, 121 Neb.

291, 236 N. W. 745, held: "The general rule of equity pleading which is preserved by our Code is that, if there is a prayer for general relief, as well as for special relief, the court may extend the relief specially prayed for and give such other relief as the case warrants, consistent with the general frame and purpose of the petition."

It has been held: "The failure to ask relief to which it is apparent the party is entitled will not, as a general rule, have the effect to deprive him of the relief to which he is entitled in fact; and especially is this so where the defendant has appeared and answered." 16 Encyclopedia, Pleading and Practice, p. 795, and cases cited. And in 5 Encyclopedia, Pleading and Practice, p. 568, it is said: "Under the general prayer for other and further relief, the creditor, as in other suits, is entitled to such relief as the law announces upon the facts pleaded and proved, whether especially asked for or not."

Without repeating the evidence but referring thereto, we believe the executor did not act in good faith. "Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render all transactions unconscientious." *Wood v. Conrad,* 2 S. Dak. 334, 50 N. W. 95. With full knowledge of all of the facts and the purpose of plaintiff's action, as heretofore related, the executor proceeded to file his final order and close the estate, and pay the assignee the distributive share of William H. Berger, the assignor.

Under the circumstances of this case, the trial court did not err in creating an equitable lien on the distributive share of William H. Berger in the George L. Berger estate in favor of the plaintiff. In addition thereto, equity and good conscience require that the executor account to the district court for such distributive share of William H. Berger, and, upon failure to do so, judgment shall be rendered in favor of the plaintiff and against the executor personally for an amount equal to, but not in excess of, the distributive share

of William H. Berger in the estate of George L. Berger, deceased.

AFFIRMED AS MODIFIED.

NETTA WHITTAKER, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.
291 N. W. 275

FILED MARCH 29, 1940. No. 30773.

1. Trial. The giving of an instruction defining the terms "ordinary care" and "negligence" is not prejudicially erroneous when a proper instruction is given as to the care required of a common carrier, and where other instructions also properly place the burden of proof on the plaintiff.
2. Appeal. An instruction containing the word "unnecessary," in referring to a sudden, violent jerk or lurch of a street car, when such word is not contained in the plaintiff's petition, is not prejudicially erroneous, since a violent, sudden jerk of an unusual character, such as to warrant an inference of negligence in the operation or handling of the street car, would be an unnecessary jerk or jolt.
3. Trial. An instruction defining the duties of a passenger riding in a street car to use reasonable care for his own safety, to guard against ordinary and usual jerking or lurching of the car, is not prejudicially erroneous when the court also states that the plaintiff must go further and show that the jerking or lurching or movement of the car was of an unusual character.
4. ———. An instruction that a street car company is under no obligation to keep a car immovable until passengers have reached a seat in the car is not prejudicial where, in other instructions, the court has set forth the claims of the plaintiff and the burden of proof required of plaintiff.
5. ———. An instruction that there is no liability on the part of a street car company for ordinary jerks and lurches, incident to the starting and stopping of a car, is not prejudicially erroneous where such instruction also contains language that the plaintiff has the burden of proving that the jerking or lurching or movement of the car was of an unusual character, and where the evidence shows that plaintiff's complaint was of a sudden, unusual and violent jerking of the car in starting.
6. ———. Instructions, defining the duties of passengers riding in

and proceeding to a seat in a street car, to exercise reasonable care for their own safety, and to take advantage of supports to guard against ordinary jerks and lurches of the car, and that passengers assume all the risks that are ordinary and usual in the way of jerking or lurching in the ordinary and necessary operation of the car, are not prejudicially erroneous where the instructions further state that plaintiff must show that the jerking and lurching movement of the car of which she complains was of an unusual and forcible nature, and so forcible that a reasonable passenger, knowing that he must take reasonable care of himself against ordinary movements of cars, would not have reasonably anticipated; such instructions are not instructions on contributory negligence, but merely apprise the jury of the duties of a passenger riding in a street car.

7. ———. It is not error for the court in an instruction to assume as true facts that are established by the evidence without controversy.

8. ———. "Where the instructions as a whole clearly present to the jury the issues of fact and the law applicable thereto, harmless error in instructions separately criticized on appeal does not require a reversal of the judgment on the verdict." *Interstate Airlines, Inc., v. Arnold,* 127 Neb. 665, 256 N. W. 513.

9. Appeal. The verdict of a jury, based on conflicting testimony, will not be disturbed on appeal unless clearly wrong.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Benjamin S. Baker, Fred A. Wright and *Edward Shafton,* for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

This is an action for damages for personal injuries sustained by plaintiff on account of the alleged negligence of defendant in operating a street car. The jury returned a verdict for the defendant. Plaintiff appeals.

Plaintiff's petition and the allegations thereof to create liability as against defendant may be more fully discerned from the evidence. The defendant's answer denies that the

plaintiff received any injuries due to any negligence on the part of its motorman in the operation of its street car. The reply is, in effect, a general denial.

The record discloses that plaintiff, a woman 66 years of age at the time of the accident, took care of her husband's office during the past few years. To do so she was required to travel on street cars, going downtown and returning five or six times a week. She had traveled on street cars for 52 years. On November 7, 1937, at 5:30 in the afternoon, plaintiff, with her husband, intending to go to the Joslyn Memorial in Omaha, boarded a street car at Fifty-first and Leavenworth streets. She preceded her husband to the platform of the street car. As to what happened is reflected by her testimony as follows: "A. Well, when I started to step up into the car, of course I was thrown off my balance when it jerked the first time, and as I started to step into this car I reached for this rod, it pitched me so quick that I fell from the front of the street car to that little cross seat, fell down and struck my—struck the knees, tore the skin all off the knees and they were both bleeding and I don't know when I hit my ankle." She fell prostrate on the floor of the street car; her elbows and knees were injured and bleeding. The nature of the jerking as described by her was very severe and of a character she had never before experienced when on a street car. She was lifted to her feet by a young man and sat on a side or long seat of the car. The plaintiff and her husband left the street car at Twenty-ninth street and Leavenworth, had lunch at a café, remained there for an hour, then boarded a street car and proceeded to Fifty-seventh street and Leavenworth, to the home of Mrs. Elizabeth Weber, who attended plaintiff.

Plaintiff's husband testified in substance as follows: "Well, I was standing there, I had handed him (the motorman) my money, waiting for my car checks, when the car gave a lurch, a jerking, then all at once it gave a second jerk, when I had to grab the iron railing there to keep me from falling and then he started again and I looked and my

wife was in the car flat on the floor." He had for more than 50 years past had occasion to travel on street cars and for a great many years in the neighborhood where he had boarded this car, and the jerk or lurch, he testified, was the severest he had experienced during all of such time. In the front part of the car there is a side seat on either side, 10 or 12 feet long, then cross seats. The plaintiff "was lying flat on the floor, face down, with her head pretty well up to the cross seats." He immediately called the motorman's attention to what had occurred.

The motorman testified: The car runs east and west on Leavenworth. There are two tracks on Leavenworth, and the street runs east downhill. He is in a sitting position when he operates the car, and when plaintiff and her husband boarded the car he came to a complete stop at Fifty-first and Leavenworth, opened the door and then closed it. He further testified, in substance, that there was a small amount of air in the brake, having a tendency to hold and keep the car from jerking. He fed the air slowly, as was his custom in operating the car. After the car started to move, or started rolling, as he expressed it, he shut off the power. He denied that the car jerked, as testified by the plaintiff and her husband. He glanced around and saw a boy attending the plaintiff. At that time plaintiff and this boy were seated on a long seat in the car. He did not see the plaintiff fall to the floor; nor did he remember any statement made by the plaintiff's husband to him, but admitted that he might have made some statement. After the plaintiff had fallen and when the young man was assisting her, plaintiff's husband was standing by the motorman; then proceeded to the plaintiff's side. The motorman took no names of witnesses, made no report of the accident, and contends that there was no jerking within a distance of 100 feet after he started the car. At the time of the accident, the motorman had been in the employ of the defendant company for a period of two weeks. He testified that he had been trained by other operators for a period of 10 days, several hours at a time, before assuming his duties. He

did not remember whether he started the car before or at the time plaintiff's husband paid the fare. He learned the next day that a claim had been made against the defendant and then reported the accident.

From the foregoing facts it is apparent that plaintiff's contention is that the motorman operating the street car, while proceeding east on Leavenworth street, started the car, then violently and suddenly stopped the car, throwing the plaintiff off-balance, and, before she could regain her balance, the motorman, with great violence, suddenly started the car forward.

The plaintiff first assigns as error the giving of instruction No. 6. This instruction defines negligence and ordinary care. The contention is that the instruction is inapplicable to common carriers for hire. The degree of care to be exercised by the operator of a street car is expressed in *Daly v. Publix Cars,* 128 Neb. 403, 259 N. W. 163, which held: "Common carriers of passengers 'are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged for the safety of the passengers, and they are liable for the slightest negligence.' *Griffen v. Lincoln Traction Co.,* 118 Neb. 459."

The preceding instructions to instruction No. 6 given by the court define the issues, the burden of proof and the definition of "preponderance of the evidence." Instruction No. 7 properly defines the degree of care to be exercised by the operator of a street car for the safety of passengers riding therein, and meets the rule as announced in *Daly v. Publix Cars, supra.* Plaintiff's petition uses the term "negligence," and instruction No. 6 merely defines the term. Such instruction, if erroneous, is without prejudice. See *Hardung v. Sheldon,* 133 Neb. 427, 275 N. W. 586.

Plaintiff next complains of instruction No. 10 given by the court as follows: "You are instructed that the plaintiff brings this action alleging that her fall was caused by a sudden, violent and unnecessary jerk or lurch of the car. Now, you are instructed that it is not sufficient for the plaintiff to show merely that she was injured by a jerking

or lurching of the car. She must go further and show that the jerking or lurching was of such an unusual character as to warrant an inference of negligent handling of the car." The contention is that the plaintiff did not allege in her petition that it was an unnecessary jerk or lurch; that the defendant may be liable whether the jerk or lurch was unnecessary or not. The language used by the court is "that her fall was caused by a sudden, violent and unnecessary jerk or lurch." In this class of cases the plaintiff has the burden of proving by a preponderance of the evidence the following: In an action by a passenger for damages against a street railway company, it is not sufficient for plaintiff to show merely that she was injured by jerking or lurching of the car; she must go further and show that the jerking or lurching was of such an unusual character as to warrant an inference of negligent handling of the car, or that it was attributable to some act of negligence. *McCann v. Omaha & C. B. Street R. Co.*, 117 Neb. 786, 222 N. W. 633.

In 13 C. J. S. 1410, sec. 750, the rule is concisely stated as follows: "A carrier is not liable for jerks or jolts which are necessarily incident to the use of the conveyance, but the rule is otherwise where the jerk or jolt is unnecessary, or sudden and violent." By the use of the word "unnecessary" in the instruction complained of, the court did not err. Any violent and sudden jerk of such an unusual character as to warrant an inference of negligence in the operation or handling of the street car, under the rule as announced in *McCann v. Omaha & C. B. Street R. Co., supra,* would be an unnecessary jerk or jolt.

Plaintiff next complains of the giving of instruction No. 11 as follows:

"You are instructed that it is a matter of common knowledge that street cars operated upon rails make some movement when they start, and for the ordinary jerks or lurches usually and ordinarily incident to the starting and stopping of a street car, there is no liability upon the part of the company and even though the plaintiff fell as the result

of the ordinary and usual jerking or lurching incident to starting or stopping a car, there would be no liability upon the part of the defendant.

"The plaintiff must go further and show that the jerking or lurching or movement of the car was of an unusual character."

Plaintiff's contention is: After the motorman started the car forward, he then reversed its movement and then moved it forward again; in all, constituting three movements in the operation of the car, all included as a part of the starting of the car; therefore, the manner of stopping the car is beside the point, and the instruction tends to mislead the jury, for the reason that the jury could well apply the instruction to the negligent stopping in the starting of the car; that is, the instruction is broad enough to include negligent stopping in the process of starting the car, and that by such instruction the plaintiff must anticipate such a stop; must anticipate that the car would jerk or lurch and prepare herself against such jerking and lurching.

The plaintiff's evidence, as we view it, attempts to show that the street car jerked in starting; that when the motorman attempted to start the car there were two jerks. The instruction complained of is not misleading or prejudicial when considered with all of the instructions given.

Plaintiff next contends that the court erred in giving instruction No. 12 as follows: "You are instructed that a street railway company is under no obligation to keep a car immovable until passengers have reached a seat within the car." The record discloses that the plaintiff entered the car, passed the motorman, and was proceeding into the main part of the car, evidently to seat herself, when the jerks of which she complains occurred, and before she reached her seat she fell, as testified. In previous instructions the court set forth the claims of the plaintiff and required her to prove by a preponderance of the evidence that the jerking or lurching of the car, resulting in her fall and injuries, was of such an unusual character as to warrant an inference of negligent handling of the car, or that it was

attributable to some act of negligence. See *McCann v. Omaha & C. B. Street R. Co., supra*; also 13 C. J. S. 1382, sec. 733. Instruction No. 12 is proper when considered with all of the instructions in the case.

The plaintiff next complains of instructions 13 and 14. Instruction No. 13 reads: "You are instructed that passengers on trolley cars, in exercising reasonable care for their own safety, must take advantage of supports to guard against ordinary jars or lurches, since passengers are charged with knowledge that the operation of a trolley car not infrequently occasions ordinary jars and lurches." Instruction No. 14 reads: "It is the duty of passengers on street cars on entering and progressing towards a seat to take reasonable care of themselves not to fall by reason of motions of the car that are necessarily made in the operation of the street cars. And should a passenger be injured, even by the motions of the car that are made reasonable and necessary in the operation of such cars on the streets, then there is no responsibility by the street car company in damages to the one injured, no matter how severe the injury may be, as a passenger assumes all the risks that are ordinary and usual in the way of jerking or lurching in the ordinary and necessary operation of the car. The plaintiff must go further and show that the jerking and lurching movement of the car of which she complains was of an unusual and forcible nature, and so forcible that a reasonable passenger knowing that he must take reasonable care of himself against ordinary movements of cars would not have reasonably anticipated."

The error complained of in the giving of instructions 13 and 14 is that the defendant's answer does not contain an allegation of contributory negligence on the part of the plaintiff, and that the instructions here given place a duty on the plaintiff; that instruction No. 13 indirectly admits that plaintiff did not exercise reasonable care for her safety, and that instruction No. 14 assumes negligence on the part of the plaintiff.

The court did not submit the issue of contributory negli-

gence to the jury; such issue was not pleaded by defendant. The instructions heretofore recited disclose the ordinary risks that are assumed by passengers riding in street cars. The crux of the plaintiff's case is not the result of an ordinary jerk or one that is incident to the mode of travel, but a sudden, violent jerk of an unusual character, such as to warrant an inference of negligence in the handling or operation of the car. *McCann v. Omaha & C. B. Street R. Co., supra.* We believe that the instructions are self-explanatory. It is proper for the trial court to give instructions to apprise the jury of the duties of a passenger riding in a street car. Such instructions do not tell the jury that the passenger violated any duty; nor do the instructions tell the jury they should ascertain whether or not the passenger violated any duty for her own safety under the circumstances.

The plaintiff complains of the giving of instruction No. 15, to the effect that plaintiff suffered from a physical ailment, leakage of the heart, many years before the accident in question, and that she had been under the observation and treatment of a physician for such ailment; that the evidence now shows that she has leakage of the heart, and that the heart is at this time compensated; that under the evidence "you could not find that the heart disease in question, i. e. mitral regurgitation or leakage of the heart was caused by the accident, but only that it may have been aggravated." The evidence establishes the foregoing facts, and the instruction is not erroneous.

Instruction No. 16 is also complained of which told the jury that plaintiff sustained only temporary injuries to her ankle and knee, and that no claim is made for permanent disability thereto. The evidence fully sustains this statement, and the instruction is free from error.

In *Gibson v. Glens Falls Ins. Co.*, 111 Neb. 827, 197 N. W. 950, this court held: "It is not error for the court in an instruction to assume as true facts that are established by the evidence without controversy." See, also, *Major v. Harrison*, 132 Neb. 363, 272 N. W. 201.

Plaintiff next complains of the refusal of the trial court to give offered instruction No. 7 and of the giving of instruction No. 18, both on the measure of damages. We have carefully read the offered instruction and that given by the court on this proposition. The objection to instruction 18 is to the following paragraph: "But you will not allow anything by way of doctor's bills, medical expense or loss of time from her usual occupation as a housewife, since any claim for these items has vested in her husband." While this language may not have been necessary in the instruction, it nevertheless is a proper statement and is not prejudicial.

"Where the instructions as a whole clearly present to the jury the issues of fact and the law applicable thereto, harmless error in instructions separately criticized on appeal does not require a reversal of the judgment on the verdict." *Interstate Airlines, Inc., v. Arnold,* 127 Neb. 665, 256 N. W. 513.

Plaintiff next contends that the verdict is not sustained by sufficient evidence, is contrary thereto and not sustained by law. The plaintiff's objection seems to be that the testimony of plaintiff and her husband should overbalance the testimony of the motorman, who denied their testimony. There are two versions of what occurred and the manner in which it happened, constituting a direct conflict in the testimony.

"In an action at law for damages, a controverted issue of fact is a question for the jury, and, when they pass on evidence which is substantially conflicting, their finding in that respect will not be set aside on appeal unless clearly wrong." *Mensinger v. Ainsworth Light & Power Co.,* 94 Neb. 465, 143 N. W. 475. See *Hahn v. Doyle,* 136 Neb. 469, 286 N. W. 389; *Dworak v. Shire,* 126 Neb. 474, 253 N. W. 655; *Prince v. Pathfinder Life Ins. Co.,* 133 Neb. 705, 276 N. W. 661.

For the reasons given, the judgment of the district court is

AFFIRMED.

JOHNSEN, J., not participating.

STATE OF NEBRASKA, PLAINTIFF, V. JAKE DEGELE, DEFENDANT.

291 N. W. 554

FILED APRIL 2, 1940. No. 30952.

Contempt. Contumacious refusal of witness to answer a legal and proper interrogatory, propounded to him in a hearing before a referee of this court, punished by imprisonment in the county jail for ten days.

Original action for contempt by the state, on the relation of the attorney general, against Jake Degele. *Defendant held guilty of contempt.*

Walter R. Johnson, Attorney General, and *Rush C. Clarke,* for plaintiff.

Homer L. Kyle, for defendant.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an original action commenced in this court by the attorney general filing an information charging the defendant with contempt of court in refusing to answer a question which he was ordered to answer by a referee conducting a hearing for this court.

The information charged, in brief, that on January 12, 1940, the defendant was guilty of contempt, in that on or about said day, at a hearing held in Lancaster county, Nebraska, in case No. 30791, pending in this court, wherein the State of Nebraska, ex rel. Nebraska State Bar Association, was relator, and I. C. Bachelor was respondent, before the Honorable Leon L. Hines, the duly appointed, qualified and acting referee in said cause, heretofore appointed by this court, the defendant, Jake Degele, was called as a witness on behalf of the relator, and duly sworn by the said Honorable Leon L. Hines, as referee, and, having been so sworn, the defendant, Jake Degele, did then and there wilfully, unlawfully, feloniously and contemptuously refuse to answer

a legal and proper question propounded to him by the attorney general, which question was this: "Mr. Degele, at any time before the fire did you tell Mr. Bachelor that you were going to burn one of the houses on your farm?"

Defendant Degele was at said time an inmate of the state penitentiary, in which he was serving a sentence for arson.

One of the several answers made by Mr. Degele was this: "A. I don't know what you men got me in here for. I am serving time in the penitentiary for my crime, and why am I here? The Referee: You are here to testify, Mr. Degele, to the questions that the attorney general puts to you, and you will please answer them. If there is any objection on the grounds of incriminating yourself, why, you, of course, have the right to raise that objection; but in that question there is no such possibility, so you may answer the question. * * * Mr. Bachelor: I think he ought to have somebody here to represent him. A. Well, I am just going to refuse to answer any more questions. You can do with me as you darn please. I am serving time in the penitentiary, and I don't belong here, out there is where I belong, and I am just absolutely through. * * * Mr. Clarke: Well now, I think this witness has been thoroughly and fully and carefully advised about his duty here, and I frankly don't propose to undertake to examine him all afternoon with him asking the court to advise him. So at this time I ask the court to enter an order adjudging this witness guilty of contempt and punishing him in such manner as the referee sees fit."

The record shows generally that, after some further attempts by the referee, the referee squarely asked the witness whether he was refusing to answer any more questions, to which the witness replied: "Until I am a free man. You can put this case off until I am a free man."

It appears from the record that this proceeding is not an attempt to compel the witness to answer the questions set out, since the hearing in the Bachelor case has been completed. The attorney general insists that the defendant be

punished for his contumacious refusal to answer questions properly put to him in the hearing before the referee.

Our law applicable to this situation reads as follows: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: First. Disorderly, contemptuous, or insolent behavior towards the court, or any of its officers in its presence; * * * Fourth. Any wilful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts; Fifth. * * * the refusal to answer any legal and proper interrogatory." Comp. St. 1929, sec. 20-2121.

When defendant was first brought before this court on March 25, 1940, and pleaded not guilty, bail was fixed at $500, which he could not raise, and he was given 20 days in which to file answer. Thereafter, on March 30, 1940, he appeared before the court with his counsel, Homer L. Kyle, and thereupon Mr. Kyle requested that the defendant be allowed to withdraw his former plea of not guilty, and the defendant thereupon entered a plea of guilty. Thereupon, full statements were made by Rush C. Clarke, assistant attorney general, and Homer L. Kyle, and the court took the matter under advisement.

Courts are charged with the duty and necessity of guarding their proceedings against everything which interferes with due and orderly administration of justice (*McCauley v. State,* 124 Neb. 102, 245 N. W. 269), and a contempt committed before a duly appointed referee of this court cannot be overlooked, but must be punished, to enforce the orderly administration of justice.

"It has been held that court commissioners and referees may punish as for contempt disobedience of their orders, but it is more generally held that in the absence of express authority such officers have no such power." 17 C. J. S. 66, sec. 53.

This court has held, under section 64-107, Comp. St. 1929, that a notary public had the right to issue an order of com-

mitment finding a witness in contempt for refusing to answer a proper question, and directing that he be confined in the county jail of Douglas county. *Ehlers v. State*, 133 Neb. 241, 274 N. W. 570; *Id.*, 302 U. S. 655, 58 S. Ct. 364.

The record shows that the defendant has realized his error, for, after going over the matter at length with his attorney, he now enters a plea of guilty.

In consideration of all the facts and circumstances in this case, this court is of the opinion that a sentence of ten days, to be served in the jail of Lancaster county, will meet the ends of justice; said sentence to begin March 26, 1940, being the day upon which the defendant's attorney notified the clerk of this court of the defendant's desire to plead guilty.

SENTENCE TEN DAYS.

GUS P. HORN, TRUSTEE, APPELLEE, V. RALPH GOLDBERG, APPELLANT.

291 N. W. 493

FILED APRIL 5, 1940. No. 30788.

1. **Bankruptcy.** "Whether a creditor had reasonable cause to believe his debtor insolvent * * * is a question of fact. In determining this question, it is not necessary to find that the creditor actually knew or believed that the debtor was insolvent. He is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's condition which were brought home to him, might fairly be expected to disclose." *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624, 94 N. W. 822.
2. **Trial.** Where an instruction correctly states the law in language commonly used and generally understood, it is not necessary that the trial court, on its own motion, define the language used. A party desiring a definition of the terms so used should offer such an instruction. In the absence of a specific request, the failure of the trial court to define the terms used in the requested instruction is not error.
3. **Appeal.** Assignments of error have been examined and prejudicial error not found.

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. *Affirmed.*

Ziegler, Dunn & Becker and *D. L. Manoli,* for appellant.

Young & Williams, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

SIMMONS, C. J.

This is an action to recover alleged preferential payments made to the defendant by a bankrupt corporation.

Plaintiff alleges: (1) That he is the trustee of the estate of Famous Liqueurs, Inc., Bankrupt (hereinafter called the company); (2) that the company was a Nebraska corporation engaged in the wholesale liquor business; (3) that, on and prior to January 13, 1937, defendant was a general unsecured creditor of the company in the sum of $2,000; (4) that voluntary payments of $500 and $1,500 were made by the company to the defendant on January 20, 1937, and February 16, 1937, respectively; (5) that the company was insolvent at the time of said payments, that said payments gave to the defendant a greater percentage of his claim than other general creditors will receive, that the payments were made from company assets and the estate of the company thereby diminished; (6) that at all of said times, defendant knew, or had a reasonable cause to believe, that a preference would be effected by said payments and that the company was insolvent; (7) that the company filed a voluntary petition in bankruptcy on March 11, 1937, and on said date was adjudged bankrupt, and that its estate has not sufficient assets to pay its liabilities.

Plaintiff prayed that said payments be adjudged to be avoidable preferences, that they be avoided, and that he have judgment for $2,000 and interest. Defendant by answer admitted allegations (1) and (2) and denied all other allegations of plaintiff's petition. Trial was to a jury. At the close of plaintiff's case in chief, and also when both parties rested, defendant moved for an instructed verdict

for the following reasons: "1. Under the law and the evidence the plaintiff is not entitled to recover. 2. The evidence fails to show that the defendant, on the date of the payments charged as a preference, was informed and is chargeable with any information, and the evidence fails to show that he knew that there was any insolvency on the part of" the company, "or that he believed, or had reason to believe, that the payments made * * * would constitute a preference in his favor." The motions were overruled. Verdict and judgment was for the plaintiff. Defendant appeals.

Defendant contends that the court erred in overruling said motions, basing his contention upon the propositions that the burden rests upon the plaintiff to prove (1) that the bankrupt was insolvent at the time of the payments; (2) that the defendant must have known, or have reasonable cause to believe, that the payment would effect a preference. U. S. C. A. Title 11, sec. 96.

On the first proposition, the defendant states that the law requires that a payment, before it can be avoided as illegal, must effect a preference, and that there is no evidence to show that a preference actually resulted from the payment to the defendant. Defendant by his answer put this matter in issue. Plaintiff concedes that, to be voidable, a payment must actually have effected a preference. Schedules of the assets and liabilities were introduced. These schedules were admissible as tending to prove the insolvency charged. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 633, 99 N. W. 675. Defendant contends that there is no proof as to what claims or amount thereof were allowed, and that, as the record stands, it is a conjecture as to whether or not a preference has been effected. There are two answers to defendant's contention. First, defendant repeatedly objected to placing the books and records of the company in evidence on the ground that it encumbered the record. Counsel for defendant at one time stated: "I think the totals of the indebtedness and the assets as shown by the books, if they do show, computed by * * * somebody * * * competent is

all that ought to be offered and go into the record." Plaintiff then proved the report of the auditor's examination of the books and records.

It is obvious from the record that the case was tried on the theory that the controverted issue was whether or not the defendant "knew or had a reasonable cause to believe that a preference would be effected by" the payments to him. That was the proposition directly presented in the motion for an instructed verdict. The defendant in several places in his brief in this court recognizes that to be the "issue." The defendant may not now be allowed to present this case on a different basis than that on which it was presented to the trial court. That the company is insolvent cannot be denied. As shown by the company's books as of December 31, 1936, the company's total assets were $8,413.68, its liabilities were approximately $16,000, it operated in 1936 at a net loss of $6,178.62, the company operated at a loss after January 1, 1937. That it was insolvent at all times after January 1, 1937, is the only conclusion that can be deducted from this record. The plaintiff has on hand a net amount of $2,052.45 plus an uncollected judgment for $665.85. One creditor has an unsecured claim for over $3,400. Defendant's account was paid in full. It is obvious that a preference has been effected.

On the second proposition in support of his position that his motion should have been sustained, defendant contends that the plaintiff's evidence establishes a "mere suspicion" and not a "reasonable cause to believe."

"Whether a creditor had reasonable cause to believe his debtor insolvent * * * is a question of fact. In determining this question, it is not necessary to find that the creditor actually knew or believed that the debtor was insolvent. He is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's condition which were brought home to him, might fairly be expected to disclose. * * * But a mere knowledge that the debtor has other liabilities, or of circumstances which could operate no further than to create a suspicion

of possible insolvency, is not always sufficient." *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624.

In *Walter v. National Fire Ins. Co.*, 101 Neb. 639, 164 N. W. 569, this court cited with approval the following:

"It is not necessary that the creditor knows or even actually believes that a preference is being given, provided he has reasonable cause to be put upon inquiry as to whether a preference is actually given or not. Constructive notice is sufficient, upon the ground that, when a party is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry as to the facts is a moral duty and diligence and an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice where the means of knowledge are at hand, and, if the party under such circumstances omits to inquire and proceeds to receive the transfer or conveyance, he does so at his peril, as he is chargeable of knowledge and of all the facts, which by a proper inquiry he might have ascertained." 1 Loveland, Bankruptcy (4th ed.) sec. 508.

What then are the facts "brought home" to the defendant which a "reasonable inquiry" would have disclosed? A representative of another creditor testified that, on January 13, 1937, he attempted to collect his account without success; that thereafter on that day he told the defendant of his efforts to collect his account; that his company was very much worried; that the president of the company would not give him definite figures of its business and refused to allow the creditor to examine its books; that it was the opinion of the creditor that the company was going "deeper and deeper in the hole;" that the company's president had given him figures indicating that the company was "several thousand dollars in the red and couldn't meet their accounts;" that that creditor believed the company should be liquidated. He further testified that the defendant replied, "Even if you do lose something on it, or a good part of it, you won't miss very much of it," and that the defendant did not think the company was making any progress, and "I don't think you will be able to get" it;

that the creditor might lose a good part of its claim. Through personal friendship and business transactions, the defendant had an intimate relationship with the company's president; at defendant's suggestion, defendant and the company employed the same auditor; defendant's bookkeeper set up the company's books. The defendant testified that he knew nothing about the company in January and February, 1937, except that it seemed to be doing a much larger business than formerly. He denied largely the plaintiff's testimony as to the conversation of January 13, 1937. The dispute of fact was a question for the jury. They believed the plaintiff's witnesses. It is obvious that defendant was not ignorant of many details of the company's business and of its financial situation and methods of doing business.

The facts which an inquiry would have disclosed have been set out herein. Each case must necessarily depend upon its own circumstances. Under the facts here, there is ample evidence to be submitted to a jury and to sustain the finding that the defendant "had reasonable cause to believe" that the payment to him "would effect a preference." The trial court did not err in overruling the motions for a directed verdict.

Defendant next contends that the court erred in giving the following instruction:

"You are instructed that for the purpose of the cause now on trial all of the relevant and material allegations of the plaintiff's petition have been established by a preponderance of the evidence *as a matter of law,* except the allegation contained in paragraph No. 6, which is as follows: 'At all of said times defendant Goldberg knew or had reasonable cause to believe that a preference would be effected by said payments, and each of them, and that said corporation was insolvent.' "

Defendant objects specifically to that part of the instruction holding that all material allegations (except the one noted) have been established *as a matter of law.* Defendant contends that there is no *conclusive* proof of those facts,

and that therefore the instruction was erroneous. By the provisions of section 20-853, Comp. St. 1929, errors not affecting the substantial rights of the defendant must be disregarded. As we have pointed out, the only issue on which the defendant offered evidence was the issue to which the court directed the jury's attention. We need not determine the question of whether or not those facts were established "as a matter of law." They were sufficiently established to take the case to the jury, and no evidence to the contrary was offered. We do not see that the defendant has been prejudiced. The trial court properly directed the jury's attention to the one issue which the parties recognized as in controversy.

Defendant next contends that the trial court erred in admitting evidence that the company sold liquor at cost to a corporation owned by the defendant and that rebates were given by the company to the defendant's corporation for the reason that it is "wholly irrelevant *to the issue* in the case at bar." Defendant on his examination in chief testified that he received "advantageous prices" from the company and that "they were never selling me at a loss." Plaintiff then offered evidence that the company sold the defendant's corporation at net cost, without margin for overhead, delivery or profit, and that the company had paid rebates to the defendant. The defendant opened the question in his case in chief, the evidence showed the manner of business between the defendant and the company, and went to the defendant's credibility. The admission of the evidence under the circumstances was not prejudicial error.

The trial court instructed the jury in part as follows: "Therefore, before the plaintiff can recover against the defendant, he must establish, by a preponderance of the evidence, that the defendant Ralph Goldberg knew or had reasonable cause to believe that Famous Liqueurs, Inc. was insolvent as of the date of January 20, 1937, and February 16, 1937, respectively, and that the payments made to him would result in a preference."

Defendant contends that the court erred in failing to de-

fine "reasonable cause" as used in this instruction. The defendant further states: "The defendant, seeking to avoid the dangers of a general instruction" tendered four proposed instructions which were refused. An examination of the tendered instructions reveals that they sometimes use but do not define the term "reasonable cause to believe."

This court has held: "Though an instruction may not be so specific as it should be, if it is not misleading, it is not cause for reversal, where the complaining party made no request for a more specific instruction." *Webb v. Omaha & S. I. R. Co.*, 101 Neb. 596, 164 N. W. 564. "A party desiring a more explicit instruction than that given should offer such an instruction." *Larsen v. Savidge*, 103 Neb. 79, 170 N. W. 353. The instruction given being a correct statement of the law, in the absence of a request for a more specific definition of the term used, the failure of the trial court to define the term "reasonable cause to believe" was not error. *Hannah v. American Live Stock Ins. Co.*, 111 Neb. 660, 197 N. W. 404; *Bonacci v. Cerra*, 134 Neb. 476, 279 N. W. 173.

The judgment of the trial court is

AFFIRMED.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. FRANK B. HUGHES ET AL., APPELLANTS.
291 N. W. 475

FILED APRIL 5, 1940. No. 30768.

1. Evidence. "This court will not take judicial notice of the rules of practice of the district court." *Dunn v. Bozarth*, 59 Neb. 244, 80 N. W. 811.
2. Appeal. "The rules of practice in a district court, alleged to have a material bearing on the rulings complained of, before they can enter into a determination of a question presented in this court, must be incorporated in the bill of exceptions." *Jones v. Cleary*, 2 Neb. (Unof.) 541, 89 N. W. 386.
3. ———. "In the absence of a bill of exceptions containing the evidence, an order made by the district court confirming sale of real estate is presumed to be correct, and supported by sufficient evidence." *Keeler v. Manwarren*, 61 Neb. 663, 85 N. W. 839.

APPEAL from the district court for Cuming county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

A. R. Oleson, for appellants.

Moodie & Burke, William W. Graham, Philip N. Johnston, Philip M. Wellman and *Franklin L. Pierce, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

We copy the following from appellants' brief as the accepted statement of the issues determined, as claimed by them, viz.:

"This is an appeal from an order of confirmation in the sale of land under an attachment proceeding and the judgment rendered therein. * * *

"(b) *The Issues Actually Tried in the Court Below*

"That the price bid for this land, being $1,644.85, for 320 acres of highly improved land in Cuming county, was so inadequate to its value that in conscience and fair dealing the sale should not be confirmed.

"Also that the (district) court could not hear this matter at the time it did, because under its rules, which provide, 'Cases in which issues are joined subsequently to the second day of the term shall be for trial at any adjourned or special term, or session of the court, upon service of a trial notice of at least ten days, but this shall not apply to cases triable by jury, unless a jury may be in attendance at such time.'

"That the regular terms of court in Cuming county for 1939, are April 3d and October 2d. * * * The appellants herein submitted their objections upon the record in the case. This record shows that the appraisers under the levy of the order of attachment, with the sheriff, fixed the value of 320 acres of land at $24,000.00. * * *

"The (district) court overruled the objections of these appellants and ordered the sale confirmed and deed issued to the purchaser."

The errors now presented are, that, (1) the (district) court erred in proceeding with hearing this matter over the objections of appellants under rule XV of the district court; (2) that the (district) court erred in overruling the objections of these appellants and in confirming this sale upon the record in this case.

The "record," as referred to, consists of, viz.: Order of Attachment, Return on Order of Attachment (by sheriff), Order of Sale on Attachment, Return to Order of Sale on Attachment, Objections to Confirmation, Order of Confirmation, Notice of Appeal.

It appears that no bill of exceptions has been settled in this proceeding, and the final judgment entered in the main action does not appear as part of the transcript. It is plain that the first objection presented by appellants may not be sustained. There is no bill of exceptions, and rule XV of the rules of the district court for Cuming county is not before us for consideration.

"The rules of practice in a district court, alleged to have a material bearing on the rulings complained of, before they can enter into a determination of a question presented in this court, must be incorporated in the bill of exceptions." *Jones v. Cleary*, 2 Neb. (Unof.) 541, 89 N. W. 386. See, also, *State v. Scott*, 59 Neb. 499, 81 N. W. 305.

"This court will not take judicial notice of the rules of practice of the district court." *Dunn v. Bozarth*, 59 Neb. 244, 80 N. W. 811.

Nor are we impressed with the challenge to the sale as made by the sheriff. Fraud is not claimed, and a presumption of regularity and validity attaches to the judgments of courts, which must be overcome by affirmative proof. In the present case, the district court properly had before it all proceedings in the case, including the final judgment entered therein, and was advised of the recitals contained in the written instruments in suit which had been introduced in evidence on the trial had of the merits. True, as part of the sheriff's return in this case, there is an appraisement wherein the "following described property" is appraised at

the sum of $24,000. This appraisement is made pursuant to section 20-1008, Comp. St. 1929, wherein the officer levying an attachment is required to secure the making of "a true inventory and appraisement of all the property attached." But this appraisement is neither limited to the net value of the interest of the attachment debtors nor is such interest therein required to be separately appraised.

Attached property shall be sold under the same restrictions and regulations as if the same had been levied on by execution. Comp. St. 1929, sec. 20-1033; *Helmer v. Rehm*, 14 Neb. 219, 15 N. W. 344.

It follows that the validity of a sheriff's sale in the instant case must be based upon the actual or net value of the defendants' interest in the lands sold. *McKeighan v. Hopkins*, 14 Neb. 361, 367, 15 N. W. 711; *Hibbard v. Weil & Kahn*, 5 Neb. 41. The appraisement upon which appellants rely does not establish this fact.

On the other hand, the amount received by the sheriff at the attachment sale is competent evidence of value. *Douglass v. Hill*, 29 Kan. 527.

The controlling rule is: "There are no restrictions upon the means by which the trial court may satisfy itself that a fair price was obtained at a foreclosure sale or that a subsequent sale would not realize a greater amount. The burden is upon the appellants to show affirmatively that the judgment of the trial court is erroneous." *Occidental Bldg. & Loan Ass'n v. Beal*, 122 Neb. 40, 239 N. W. 202. See, also, *Crews v. Alberts*, 124 Neb. 671, 247 N. W. 602; *Lindberg v. Tolle*, 121 Neb. 25, 235 N. W. 670.

Neither can the objection to this sale, based upon the fact that the attached lands were sold *en masse*, in the absence of further evidence properly preserved in a bill of exceptions duly allowed, showing appellants were prejudiced thereby, secure them any relief. The rules long adopted in this jurisdiction as applied to foreclosure sales, and equally applicable here, are:

"It is within the province of the district court in a decree of foreclosure to provide for the appraisement and sale of

the premises in parcels or *en masse*, as the best interests of the parties may require.

"Where a decree of foreclosure contains no direction to the officer charged with its execution touching the appraisement and sale of the mortgaged property, he is vested with a discretion in regard to the matter which will not be disturbed, in the absence of a showing of prejudice to the party complaining.

"Nothing appearing to the contrary, it will be presumed that an officer charged with the execution of a decree was regardful of the rights of the parties to the action, and in a lawful manner performed the duties imposed upon him." *Kane v. Jonasen*, 55 Neb. 757, 76 N. W. 441. See, also, *Clark v. Birge*, 100 Neb. 769, 161 N. W. 427.

As hereinbefore suggested, these rules are equally applicable to attachment sales of real estate.

Indeed, the general rule controlling the class of cases here under consideration is: "In the absence of a bill of exceptions containing the evidence, an order made by the district court confirming sale of real estate is presumed to be correct, and supported by sufficient evidence." *Keeler v. Manwarren*, 61 Neb. 663, 85 N. W. 839. See, also, *State v. Knapp*, 8 Neb. 436, 1 N. W. 128; *Doon v. Adcock*, 127 Neb. 335, 255 N. W. 548.

It follows that the decree of confirmation entered herein by the trial court is correct, and it is

AFFIRMED.

STATE, EX REL. GLENN GOSSETT, APPELLANT, V. JOSEPH O'GRADY, APPELLEE.

291 N. W. 497

FILED APRIL 5, 1940. No. 30819.

1. **Indictment and Information.** All criminal informations in this state shall be verified by the oath of the county attorney, complainant, or *some other person.*
2. ———. All words descriptive of the capacity or character of

the affiant contained in the verification of a criminal information may be entirely disregarded, and if otherwise complete such verification will still be sufficient.

3. ———. Under the statute, a proper verification of a criminal information by "some other person" is sufficient and renders additional verification by the prosecuting attorney unnecessary.
4. **Habeas Corpus.** A judgment or sentence of a court of record in a criminal case is supported by the usual presumptions of validity and regularity when attacked collaterally. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void.
5. ———. "Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant." *Hulbert v. Fenton*, 115 Neb. 818, 215 N. W. 104.
6. **Indictment and Information.** It is a general rule that, where an objection is not made at the time prescribed by law, the objection is waived.
7. ———. The failure of the county attorney, in person, to present and file a criminal information, and indorse or sign his name thereto, if omissions, are to be corrected by a motion to quash presented by defendant, and his failure to present such motion within the time prescribed by statute constitutes a waiver of all objections based thereon.
8. **Criminal Law.** "A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement." 16 C. J. 403.
9. **Query:** Under the facts and circumstances set forth in this record, is not the "acting county attorney" herein to be considered as a deputy, appointed by a person having lawful authority to appoint, and a *de facto* officer whose official acts, so far as they affect the public or third persons, are valid?

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Olaf W. Osnes, for appellant.

Walter R. Johnson, Attorney General, and *George W. Ayres, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

Glenn Gossett appeals from a final order entered in the

district court for Lancaster county, in a habeas corpus proceeding instituted by him therein, which order determined that he was "not unlawfully imprisoned or deprived of his liberty by respondent," Joseph O'Grady; denied his application for release; dismissed his petition; and discharged the writ of habeas corpus theretofore issued on his application therefor.

The record discloses that William P. Mullen was a practicing attorney at law in Hall county, Nebraska, in June and July, 1936. Lloyd Kelly was at that time the county attorney of Hall county, and, being about to be absent from the state, he asked William P. Mullen to take care of the duties of the county attorney's office. Mr. Mullen agreed to do so. On June 27, 1936, and while Mr. Kelly was absent from the state, occasion arose to file an information against Glenn Gossett, who is now the relator and appellant in this action, charging him with grand larceny, alleged to have been committed in Hall county. Mr. Mullen prepared, verified and filed such an information, and signed his own name to it as acting county attorney. On June 27, 1936, Glenn Gossett pleaded guilty to the charges contained in the information before Honorable E. G. Kroger, a judge of the district court for Hall county, Nebraska, and was sentenced to serve a term of five years in the Nebraska state penitentiary. He was thereupon conveyed to the place of confinement pursuant to such sentence, and was thereafter imprisoned therein pursuant thereto. On August 1, 1939, he instituted the proceeding herein, and the final order thereafter entered denying relief, he now challenges by this appeal. His claim for relief is based upon the proposition that William P. Mullen had no legal right to sign, make, verify and file the information against him, and the information thus signed and filed by William P. Mullen was void, and the action of the trial court thereon was also void as being without jurisdiction.

The information, omitting the caption, is as follows: "Be It Remembered, That Wm. P. Mullen, Acting County Attorney in and for Hall County, and in the Eleventh Ju-

dicial District of the State of Nebraska, who prosecutes in the name and by the authority of the State of Nebraska, comes here in person into Court at this the April Term, A. D. 1936, thereof, and for the State of Nebraska gives the Court to understand and be informed that Glenn Gossett, late of the County aforesaid, did, on or about the 23rd day of June, A. D. 1936, in the County of Hall and the State of Nebraska aforesaid, then and there being, then and there unlawfully and feloniously did steal, take and carry away Fifty Dollars ($50.00)," etc.

This information is sworn to and verified by Wm. P. Mullen, as the acting county attorney.

The proceedings of the district court, and the sentence imposed upon this information, are, in substance, as follows: "Whereas; At a regular term of the District Court for said county, which term was begun and held at the courthouse, in Grand Island, Nebraska, in said county, on the 13th day of April, 1936; Present, the Hon. E. G. Kroger, one of the judges of said court; And, Whereas, Wm. P. Mullen, Acting County Attorney in and for the County of Hall, State of Nebraska, on the 27th day of June, 1936, came into Court, and presented a certain information in due form of law, against Glenn Gossett for Grand Larceny, which information was by order of the Court filed and the cause docketed; and afterwards on the 27th day of June, 1936, further proceedings were had upon said information, to-wit: On Plea of Guilty, The said defendant Glenn Gossett was duly arraigned and entered his plea of guilty to the charge contained in the information. * * * And, Whereas, On the 3d day of July, 1936, the said Glenn Gossett was duly arraigned before the Court for sentence, and was then by the said Judge sentenced, in these words: 'It is the sentence of the Court that the defendant be confined in the State Penitentiary at Lancaster, in Lancaster County, Nebraska, at hard labor, Sundays and Holidays excepted, for a period of five years. Solitary confinement to be no part of this sentence."

Originally section 8 of article I of the Constitution of 1866

required prosecutions for felonies, with certain exceptions, to be "on the presentment or indictment of a grand jury." In our Constitution of 1875 this provision was modified in part by adding thereto a proviso in the following terms: "Provided, That the Legislature may by law, provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may, by law, abolish, limit, change, amend or otherwise regulate the grand jury system." Neb. Const. 1875, art. I, sec. 10.

By chapter 108 of the session laws of 1885, approved March 9, 1885, there was duly enacted "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges."

The following constitutes excerpts of this legislation, as now carried in our Compiled Statutes of 1929, viz.:

Section 29-1601, Comp. St. 1929, provides: "The several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information, for crimes, misdemeanors, and offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of the like prosecutions upon indictments."

By section 29-1602, it is provided, in part: "All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto," etc.

Section 29-1603 provides in part: "All informations shall be verified by the oath of the county attorney, complainant, or some other person, and the offenses charged therein shall be stated with the same fullness and precision in matters of substance as is required in indictments in like cases."

In section 29-1604 we find the following: "The provisions of the criminal code in relation to indictments, and all other provisions of law, applying to prosecutions upon indictments to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punish-

ments or the execution of any sentence, and to all other proceedings in cases of indictments, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as near as may be, apply to informations, and all prosecutions and proceedings thereon."

Embraced within the provisions thus made applicable to prosecutions by informations by such section 29-1604 are the following:

Section 29-1806: "The accused may except to an indictment by: First. A motion to quash; Second. A plea in abatement; Third. A demurrer."

Section 29-1807: "A motion to quash may be made in all cases, when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged."

Section 29-1811: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue."

As to the verification of the information now before us, it may be said that a similar statutory provision existed in Washington, which provided that such a verification may be made by the "prosecuting attorney, complainant, or some other person." It was held that in the verification of an information "all the words descriptive of the capacity or character of the affiant may be entirely disregarded, and the verification will still be sufficient." *Hammond v. State,* 3 Wash. 171, 28 Pac. 334.

Washington, Kansas and Missouri have statutory provisions relative to the verification of criminal informations similar to the provision here under consideration. The following cases hold that a verification by "some other person" is sufficient and renders additional verification by the prosecuting official unnecessary. *State v. Brooks,* 33 Kan. 708, 1 Pac. 591; *State v. Clark,* 158 Mo. App. 489, 138 S. W. 894; *State v. Davidson,* 44 Mo. App. 513. *Bailey v. State,* 36 Neb. 808, 55 N. W. 241, affords an instance where this court sustained an information so verified.

It is obvious, therefore, as disclosed by the record presented, that as to a proper statement of the offense charged and the verification thereof, the information attacked complies with the statutory requirements. The force and effect of the requirements that "all informations shall be filed * * * by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto," under the facts in this case, are all that still remain for our consideration.

It will be remembered that "Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon a judgment sentencing a defendant." *Hulbert v. Fenton*, 115 Neb. 818, 215 N. W. 104. See, also, *Alexander v. O'Grady, ante*, p. 645, 290 N. W. 718.

A judgment or sentence of a court of record in a criminal case is thus supported by the usual presumptions of validity and regularity when thus attacked. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void. *Hulbert v. Fenton, supra*; *Michaelson v. Beemer*, 72 Neb. 761, 101 N. W. 1007; *In re Carbino*, 117 Neb. 107, 219 N. W. 846.

The failure of the county attorney, in person, to present to and file the information in the proper court, and the failure of the county attorney, in person, to indorse or sign his name thereto were obviously known to the relator, and were at all times disclosed by the public records, of which he was bound to take notice. Under the statutes quoted, if these omissions complained of constituted errors, a definite time was provided for their correction by a motion to quash. A failure of the relator to avail himself of that remedy prior to his plea to the merits, by force of statute, constituted a waiver thereof.

The general rule is that, where an objection is not made at the time prescribed by law, the objection is waived. 12 Standard Ency. of Procedure, 665. This jurisdiction is fully committed to this rule. *Johnson v. State*, 53 Neb. 103, 73 N. W. 463; *Davis v. State*, 31 Neb. 247, 47 N. W. 854; *Richards v. State*, 22 Neb. 145, 34 N. W. 346;

Emery v. State, 78 Neb. 547, 111 N. W. 374; *Guignon v. State,* 101 Neb. 587, 163 N. W. 858; *Tasich v. State,* 111 Neb. 465, 196 N. W. 688.

It is also a well-established principle of criminal procedure that "A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement." 16 C. J. 403.

Indeed, in *Trimble v. State,* 61 Neb. 604, 85 N. W. 844, this court expressly approved the principle which controls in the instant case. In that case defendants Trimble and Wilson were being tried on the charge of robbery from the person. They had been arraigned and a plea of not guilty entered in their behalf. On the day of trial, without withdrawal of their plea, defendants filed a motion to quash the information, based on the grounds, viz.: (1) That the information was not filed by, or verified by the oath of, the prosecuting attorney; (2) that the information was not sworn to before a magistrate or other judicial officer authorized by law to administer oaths. The trial court struck the motion from the files and refused to accord it any consideration whatever. This action of the district court this court sustained, for the reason that these objections, if ever existing, had been waived by the defendants under the statutes, now sections 29-1811 and 29-1604, Comp. St. 1929. It will be noted that the first clause of the motion to quash in the *Trimble* case sets forth a contention similar to that here presented, and which was held waived by failure to file a motion to quash within the time prescribed, which is the exact situation presented in the instant record.

But even if properly raised by timely objection, the validity of the information is by no means foreclosed. It is not questioned but that this information in terms properly charges the crime. It is properly sworn to.

The admitted facts include the following, viz.: Lloyd Kelly, the duly elected and qualified county attorney, was absent from the state of Nebraska from June 23 to July 4, 1936. Before leaving he requested William P. Mullen to take care of the duties of the county attorney's office, and

Mullen expressly assented to such request. Attorney Mullen thereupon, after this authorization, without taking an oath or giving bond, prepared, signed, swore to and filed this information as acting county attorney in the district court for Hall county on June 27, 1936. The district court thereupon caused the record to be made as hereinbefore set forth. The word "acting" in this connection has been employed to designate a *locum tenens* who is performing the duties of an office to which he does not himself claim title.

The supreme court of Iowa in *State Bank of Williams v. Gish,* 167 Ia. 526, 149 N. W. 600, in discussing the term "acting officer," employed the following language:

"The phrase 'acting officer' is used to designate, not an appointed incumbent, but merely a *locum tenens,* who is performing the duties of an office to which he himself does not claim title. 1 Am. & Eng. Ency. of Law (2d ed.) 577; 1 Cyc. 632. Both these authorities cite the same case, *Fraser v. United States,* 16 Ct. Cl. 514.

"There is no evidence in the record as to how long this acting superintendent had been so acting, whether he was a deputy acting in the place of the superintendent, whether the superintendent had resigned, or whether he was dead or away on a vacation. All we have is the bare return."

In this *Gish* case, service of process upon an acting superintendent of an insane hospital was held good although no provision of statute authorized such designation.

Section 26-904, Comp. St. 1929, provides in part: "The county attorney may appoint one or more deputies who shall act without any compensation from the county, to assist him in the discharge of his duties." So far as advised, there is no requirement that such appointment be in writing. It is obvious, however, that the designation "acting county attorney" is not inconsistent with an appointment of one as the substitute of the county attorney and empowered to act for him in his name or in his behalf. The words employed must be taken in the light of the duties to be performed, and the acts required to make such performance legal and valid. This was certainly in the contempla-

tion of the parties to the transaction, and, under the facts involved, necessarily required the creation of a deputy county attorney. True, Mullen did not qualify by taking the oath and giving bond as such. But, would these omissions invalidate his official acts when collaterally attacked?

The relator relies upon *Langford v. State,* 114 Neb. 207, 206 N. W. 756, and *Lower v. State,* 106 Neb. 666, 184 N. W. 174, to sustain an affirmative answer to this question. Neither of these cases involved a collateral attack upon a judicial determination; both were direct attacks by appropriate proceedings in error. In the *Langford* case no information was filed by any one. In the *Lower* case the information was timely attacked by motion to quash, so that the doctrine of waiver here controlling was in no manner involved or determined in either of the decisions so relied upon by the relator.

In *Haskell v. Dutton,* 65 Neb. 274, 91 N. W. 395, this court sustained the validity of summons issued by J. E. Evans as deputy clerk of the district court, under the following facts: "When the present action was instituted, Evans was in the office of the clerk of the district court, claiming the right to act as deputy. He had acted in that capacity continuously for a year or more. He held an appointment from the duly constituted clerk and was discharging the duties of the office with his consent and under his direction. The appointment, however, was not in writing, and there had been, on Evans' part, a total failure to comply with the provisions of the statute (Compiled Statutes, 1901, ch. 10), relative to official bonds and oaths. Upon these facts, the district court rightly ruled that it had jurisdiction of the defendants and authority to pronounce judgment against them. Evans, according to the narrowest definition of the term, was a *de facto* officer, and his acts, so far as they affected the parties to the suit, were just as binding and efficacious as they would have been if all the conditions necessary to make him a *de jure* officer had been fulfilled. *Ex parte Johnson,* 15 Neb. 512; *Hamlin v. Kassafer,* 15 Or. 456; *Norton v. Shelby County,* 118 U. S. 425;

Fulton v. Town of Andrea, 73 N. W. Rep. (Minn.) 256; *Wheeler v. Sterrett,* 62 N. W. Rep. (Ia.) 675; *Carleton v. People,* 10 Mich. 249, 259."

We also take the following from the opinion in *Gragg v. State,* 112 Neb. 732, 201 N. W. 338, viz.: "Besides the foregoing averments, defendant charges that Mr. Gibbs, who verified and filed the information, was not the duly qualified, elected or appointed county attorney of McPherson county, and that 'his pretended acts as such assumed official were and are without authority of law and of no force or effect.' But the record shows that his appointment was regular. He did not, however, take the official oath nor file a bond. But he held himself out as county attorney and performed the duties pertaining to this office and was recognized by the public as county attorney, so that he was county attorney *de facto. Baker v. State, ante,* p. 654."

Now, the journal entry heretofore quoted discloses that Mr. Mullen held himself out as the duly authorized "acting county attorney" and was recognized as such by the district court for Hall county, and the information prepared, signed and filed by him was, by the order of that court, accepted and ordered entered of record as such. While he took no official oath and gave no official bond, these omissions, under the authority above cited, it would seem, could not be challenged collaterally, as is attempted in the instant case.

The following language of Morrissey, C. J., in *Holland v. State,* 100 Neb. 444, 160 N. W. 893 (an error proceeding to the district court for Furnas county), is applicable and controlling, it would seem, in the case here presented, viz.:

"It is urged that the information is absolutely void, because not signed by the county attorney in person, and we are cited to *Cubbison v. Beemer,* 81 Neb. 824, which follows an earlier case, holding that an information filed out of the term time is void. Section 5599, Rev. St. 1913 (Comp. St. 1929, sec. 26-904) authorizes the county attorney to appoint deputies who may assist him in the discharge of his duties. There is nothing in this record to show that Lambe was appointed such deputy, but when his right to sign the

information is questioned for the first time after arraignment and plea, and while a plea of not guilty is still pending, his appointment, qualification and right to act in the absence of a showing to the contrary, will be presumed."

It must also be admitted that a plea of guilty as charged is equally as effective as a waiver as is a plea of not guilty.

The conclusion of the entire matter in the instant case is: That the regularity of the proceedings leading up to a sentence in a criminal case cannot be inquired into in a proceeding for a writ of habeas corpus; that, if the court had jurisdiction of the defendant and authority to try the charge against him, its action can be assailed only in a direct proceeding; that none of the errors upon which the relator relies in this proceeding affect the jurisdiction of the trial court (when collaterally considered) and they have been effectually waived by the petitioner.

It follows, therefore, that the action of the district court in its denial of relief to petitioner is correct, and is

AFFIRMED.

ARTHUR BALIS V. STATE OF NEBRASKA.
291 N. W. 477

FILED APRIL 5, 1940. No. 30763.

1. **Forgery.** A variance between an instrument described in the information in a criminal case and the evidence given in support thereof is not fatal unless it is material to the merits of the case or prejudicial to the rights of the accused.
2. **Criminal Law.** Where evidence is produced tending to show a common plan by several persons to commit a crime, the statements of each looking toward the carrying out of the plan are competent against the others.
3. ———. Where a county attorney, on the cross-examination of the accused charged with forgery, asked him: "And in 1926 when you forged checks up in Bellevue, Nebraska, I went up and straightened them up for you, with Charlie Matson?," the subject-matter of the question being in no way connected with the crime charged, it constitutes prejudicial error.
4. ———. "It is highly improper for the prosecuting attorney in a criminal case to declare to the jury his personal belief in

defendant's guilt, unless such belief is given as a deduction from the evidence." *Olsen v. State*, 113 Neb. 69, 201 N. W. 969.

5. ———. If the improper conduct of a prosecuting attorney is so flagrant and of such a character that neither rebuke nor instructions to the jury to disregard it can remove its sinister influence, a mistrial should be declared.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed.*

I. D. Beynon, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Don Kelley, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

Plaintiff in error was convicted in the district court for Lancaster county of the crime of forgery, and sentenced to serve eight years in the penitentiary.

The record shows that plaintiff in error, a practicing lawyer in Lincoln, Nebraska, became acquainted with and performed legal services for three inmates of the penitentiary, Ray O'Neil, Monroe Seiner and Blanchard Beemer. Shortly after his release from the penitentiary, Beemer broke into the branch office of E. W. Biggs & Co., at Fremont, Nebraska, and stole three books of blank drafts. It also appears from the testimony of plaintiff in error that O'Neil and one King called on him and informed him that they were going into the hide and fur business in a big way and that they were looking around for a place to live. Plaintiff in error sold them a house that he owned, taking $129.60 from the sale of some hides and furs, which they had with them, as a first instalment on the purchase price. O'Neil also was indebted to plaintiff in error in the amount of $440.05 for legal services.

On December 6, 1937, plaintiff in error received a letter from O'Neil inclosing a draft for $870.76, from which he

was instructed to deduct the $440.05 which O'Neil owed him, and to retain the balance until O'Neil called for it. Later in the day O'Neil and King called to make settlement on the house, and delivered to him three more drafts which were involved in this case. All four drafts proved to be forgeries. After the house deal was completed, O'Neil demanded the balance due him on the draft he had mailed to plaintiff in error, the amount being $430.71. Plaintiff in error refused to turn over the cash until the draft had been paid by the bank upon which it was drawn. Of the other three drafts, the first was left at the collection window of the Continental National Bank of Lincoln for collection, with instructions to advise him when they received the returns. The other two drafts were deposited in the First National Bank of Lincoln by plaintiff in error, with the understanding that no withdrawals would be made until the bank had made collection. All of said drafts were returned unpaid as forgeries. Plaintiff in error then picked up the four drafts and handed them over to the police department.

There is evidence in the record that Beemer took part of the stolen drafts to plaintiff in error. There is also evidence that plaintiff in error visited Seiner at the penitentiary on several occasions, including December 6, 1937, the date which the forged drafts bear and the date they were deposited with the Lincoln banks. Beemer was called as a witness for the state and testified that he delivered the stolen drafts to plaintiff in error and that he was to have one-third of the proceeds obtained from the forgery of the drafts. There is evidence that Beemer agreed to and did obtain the blank drafts and a valid draft executed by E. W. Biggs & Co., at Fremont, and turned them over to plaintiff in error for transmission to Seiner for the purpose of having the drafts forged. Other evidence is in the record which connects the plaintiff in error with the forging and uttering of the drafts in question. Without relating all the details of the evidence, we are convinced the evidence is ample to take the case to the jury.

Plaintiff in error contends that there was a fatal variance

between the drafts described in several counts of the information and the ones offered in evidence to prove the allegations of the respective counts. Some of the drafts offered in evidence contained the following statement which was not contained in the drafts described in the information: "Payable only for merchandise as printed on reverse side of this sheet." On the back of the drafts offered in evidence there was listed the number of hides and furs purchased, with the weight, price per pound and the total purchase price, none of which was copied in the various counts of the information. The following also appears on the drafts offered in evidence and not on those described in the various counts of the information: "The payee accepts this draft in payment of the invoice on the reverse side of this sheet, and guarantees the count, weight and delivery of the merchandise listed."

It is the general rule in criminal prosecutions where written instruments enter into the gist of the offense that they should be set out literally correct, and the omission of any part of the instrument in the indictment constitutes a variance. *Haslip v. State,* 10 Neb. 590, 7 N. W. 331; *Sutton v. State,* 58 Neb. 567, 79 N. W. 154. But a variance between an instrument alleged in the information and the evidence offered in proof thereof is not fatal unless it is material to the merits of the case or such as may be prejudicial to the defendant. Comp. St. 1929, secs. 29-1501 to 29-1503. *Goldsberry v. State,* 66 Neb. 312, 92 N. W. 906; *Flannigan v. State,* 127 Neb. 640, 256 N. W. 321. The variance in the instant case was not material, and consequently not prejudicial. As was said in *Burlingim v. State,* 61 Neb. 276, 85 N. W. 76, it was the intention of the legislature in adopting the Criminal Code to provide a rational system of procedure for the trial of accused persons and the punishment of crime. It was clearly the intent of the legislature to abolish supertechnical rules requiring literal exactness between the information and the proof. The variances complained of in the instant case do not constitute a material element of the offense charged. Neither do they mislead the accused nor

in any manner prejudice his rights. Such variances between the information and the proof received in evidence are not fatal. The receipt of the drafts in evidence in the present case, though at variance with the information in the respects noted, does not constitute reversible error.

Plaintiff in error complains of the ruling of the trial court admitting in evidence certain letters written by Seiner to Beemer. The letters make reference to transactions involving a person referred to as "Paw" or "Pappy." The evidence of Beemer is to the effect that plaintiff in error was the person referred to as "Paw" or "Pappy" in these letters. It is evident from an examination of the letters that they were written to further the perpetration of the crime of forgery. Seiner was an inmate of the penitentiary and Beemer had been only recently released. Getting the blank drafts and samples into the penitentiary, in order that Seiner could do the forging, became a major problem. There is competent evidence that the plaintiff in error conveyed the drafts to and from Seiner. The letters in question substantiate this evidence and tend to show the whole transaction which culminated in the forging and uttering of the drafts. We think the applicable rule is that, where evidence is produced tending to show a common plan by several persons to commit a crime, the statements of each looking toward the carrying out of the plan are competent against the others. *Smith v. State,* 111 Neb. 432, 196 N. W. 633; *Fields v. State,* 107 Neb. 91, 185 N. W. 400.

Plaintiff in error contends that there was misconduct on the part of the trial judge in that he appeared in the hall of the courthouse during a recess with a number of the forged drafts in his hands, at a time when the jury were present. The warrants were in evidence and had undoubtedly already been examined by the jury. We fail to see where any prejudice could possibly be inferred from this circumstance. The implications attempted to be drawn from this incident do not appear from the record to be in any way justified.

Plaintiff in error complains of the following question asked him by the county attorney: "And in 1926 when you

forged checks up in Bellevue, Nebraska, I went up and straightened them up for you, with Charlie Matson?" Proper objection was made and sustained. A mistrial was requested and the request overruled. It is true that the trial court attempted by instruction to the jury to remove the prejudice produced by the question. Questions of a county attorney, stating that the accused had committed or had been charged with other crimes, are wholly improper and constitute misconduct on the part of the prosecutor. In the instant case it was followed up by the county attorney in his closing argument when he referred to the wife of plaintiff in error in the following language: "But I will tell you what happened. She left him because she was tired of putting up with these kind of situations." Such remarks are so inflammatory and prejudicial to the rights of the accused that the efficient effort of the trial court to overcome it by instructions to the jury to disregard it is without avail. As was said in *Leo v. State*, 63 Neb. 723, 89 N. W. 303: "The poisoned shaft had sped its way, and it is difficult to conceive how the jury could thereafter have been oblivious of or ignored the fact that the accused was a suspicious character, and under police surveillance, because believed to be engaged in the perpetration of 'other jobs,' or, in other words, in the commission of different crimes."

In *Elliott v. State*, 34 Neb. 48, 51 N. W. 315, the prosecutor asked the defendant if it was not true that he stole a horse in Burnett county, Texas, and that the sheriff of that county had a warrant for his arrest. In reversing the case the court said: "Such cross-examination is highly improper and cannot fail to be prejudicial. A prosecuting officer, in his zeal to enforce the law must not forget that he also occupies a semi-judicial position, and that his duty requires him to resort to no questionable or improper means to secure a conviction."

The transgression in the instant case was so flagrant that the attempt of the trial court to destroy its influence by instructing the jury to ignore it cannot cure the error. A mistrial should have been declared.

Plaintiff in error complains of the following extract from the closing argument of the county attorney: "He told you to watch and see whether I told you I thought that Balis was guilty. Do you remember that? I wrote everything down as fast as he said it. Now he said you wait and see. Gentlemen of the jury, I think Balis is guilty. I don't hesitate to come out and answer that. And I can make it a lot stronger than I think he is guilty. I have investigated this case from 'A to Z.' I have checked it carefully the same as any other cases and I have never yet—(interrupted).

"Why, gentlemen of the jury, he stood here for an hour and sought to paint a halo of sanctity about the head of this defendant. You heard the testimony. He said to you, 'Why, the defendant at this moment is in an hour of domestic tragedy by reason of his wife.' He didn't say what about his wife. So far as you know she might be in a hospital on her death-bed,—she might have had her leg cut off. But I will tell you what happened. She left him because she was tired of putting up with these kind of situations. Since he asked for it,—I didn't want to bring it out, but he asked for it. * * * And I tell you honestly and I answer Beynon that in my own heart and in my own mind I believe the defendant guilty." Proper objections were made to these statements and a mistrial requested.

"It is highly improper for the prosecuting attorney in a criminal case to declare to the jury his personal belief in defendant's guilt, unless such belief is given as a deduction from the evidence." *Olsen v. State,* 113 Neb. 69, 201 N. W. 969.

The prosecuting attorney told the jury that he had investigated this case from "A to Z" and "that in my own heart and in my own mind I believe the defendant guilty." These statements contain a logical inference that the county attorney's personal belief of the guilt of the accused may not have been based wholly on the evidence before the jury, but that it is based upon other evidence ferreted out which is not before the jury. This is, of course, highly prejudicial to the rights of the accused. The statement in the oral ar-

gument that the wife of the accused left him because she was tired of putting up with situations of this kind is not supported by any evidence. The only purpose to be accomplished by commenting upon the domestic relations of the accused and his wife was to inflame and prejudice the jury against plaintiff in error. Such statements have no place in the argument of a criminal case to a jury, and tend to deprive the accused of the fair and impartial trial to which he is entitled.

The following quotation expresses our views: "The prosecuting attorney should be permitted to argue the testimony, but has no right to state what he personally thinks or believes of defendant's guilt, except as shown by proof. If he has first-hand knowledge of facts which legitimately tend to show defendant's guilt, it is his duty to present them under oath from the witness-stand the same as any other witness. If his knowledge is only that based upon the testimony, he should confine himself to his duty as a prosecuting official." *People v. Hill*, 258 Mich. 79, 241 N. W. 873.

In our judgment, the expressions of the county attorney of his belief of the guilt of the accused, as shown by the record, are such as to require a reversal of the case.

A person accused of crime is clothed with a presumption of innocence until he is proved guilty by competent evidence beyond a reasonable doubt. Evidence of former charges of previous crimes, in no way connected with the offense for which the accused is being tried, are not admissible against him. Rules of evidence and conduct are prescribed to insure that the rights of the accused are maintained. It is the duty of a prosecuting attorney to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, no matter how guilty. One accused of crime is entitled to a fair and impartial trial, uninfluenced by prejudice, passion or public clamor. *Cooper v. State*, 120 Neb. 598, 234 N. W. 406. We are not able, of course, to evaluate the amount of influence, if any, that the improper argument of the prosecuting attorney had upon the jury, but it was well calculated to draw their attention

from the real issues. The refusal of the trial court to grant a new trial on this ground alone was prejudicial error.

The state argues that the improper and prejudicial statements complained of were invited. The argument of defense counsel made to the jury does not appear in the record. There is nothing in the record therefore to substantiate this contention.

For the reason herein set forth, the judgment and sentence of the district court is reversed and the cause remanded for a new trial.

REVERSED.

IN RE ESTATE OF RILEY S. HART.
LOUISA C. HART, APPELLANT, V. HARRY S. WHITE, EXECUTOR, APPELLEE.

291 N. W. 502

FILED APRIL 5, 1940. No. 30780.

1. Wills. In construing a will, courts are required to carry into effect the true intent of the testator as determined from the whole instrument.
2. ———. Where there are two provisions in a will relating to the disposition of the same property, the relative positions of the provisions in the will are not important where the intention of the testator can be ascertained by construing the provisions together.
3. ———. Where it can reasonably be done, a court will harmonize ambiguous expressions with the plain provisions of the will to effectuate the testator's intent.
4. ———. Where the intent of the testator with reference to specific property is plain in one part of a will, a court will not, in another part of the will relating to the same property, create an ambiguity by construction. The two parts of the instrument will be construed together in determining the true intent of the testator.

APPEAL from the district court for Burt county: JOHN W. YEAGER, JUDGE. *Affirmed.*

James A. Brown and *William O. Brown,* for appellant.

Chatt & Ellenberger, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a suit brought by Louisa C. Hart, the widow of the testator, Riley S. Hart, to obtain a construction of the will of the said Riley S. Hart. The contest is between the executor of the estate and the widow of the deceased.

The difficulty arises out of the provisions of the sixth and seventh paragraphs of the will, the pertinent parts of which are as follows:

"Sixth:—All the rest, residue and remainder of my property, real, personal and mixed, I give to my said Executor hereinafter named to be held, by him in trust and to be disposed of in the following manner, to-wit:

"(1) My said Executor shall first pay all taxes thereon and keep the real estate in a good state of cultivation and the improvements thereon in as good a state of repair as the same may be at the time of my death, and shall then turn all the remaining income from said real estate, and all interest upon my personal estate to my said wife, Louie Hart, during the period of her natural life, I further direct my Executor not to lease any of the real estate of which I may die seized and possessed for a longer period of time than three years at any one time."

"Seventh:—Subject to the life estate hereinbefore given my said wife, I give, devise, and bequeath the following described real estate, to-wit: Northwest Quarter of Section 12, Township 23, North, Range 8, and also 17 acres of land in said Township and Range, lying and being along the west side of the Northwest Quarter of Section 12, and adjoining it, and being a part of the Northeast Quarter of Section 11, in said Township and Range, and being 177 acres, more or less, of land in Burt County, Nebraska, to Milton Metcalf, son of my deceased niece, Etta Metcalf, to be his absolute property, subject only to said Life Estate."

The only question to be decided is whether the widow

has a legal life estate in the real estate described in the seventh paragraph of the will, or whether said real estate is a part of the trust estate conveyed to the executor in the sixth paragraph of the will.

In the construction of a will conveying real estate, or an interest therein, courts are required to carry into effect the true intent of the testator as determined from the whole instrument. *In re Estate of Zimmermann,* 122 Neb. 812, 241 N. W. 553; *Krause v. Krause,* 113 Neb. 22, 201 N. W. 670. This court has plainly said that the intention of the testator as gleaned from the four corners of the will, unvexed by legal technicalities, will govern. *Albin v. Parmele,* 70 Neb. 740, 98 N. W. 29; *Seybert v. Seybert,* 118 Neb. 246, 224 N. W. 1. Where there are two provisions in a will relating to the disposition of the same property, the relative position of the provisions in the will is not important where the intention of the testator can be ascertained by construing the provisions together. *Grant v. Hover,* 103 Neb. 730, 174 N. W. 317. In construing a will, the court will presume that a testator intended the will to be a consistent whole and, if it can reasonably be done, the court will harmonize ambiguous expressions with the plain provisions of the will to effectuate the testator's intent. *In re Estate of Buerstetta,* 83 Neb. 287, 119 N. W. 469; *Marsh v. Marsh,* 92 Neb. 189, 137 N. W. 1122. It is by the application of these rules of construction to the whole will that we arrive at the true intent of the testator.

It will be noted that the sixth paragraph of the will gives all the residue of the estate to the executor to be actively managed by him, the net income from the residue, both real and personal, to be paid over to the widow during the period of her natural life. The seventh paragraph opens with the phrase "subject to the life estate hereinbefore given my said wife," clearly indicating that the testator himself thought he had already conveyed a life estate to the widow in the sixth paragraph of the will. Clearly, if the testator intended to and did convey an interest in the property under paragraph six of the will, the court will not by

construction create an ambiguity in the will by placing a construction on paragraph seven which is repugnant to the plain intention of the testator as set forth in paragraph six. We are of the opinion that paragraph seven creates no estate in the widow, Louisa C. Hart. The interest of the widow in the property described in paragraph seven is conveyed by paragraph six of the will, and the remainder interest only is devised by paragraph seven. Since paragraph seven conveys no new estate to the widow, the trial court properly decided that the only interest of the widow in the real estate described in paragraph seven was the interest she obtained under paragraph six of the will.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF GEORGE A. LUCE.
NEBRASKA WESLEYAN UNIVERSITY, APPELLANT, V. GEORGE A. LUCE ESTATE ET AL., APPELLEES.
291 N. W. 562

FILED APRIL 12, 1940. No. 30707.

Subscriptions. A pledge or donation to the funds of a university, payable after the death of donor, under the facts set out in the opinion, is subject to the implied condition that it is not to be paid until the debts of donor's estate have been satisfied.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Stewart, Stewart & Whitworth and *Charles B. Paine,* for appellant.

De Lamatre & De Lamatre, Cranny & Moore and *William H. Thomas, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and JOHNSEN, JJ., and FALLOON, District Judge.

ROSE, J.

This is a controversy between Nebraska Wesleyan Uni-

versity, a nonprofit corporation maintaining an educational institution by that name in Lincoln, Nebraska, plaintiff, and Elizabeth S. Gillon, defendant, over the priority of claims against the estate of George A. Luce, deceased.

In a proceeding to settle decedent's estate, the county court of Douglas county allowed the claim of plaintiff in the sum of $10,000 on a par with that of defendant Elizabeth S. Gillon for $5,433.43.

The claim of the Nebraska Wesleyan University, plaintiff, rests on a subscription or pledge to the university by George A. Luce for $10,000, due and payable at his death. The claim of Elizabeth S. Gillon, defendant, consists of a balance of $5,433.43, due her from decedent's estate on a promissory note for borrowed money. Seeking subordination of the former claim to that of the latter, defendant appealed from the county court to the district court, where her claim against the estate was decreed to be superior to that of the Wesleyan University. Plaintiff appealed to the supreme court.

Is the claim on the note for borrowed money, like other claims of the same rank, payable from decedent's estate before applying any funds therein to payment of the subscription or pledge to funds of the university, as held by the district court? This is the question presented by the appeal. Neither the county court nor the district court on appeal disallowed the claim of plaintiff. There is precedent for the sufficiency of the consideration to support the pledge as a claim against the estate of decedent. *In re Estate of Griswold,* 113 Neb. 256, 202 N. W. 609. Plaintiff contends and argues:

"The question for the court to decide was, should the university's claim be allowed or disallowed? If allowed, it automatically fell into the fourth or last class of estate claims and was, therefore, on a parity with the claim of Mrs. Gillon and any other fourth class claims."

The classification of claims upon which plaintiff relies is found in the statute relating to insolvent estates, which provides:

"If the assets which the executor or administrator may have received and which can be appropriated to the payment of debts shall not be sufficient, he shall, after paying the necessary expenses of administration, pay the debts against the estate in the following order: First. The necessary funeral expenses, which shall be a preferred claim only to an amount not exceeding Two Hundred and Fifty Dollars ($250.00) for casket and services of undertaker. Second. The expenses of the last sickness. Third. Debts having a preference by the laws of the United States. Fourth. Debts due to other creditors." Comp. St. 1929, sec. 30-615.

The view of counsel for plaintiff seems to be that the claim of the university, if valid for any purpose or to any extent, is, under the statute quoted, a debt due to a creditor whose claim is not in the first or second or third class, but is one which automatically falls into the fourth class where claims therein are all of equal rank as to order of payment. The argument on this point is made in good faith to establish what is thought to be a legal right, but it fails to take into account that, from the nature of the contract and the date of its enforceability, the pledge must be held to be conditional as a matter of necessary public policy and of implied intention and understanding between the parties. The instrument itself is in the following language:

"Nebraska Wesleyan Endowment Fund

"Estate Pledge

"$10,000 Omaha, Nebraska, December 9th, 1921

"In consideration of my interest in Christian education and of other subscriptions to this endowment, building and expense fund, I hereby subscribe and promise to pay to the Nebraska Wesleyan University the sum of Ten Thousand and no/100 Dollars due and payable at my death. For value received, subject to the following condition:

"It is understood and agreed that a discount of five per cent. will be allowed on this pledge if the same shall be fully paid prior to my death.

"Omaha District George A. Luce
"Trinity Charge Laura E. Luce."

George A. Luce died June 21, 1931. It was stipulated that there was no consideration for the instrument beyond what was recited therein—"my interest in Christian education" and "other subscriptions to this endowment, building and expense fund." M. E. Gilbert, executive secretary of the university from 1925 to 1932, testified that it had an endowment fund, the income from which was used only for operating expenses, and that the pledge quoted was part of the endowment fund, but on cross-examination he stated in answer to a question: "Well, the note was always listed as an asset of the endowment; of course, not being money, it could not be used until it was paid." The pledge, though contractual in form as against the pledgor, was nevertheless donative as against the other creditors of his estate. While its contractual form created an enforceable right against the decedent's personal representative and his heirs, if funds were available for the purpose, it was not a right which in good conscience should be permitted to operate to the prejudice of those who had parted with money or property to the donor in reliance upon his estate. Nor would it be possible to contend, with any degree of plausibility, that the donor, who was a minister of the gospel, in making such a pledge to the cause of Christian education, payable on his death, or a Christian university in taking it, could have intended that it should operate to leave a debit for money, which he found it necessary to borrow, or any other similar obligation, unsatisfied on his death. Under the circumstances, the pledge must be held to be conditional, both as a matter of implied intention and of sound public policy, and to be payable or enforceable only if assets are available for that purpose after the decedent's actual debts have been paid. The situation presents no difficulty in the classification of claims under the statute. It is the same as if the contract had expressly provided that nothing should be paid thereon, until all the decedent's just and legal debts had been satisfied. Conditions necessarily may be implied in contracts as a matter of sound public policy and reasonably imputed intention. Thus, it is usually recognized that

the contract of a corporation to purchase its own stock is subject to the implied condition that such contract cannot be enforced if the corporation is insolvent or if the rights of creditors are prejudiced. 13 Am. Jur. 809, sec. 787; *Fremont Carriage Mfg. Co. v. Thomsen,* 65 Neb. 370, 91 N. W. 376. Whether the claim of Wesleyan University should be allowed, with an order directing that it should not be paid until the debts of the decedent were satisfied, or whether allowance should be withheld until such debts had been satisfied, is purely a procedural question that is unimportant, since in either case the result would be the same.

In re Estate of Griswold, 113 Neb. 256, 202 N. W. 609, 38 A. L. R. 858, cited to sustain the position of plaintiff, does not conflict with the views herein expressed. In that case the testamentary character of the instrument and the consideration therefor were the questions discussed and determined. Infringement by donation on the rights of creditors with superior claims and the statute classifying claims against the insolvent estates of deceased persons were not involved, but to guard against even an inference that a donor by his gift might so deplete his estate as to require his creditors to prorate their claims with donee, Judge Redick, author of the opinion, made the following significant observation:

"No difficulty is presented by the suggestion that a donor might so deplete his estate as to require his creditors to prorate their claims with the donee, for a contract perfectly valid between the parties may be void as to creditors."

The judgment of the district court is in harmony with the conclusion herein reached and is

AFFIRMED.

CARTER, J., concurring.

The writers of the dissenting opinions filed in this case charge that the court has indulged in judicial legislation which permits the probate judges of this state to arbitrarily direct the allowance and payment of claims according to their personal inclinations. I challenge these statements.

There can be no question that the contract evidencing the

claim of Nebraska Wesleyan University against the estate of George A. Luce was based upon a sufficient consideration as between the parties. That a contract may have a sufficient consideration to sustain it as between the parties themselves and yet be void as to existing, *bona fide* creditors is fundamental in this state. Love and affection may constitute a sufficient consideration for a contract or conveyance, but as to *bona fide* creditors such a consideration is generally condemned where the result is to deprive existing creditors of payment.

There is no question in my mind that the claim of Nebraska Wesleyan University is a fourth-class claim under the statute. This court in its opinion does not ignore the statute, or rewrite its terms. Neither does it attempt to legislate a fifth class into the statute as charged. The majority opinion merely carries out the contract of the parties as made by them. In determining the nature of the contract and the obligations created by it, it is the duty of this court to consider not only the literal wording of the instrument, but also the facts and circumstances surrounding its execution which throw light upon the intent of the parties.

Can it be said that, if a donor writes into his pledge that the amount is to be paid only after all his just debts are paid, the courts are powerless to give effect to his contract? Will the fact that it is a fourth-class claim require the county court to prorate it equally with other fourth-class claims regardless of the express provision of the contract to the contrary? Certainly, under such circumstances the claim would be a fourth-class claim payable only when all other claims had been paid. In so doing, the contract of the parties would have been carried out without reference to the statute providing for the classification of claims.

The instant case is no different. An interpretation of the contract in connection with all the facts and circumstances surrounding its execution reveals that the parties intended the pledge to be paid after all other creditors had been satisfied, and such interpretation becomes a part of the contract by implication. Any other conclusion would force the de-

ceased donor into the position of consummating a fraud upon his creditors. An enlightened public policy requires that no such result obtain where a contrary intent may reasonably be inferred from the evidence. The contract should be interpreted to avoid such an unmoral consequence.

The case resolves itself into an interpretation of the contract and not into one involving the construction of the statute classifying claims. To place an interpretation on the contract, other than is done in the majority opinion, would leave creditors at the mercy of unscrupulous debtors. To attain such a result by judicial interpretation is abhorrent to the sound jurisprudence of this country.

The *Griswold* case, relied on in the dissents, anticipates that the situation before us would arise. The author of that opinion disposes of the question in these words: "No difficulty is presented by the suggestion that a donor might so deplete his estate as to require his creditors to prorate their claims with the donee, for a contract perfectly valid between the parties may be void as to creditors." A consistent view of the situation requires the result obtained in the majority opinion.

No one believes more strongly than the writer in the principle of the division of powers of government and the necessity of each branch to confine itself within its respective sphere. It is the function of a court, however, to interpret contracts and give them the effect intended by the parties. This, and this only, have we done.

The attempt made in the dissenting opinions to make the literal wording of the statute classifying claims the basis of the decision is without foundation. Technical refinements cannot be permitted to overcome the plain intent of the parties. No more glaring example has been before us of the truth of the statement that "the letter killeth, but the spirit giveth life."

EBERLY, J., dissents.

SIMMONS, C. J., dissenting.

The facts of this case are not in dispute. Both plaintiff and defendant have claims which have been allowed against

the Luce estate. Their proper allowance is not questioned. The estate is probably insolvent. Were it not, it is obvious this case would not be here. The majority opinion holds that the claim of the defendant is superior to the claim of the plaintiff, and that defendant's claim (as well as all other allowed claims) must be paid in full before any payment can be made on plaintiff's claim.

It must be remembered that this instrument was given in 1921. By the decision *In re Estate of Griswold,* 113 Neb. 256, 202 N. W. 609, it then became and was "a valid contract supported by a sufficient consideration." (Page 271) It not only became an asset of the plaintiff at that time, but for approximately ten years thereafter during the lifetime of the maker, the plaintiff on its part continued the full performance of the consideration for the instrument. By its terms, the instrument was payable at a discount at the option of the maker at any time after its delivery. The defendant's claim is based upon promissory notes given in 1922 and 1925 after the instrument here involved had become a binding obligation of the maker. Defendant is a subsequent creditor. The evidence negatives any fraudulent intent on the part of any party to these transactions. Both claims are unsecured. The majority, therefore, hold that, where there are two unsecured allowed claims, based upon written instruments, which are contracts supported by a sufficient consideration, the claim, junior in time of the origin of liability, is superior, and that the junior obligation must be paid in full before the senior obligation may be paid even in part. I do not agree.

The plaintiff's assignments of error raise the one general question as to the power of the court to classify defendant's claim so as to make it a preferred claim to that of the plaintiff.

The proper allowance of plaintiff's claim, as payable from the assets of the estate of deceased, is established *In re Estate of Griswold, supra.* Defendant, while admitting the force of this decision, contends that, although the claim of plaintiff may be good as against the heirs of the deceased,

it is not good as against creditors who have claims based, as is defendant's, upon money loaned to the deceased.

The applicable provisions of the Nebraska statute are as follows:

It shall be the duty of the judge "to receive, examine, adjust, and allow all lawful claims and demands of all persons against the deceased." (Comp. St. 1929, sec. 30-601.) The court shall allow time "for the creditors to present their claims for examination and allowance." (Sec. 30-603.) "On the application of a creditor" further time may be allowed. (Sec. 30-605.) A "claim of the deceased" may be exhibited "in offset to the claims of the creditor." (Sec. 30-606.) The court shall fix a time for the executor or administrator to pay "the debts and legacies of the deceased." (Sec. 30-610.) The time for the payment of "debts and legacies" may be extended. (Secs. 30-611, 30-612, 30-613.) "If, after ascertaining the claims against any estate, it shall appear that the executor or administrator has in his possession sufficient to pay all the debts, he shall pay the same in full." (Sec. 30-614.) "If the assets * * * shall not be sufficient, he shall, * * * pay the debts * * * in the following order: First. The necessary funeral expenses, which shall be a preferred claim only to an amount not exceeding Two Hundred and Fifty Dollars ($250.00) for casket and services of undertaker. Second, the expenses of the last sickness. Third. Debts having a preference by the laws of the United States. Fourth. Debts due to other creditors." (Sec. 30-615.)

"If there shall not be assets enough to pay all the debts of any one class, each creditor shall be paid a dividend in proportion to his claim, and no creditor of any one class shall receive any payment until all those of the preceding class shall be fully paid." (Sec. 30-616.) "After the expiration of the time limited for the payment of debts," the court shall order "the payment of the debts and the distribution of the assets * * * among the creditors, as the circumstances of the estate shall require, according to the provisions of this article." (Sec. 30-617.) "If an appeal shall

have been taken, and shall remain undetermined, the court * * * may order a distribution among the creditors whose claims have been allowed, leaving * * * sufficient assets to pay" the disputed claim. (Sec. 30-618.) When the disputed claim is finally settled, the court shall order it "paid out of the assets retained, to the same extent and in the same proportion as the claims of other creditors." (Sec. 30-619.)

It is evident that the legislature classified all demands against a deceased as "claims;" that, when allowed, they become "debts" payable from the assets of the estate, that, if the assets are insufficient to pay the debts, said debts shall be classified and paid in the order specified in section 30-615, Comp. St. 1929, and that, if there are insufficient assets to pay the debts of creditors in any one class, "each creditor shall be paid a dividend in proportion to his claim." The term "creditor," as used in the statute, means the person who is the claimant against the estate, and, when the "claim" is allowed, the person to whom the "debt" is payable. The statute is complete in itself and is clearly intended to cover any situation that might arise in the administration of estates in Nebraska. It necessarily follows that plaintiff's claim as well as the claim of the defendant fall within the classification of "debts due to other creditors," and that, if the estate of the deceased is insolvent, each creditor (including the plaintiff) "shall be paid a dividend in proportion to his claim" on a parity with, and not subordinate to, any other creditor whose debt is in that classification.

The following authorities support the conclusion above stated.

"In most jurisdictions the word 'claimant' is used synonymously with 'creditor,' and the word 'claim' with 'legal demand for money.' The word 'claim' is also used synonymously with 'demand,' or 'debt.' 'Creditors of the estate' have been defined as persons who are such or become such because of dealings or transactions with the decedent during his lifetime. Their claims are debts or obligations with the origin of which the personal representative had nothing to do. The phrase 'creditors of the decedent' is more appropri-

ate as a designation of such creditors, however, in order to distinguish them from persons contracting with the executor or administrator upon the credit of the latter and of the estate; for it is settled in most of the states that creditors who become such after death of the decedent need not, and cannot, present claims and must rely on the individual liability of the representative." 3 Bancroft's Probate Practice, 1351, sec. 753.

" 'Creditors' of an estate are only those who have become such because of dealings or transactions with the testator in his lifetime, concerning whose claim the personal representative has nothing to do originally." 3 Schouler on Wills, Executors and Administrators (6th ed.) 2361, sec. 2711, footnote 2.

"The priorities of debts are governed wholly by the law of the jurisdiction in which the representative acts and from which he derives his authority." 24 C. J. 418.

"The common-law order of priority still exists in so far as it has not been expressly abrogated or superseded by the local administration laws; but the power of state legislatures to regulate the priorities of claims against decedent's estates is well settled, and the common-law rules have been very generally superseded by statutes, differing widely in the various jurisdictions, classifying the debts of decedents and specifying the order in which they shall be paid, or even, sometimes, abolishing all preferences and placing all debts on an equality with respect to the right of payment. The provisions of the local statutes fixing the order of payment are mandatory; they cannot be changed or disregarded by the court or by the representative, * * *." 24 C. J. 420.

"In the modern administration of estates there are no priorities among creditors except as given by statute." 24 C. J. 422.

"If an estate is solvent, there is no need for classifying its obligations according to priorities. But if solvency is doubtful and a dividend is to be declared, or if insolvency is established. the various obligations must be classified

according to their relative standing." 3 Bancroft's Probate Practice, 1739, sec. 1037.

"The court, in classifying obligations of an estate, has no authority to change the order prescribed by statute." 3 Bancroft's Probate Practice, 1740, sec. 1037.

"We have already seen, that executors and administrators are bound, in the payment of the debts of their testators and intestates, to observe the order of priority established by law." Woerner, The Law of Decedents' Estates, 316, sec. 364.

"When the time for proving or exhibiting debts has expired, or when, in those states in which classification is determined by the time of presentation, the time for proving the preferred class has expired, it is the duty of the executor or administrator to lay before the court a complete statement of the condition of the estate, showing what assets are in his hands, and what funds immediately available for the payment of debts; also the amount of debts proved against the estate, or admitted; what claims, if any, have been presented and not allowed, or which may be in suit and remain undetermined; and all other matters necessary to enable the court to ascertain the solvency or insolvency of the estate, and determine the amount of the dividend if insolvent. The court will thereupon decree the payment of the debts which have been proved, in the order of the classes to which they were assigned, each class to be paid in full before the next inferior class receives anything; and when the assets are sufficient to pay a part, but not the whole, of the debts of any one class, the creditors of that class will be payable *pro rata*." Woerner, The Law of Decedents' Estates, 350, sec. 401.

"After the preferred debts have been discharged, all liabilities of the deceased, of any kind or nature, not included in one of the preferred classes, are entitled to be paid *pro rata* * * *." Woerner, The Law of Decedents' Estates, 315, sec. 363.

"The rule now generally prevailing is that, aside from any preferences that may be provided for by statute, claims

of creditors against a decedent are, in case of the insolvency of his estate, to be paid *pro rata.*" 21 Am. Jur. 622, sec. 423.

"Once the assets have been applied in payment as far as they will go down the range of priority classes, claims in the last class to be reached can only be paid *pro rata.*" 3 Bancroft's Probate Practice, 1736, sec. 1035.

"Within any particular class of claimants, no one is entitled to preference over any other; * * *." 3 Bancroft's Probate Practice, 1737, sec. 1035.

Now let us consider the majority opinion.

It first holds that plaintiff's claim rests upon an instrument "due and payable" at death. As above pointed out, at the option of maker it was payable during his lifetime. The importance of this distinction is apparent. The majority next state: "The view of counsel for plaintiff seems to be that the claim of the university, if valid for any purpose or to any extent, is, under the statute quoted (sec. 30-615, Comp. St. 1929), a debt due to a creditor whose claim is not in the first or second or third class, but is one which automatically falls into the fourth class where claims therein are all of equal rank as to order of payment." Nothing in plaintiff's brief justifies the inference that plaintiff doubted that its claim was "valid for any purpose or to any extent." On the contrary, plaintiff contends that its claim is valid for all purposes. If the plaintiff's claim (and the defendant's also) does not fall "in the fourth class where claims * * * are all of equal rank as to order of payment," where, *under our statute,* does it fall? The majority opinion does not answer that question, and it should be answered. There is no other statutory class into which either the plaintiff's or the defendant's claim can fall, and within that class, there is no distinction and no priority. This court has no right or power to create an additional classification, or to create priorities within a class. (See authorities cited herein.) It is axiomatic that courts do not have legislative powers.

It is a "fundamental principle that the courts cannot set aside valid legislative acts or engraft amendments upon

them merely because the judges deem the legislation unwise or even unjust." *Paxton v. Sutton*, 53 Neb. 81, 73 N. W. 221. Is not the court doing exactly that in the instant case?

Contrary to the statement in the majority opinion, the plaintiff does not rely upon the *Griswold* case to sustain its position that it is entitled to payment on a parity with the defendant. It relies upon that case to sustain its position that it has a claim properly allowed based upon a contract supported by a sufficient consideration and one that it has performed. It relies upon the statutes of this state to sustain its position that the claim is entitled to be paid *pro rata* with the claim of the defendant.

The majority opinion states that "Infringement by donation on the rights of creditors with superior claims and the statute classifying claims against the insolvent estates of deceased persons were not involved" in the *Griswold* case. Agreed. But who determines what are superior claims —this court or the legislature? The authorities state that the legislature has that power, and our legislature has said what claims shall be superior to the one here in question by giving preference to (1) funeral expenses, (2) expenses of the last sickness, (3) debts having a preference under the laws of the United States. No other statutory preference exists. In my opinion, a preference is specifically denied by section 30-616, Comp. St. 1929.

The majority opinion states that plaintiff's claim should not be paid until "after decedent's *actual* debts have been paid" and until "decedent's *just* and *legal* debts" have been satisfied. How is plaintiff's allowed claim distinguished from an "actual" "just" or "legal" debt? By statute, hereinbefore cited, an allowed claim is a debt of the estate. Obviously, plaintiff's claim should not have been allowed unless it was an actual legal claim, which, when allowed, became an actual legal debt of the estate. Defendant does not appeal from the allowance. This court should not place plaintiff in the position of presenting a fictitious, unjust, illegal claim, of having it allowed, and then insisting upon payment. Yet, it must be conceded that, in order to sus-

tain its reasoning, the majority opinion places plaintiff in such a position.

The majority state that plaintiff's argument "fails to take into account that, from the nature of the contract and the date of its enforceability, the pledge must be held to be conditional as a matter of necessary public policy and of implied intention and understanding between the parties." Let us examine that. The parties to the instrument were a minister of the gospel and an institution of higher learning in this state. They were fully competent to express their intent in the written contract, which the one executed and the other accepted and performed. Their contract was valid, legal, and enforceable as written. (See *Griswold* case.) This court now, 18 years later, writes into that contract a condition, based upon "an implied intention and understanding," that the maker's estate was not to be liable therefor until all other claims were fully paid. This court has said: "While a court may construe and enforce contracts duly entered into, it is not the province of the judiciary to make contracts for parties." *TePoel v. Shutt,* 57 Neb. 592, 78 N. W. 288. In my judgment, the majority are now making a new contract for the parties after one is dead and the other has performed.

The majority state the condition is there "as a matter of necessary public policy." The public policy of this state, as declared by the cited legislative provisions, is controlling upon the courts. The courts have no right to ignore or override that declared public policy.

In *State v. Price,* 129 Neb. 433, 441, 261 N. W. 894, this court quoted with approval the following from *Mieyr v. Federal Surety Co.,* 97 Mont. 503, 34 Pac. (2d) 982: "What is the 'public policy' of a state and what is contrary to it is not to be measured by the private convictions or notions of the persons who happen to be exercising judicial functions, but by reference to the enactments of the lawmaking power, and, in the absence of them, to the decisions of the courts. When, however, the legislature has spoken upon a particular subject and within the limits of its constitutional powers, its utterance is the public policy of the state."

"No duty of this court is more manifest and exacting than the duty to avoid trespassing upon the province of the legislature. * * * It is not for this court to determine the legislative policy, nor to criticize that policy when adopted by the lawmakers. If apparently matters have been omitted in legislation which would have been supplied if brought to the attention of the lawmakers, it is not within the province of the court to supply such omissions." *Gaster v. Estate of Gaster,* 92 Neb. 6, 137 N. W. 900.

Subsequently in the opinion the majority repeat their statement about "implied" conditions, "sound public policy," and "imputed intentions," but do not cite any authority, judicial or statutory, to sustain their position. I am not unmindful that the majority state: "Thus, it is usually recognized that the contract of a corporation to purchase its own stock is subject to the implied condition that such contract cannot be enforced if the corporation is insolvent or if the rights of creditors are prejudiced." (Citing 13 Am. Jur. 809, sec. 787.) However, this is not a contest between a stockholder and a creditor. It is a contest between two creditors who have allowed claims which fall into the same statutory classification. Obviously, the cited authority is not in point. The majority also cited *Fremont Carriage Mfg. Co. v. Thomsen,* 65 Neb. 370, 91 N. W. 376. It is interesting to note that in that case the corporation was not insolvent, and the stockholder recovered on his contract of repurchase. So, I submit that the majority opinion stands without support of any authority. Surely, if the reason of the majority is sound, judicial decision could be found to support it.

The fault with the majority opinion is that it adopts the argument and reasoning that was rejected in the *Griswold* case, and, contrary to that decision, treats the Luce note as a gift, without a consideration, and not as a valid contract based upon a sufficient consideration. For the majority next state: "The pledge, though contractual in form as against the pledgor, was nevertheless donative as against the other creditors of his estate. While its contractual

form created an enforceable right against the decedent's personal representative and his heirs, if funds were available for the purpose, it was not a right which in good conscience should be permitted to operate to the prejudice of those who had parted with money or property to the donor in reliance upon his estate." Again no citation of authority is given. What is the effect of this statement? First, as between the plaintiff and the beneficiaries of the estate of the "pledgor," the instrument is a contract founded on a sufficient consideration. (Such is the holding in the *Griswold* case.) Second, as between the plaintiff and the defendant (another creditor), the instrument was a donation, a gift. A gift is a voluntary transfer of property "without any consideration." A gift "not only does not require a consideration, but there can be none; if there is a consideration for the transaction it is not a gift." 28 C. J. 620. It is obvious that the instrument cannot be both a contract based upon a sufficient consideration and a gift without any consideration. Yet the majority reason that this instrument is a valid contract, the proper foundation for a claim allowable against the estate, and a gift not good as against "other creditors." Not only is that so, but the question of whether it is a contract or a gift is made to depend not upon anything said or done by the parties at the time the instrument was executed, but upon the question as to whether or not the maker's estate is solvent 11 years after the contract "and/or" gift was made. The majority reach the somewhat remarkable conclusion that, if the estate is solvent, then this instrument is a contract based on a sufficient consideration, and if the estate is insolvent, then it is a gift without consideration, good as against heirs, but not good as against "other creditors." Such a result is not based upon either good reasoning or good law.

The syllabus likewise classifies the plaintiff's claim as "a pledge or donation," refuses to recognize its status as a debt of the estate, contrary to the holding in the *Griswold* case, and refuses to recognize its statutory status as an allowed debt of the estate.

But in any event, the plaintiff has an allowed claim against the estate. Defendant has an allowed claim against the estate. The majority cite section 30-615, Comp. St. 1929, which provides that "debts due to other creditors" are in the fourth class. The majority, ignoring the fact that the legislature provided no priorities within that class, construe the instrument to create priorities within the class and state: "The situation presents no difficulty in the classification of claims under the statute." If well-defined and long-established rules cited herein are to be ignored, then I admit no difficulty is presented.

However, the majority entirely ignore section 30-616, *supra,* which provides: *"If there shall not be assets enough to pay all the debts of any one class, each creditor shall be paid a dividend in proportion to his claim."* By section 30-617, *supra,* the county court is required to make an order for the payment of debts "according to the provisions of this article." I have heretofore quoted from several recognized authorities all to the effect that the statutory provisions are mandatory, that legislative classifications are controlling, and cannot be changed or disregarded by the courts, and that, in case of insolvency, creditors within a class are to be paid *pro rata.* Our statute is in accord with those texts. The majority cite no authorities to the contrary. Is every one out of step, including our legislature, and excluding a majority of this court? Where is the authority for this court to ignore the statutes classifying claims and providing for *pro rata* payment within a class?

Bearing in mind the fact that plaintiff's claim is an allowed claim or debt of the estate, is not the effect of the majority decision to set aside that allowance and allow the claim conditioned upon there being assets in the estate from which it can be paid after all other allowed claims are paid? If so, where is the authority, statutory or otherwise, for this court to enter such an order?

If this court has the power to create classes A and B within the statutory claims of the fourth class and put all claims except the plaintiff's in class A, then what is to pre-

vent the court from hereafter creating as many subclasses as there are claims, and ordering their payment in the order that the court may deem wise and just and in accord with a "necessary public policy?" Does not the court thereby invade a field that has been fully covered by legislative provisions? Does it not in effect repeal the statutory order of payment of claims? Has not this court violated the constitutional injunction that "no person or collection of persons being one of these departments (legislative, executive and judicial) shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted?" Const. art. II, sec. 1. Where is the direction or permission to this court to invade this field wherein the legislature has fully directed what shall be done?

In my opinion, the courts do not have the authority to enter the order here affirmed. We should not disturb the probate law of this state with reference to the classification of claims in order to prevent what, to some of us, appears to be an inequitable result. If this opinion becomes the law of Nebraska, then every probate judge will feel that he has the right to determine "as a matter of necessary public policy" whether or not the payment of one claim in an insolvent estate should be preferred to another, and instead of having an orderly payment of claims, based upon the statutes, we will have the payment of claims based upon the personal views of the 93 probate judges of this state.

MESSMORE, J., dissenting.

I agree that the subscription, note or pledge made to Nebraska Wesleyan University by George A. Luce for $10,000, due and payable at his death, does, as stated in the majority opinion, constitute a just and enforceable claim against his estate. Under section 30-615, Comp. St. 1929, it is a claim which would fall within the fourth class. The majority opinion states: "It was not a right which in good conscience should be permitted to operate to the prejudice of those who had parted with money or property to the donor in reliance upon his estate," and that such pledge or

donation to the fund of the university, payable after the death of the donor, under the facts set out in the opinion is subject to the implied condition that it is not to be paid until the debts of donor's estate have been satisfied.

The contract provides: "In consideration of my interest in Christian education and of other subscriptions to this endowment, building and expense fund (an adequate consideration), I hereby subscribe and promise to pay to the Nebraska Wesleyan University the sum of Ten Thousand and no/100 Dollars due and payable at my death (a direct promise to pay from the assets of his estate at a given time,—his death). For value received," etc.

The majority opinion, in substance, says that in equity and good conscience this debt should be subsequent to and follow after, as far as allowance or payment is concerned, debts admittedly in the same class, the exception being that where money was advanced and used by the decedent during his lifetime such obligations against his estate precede claims of the kind in question.

The language used in section 30-615, Comp. St. 1929, is unambiguous, direct and complete, and fully discloses the classification of claims. To interpret such provision as stated in the majority opinion is tantamount to judicial legislation, in creating a fifth class of claims, or an exception to the specific language of the statute. The language of the statute under the fourth classification is: "Debts due to other creditors." This could have only one meaning: All debts owing by the estate to all other creditors, not specifically excepted by the preceding provisions of the statute, fall within the category of fourth-class claims.

WILLIAM J. RITTER ET AL., APPELLANTS, V. DRAINAGE DISTRICT NO. 1 OF OTOE AND JOHNSON COUNTIES, APPELLEES.
291 N. W. 718

FILED APRIL 12, 1940. NO. 30776.

1. **Drains.** It is a duty of the board of supervisors of a drainage district organized under the legislative act of 1905 to repair ditches which become ineffective. Comp. St. 1929, sec. 31-463.
2. ———. The incorporation of a drainage district under the legislative act of 1905, the written promises in the charter or obligations of the landowners to pay assessments for drainage, the construction by the incorporated district of the drainage system pursuant to statute and the levy and payment of such assessments create contracts between the district and the individual landowners. Comp. St. 1929, sec. 31-401 *et seq.*
3. **Constitutional Law.** Where contractual and vested rights are created pursuant to statute, they cannot be destroyed by a subsequent act of the legislature.
4. ———. "A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights." *Travelers Ins. Co. v. Ohler*, 119 Neb. 121, 227 N. W. 449.

APPEAL from the district court for Otoe county: WILMER W. WILSON, JUDGE. *Reversed.*

Spencer & Neumeister, for appellants.

Moran & James and *Otto H. Wellensiek, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This is a suit in equity for a mandatory injunction requiring defendants, Drainage District Number 1 of Otoe and Johnson counties and the members of the board of district supervisors, to repair portions of its drainage system to prevent the overflow of plaintiffs' lands and the destruction of their crops by water. Plaintiffs seek also an injunction to prevent defendants, including the clerk of the district court for Otoe county, from holding an election to vote on the dissolution of the drainage district.

Plaintiffs are landowners who paid assessments for drainage which, through failure of the district to repair ditches, no longer protects their lands or crops from damages by water. Plaintiffs sue also for others similarly situated.

The drainage district was duly incorporated in 1910 pursuant to the drainage law of 1905 and amendments thereof. Laws 1905, ch. 161; Laws 1907, ch. 153; Laws 1909, ch. 150; Comp. St. 1929, sec. 31-401 *et seq.* The statute of 1905 provides for the drainage of lands in the district and for protection thereof from the effects of water. The regularity and validity of the incorporation of the district under its charter were confirmed by the district court for Otoe county and by the supreme court. *Drainage District v. Wilkins*, 93 Neb. 567, 141 N. W. 151.

The charter provides that the corporation shall continue for 50 years and it therefore has 20 years to run unless sooner dissolved. The improvement district contained approximately 16,090 acres of land. The articles of incorporation named each landowner and described his tract. In the feasible, engineering project, the benefits to land in the district were estimated at $566,050.66 and the cost of construction at $215,843.96. The ditches, dikes, drains and other improvements were made according to the plans adopted. Total benefits to the extent of 48½ per cent. only were levied on the lands in the entire district. Plaintiffs paid the assessments levied against their lands.

Plaintiffs allege in their petition that improvements formerly benefiting their lands no longer serve the purposes of drainage; that dikes have been washed away and ditches filled up; that defendants refuse to make the necessary repairs; that they have on hand a fund of $800 which they threaten to use in calling and holding an election to dissolve the district pursuant to the act of 1933. Comp. St. Supp. 1939, sec. 31-475.

That act provides for the dissolution of a drainage district organized under article 4, ch. 31, Comp. St. 1929, and directs how the election shall be called and conducted. That there shall be no outstanding indebtedness of the district is

a condition of dissolution by election. The act of 1933 is alleged to be void, if construed to operate retroactively and prevent the relief sought by plaintiffs. In different forms the sufficiency of the petition to state a cause of action was raised by demurrers.

The district court heard the cause on the demurrers, special and general, and held that the act authorizing the dissolution of the district by voters at an election was constitutional; that the petition does not disclose any outstanding indebtedness of the district; that plaintiffs have no contractual or vested rights to prevent the election to dissolve the district; that the petition does not state facts sufficient to constitute a cause of action; that a former temporary injunction was wrongfully granted; that the demurrers should be sustained; that the relief sought by plaintiffs should be denied. Plaintiffs appealed.

The rulings of the district court conform to the views of defendants and are defended as sound in elaborate arguments in which many cases are cited.

The position of plaintiffs is that the drainage act, the valid proceedings under it, the signing of the articles organizing the public corporation containing the promises and the obligations of the signers to pay assessments for drainage, the duty of the district to make repairs for 50 years, the construction of the feasible drainage project and the levy and payment of assessments on the property of the landowners for drainage purposes constitute a binding contract between the district and the individual owners of benefited lands therein.

The legislature provided by law for the creation of a public body or corporation to deal with individual landowners for the drainage of their lands on equal terms measured by individual benefits. The drainage district, acting through its board of supervisors, exercised public powers and performed public duties in constructing a drainage system to be in operation 50 years. The public corporation in the performance of such duties acted as a unit. Each landowner acted for himself in making promises and

in paying his proportionate share of the entire cost of the improvement by means of assessments for individual benefits. One of the articles of incorporation provides:

"The persons whose names are hereto subscribed are a majority in interest of the owners of all of the lands included within said district above described, and the undersigned are willing and hereby obligate themselves to pay the tax and taxes that may be levied and assessed to pay the expenses of making the improvements for which this district is formed."

The statute which is part of the charter provides:

"If at any time after the final construction of such improvement the same shall become out of repair, obstructed, inefficient, or defective from any cause, the board of supervisors may order an assessment upon the lands and property benefited by the drainage system for the purpose of placing the same in proper and suitable condition for drainage purposes." Comp. St. 1929, sec. 31-463, "may" therein being mandatory. *Mooney v. Drainage District,* 126 Neb. 219, 252 N. W. 910.

The duty of the board of supervisors to make the necessary repairs, as the statute has been construed, is as imperative as the duty to complete the drainage system and levy and collect assessments for benefits in the first instance. *Mooney v. Drainage District,* 134 Neb. 192, 278 N. W. 368. In an earlier opinion in the same case it was said:

"Whenever such drainage system becomes out of repair, defective, or inefficient for any reason, it is its (district's) duty to improve and repair it, within the limit of its power, so that it may serve the purpose for which it was constructed, and to the end that the landowners may receive the benefits for which the land is assessed." *Mooney v. Drainage District,* 126 Neb. 219, 233, 252 N. W. 910.

The written promises or legal obligations of the landowners to pay assessments for drainage improvements and the statutory duty of the district to construct the drainage system, keep the drains in repair, and levy the necessary taxes or assessments to pay the expense of drainage, and

the performance of duties and obligations by both district and landowners created contractual relations through which the landowners acquired vested property rights in the improvement of their lands by drainage. The system of drainage contemplated by the legislature did not mean a plan furnishing 50-year drainage for some landowners in the district and denying the same protection to others on an equal footing. A law text reads thus:

"It has become the established law that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of the clause of the federal Constitution forbidding impairment of contractual obligations." 6 R. C. L. 338, sec. 331. See, also, 12 C. J. 969.

An opinion of the supreme court of the United States, referring to contracts arising from statutes, contains this language:

"And in regard to the cases of contract, while the principle that a contract may arise from a legislative enactment has been reiterated times without number, it must always rest for its support in the particular case upon the construction to be given the act." *American Smelting & Refining Co. v. Colorado,* 204 U. S. 103, 115, 27 S. Ct. 198.

The drainage act, the proceedings thereunder and the payments by the landowners for drainage as the facts are alleged in the petition bring the case at bar within the foregoing principle applicable to contracts arising from legislative enactments.

The contractual and vested rights of plaintiffs cannot be taken away by the subsequent act authorizing dissolution of the drainage district by the ballots of landowners who may still enjoy the benefits of drainage, while plaintiffs who are landowners in the same district with the same rights are deprived of drainage. The law applicable has been stated as follows:

"A legislative act will not be permitted, even if an at-

tempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights. 2 Lewis' Sutherland, Statutory Construction (2d ed.) sec. 642; *United States v. Jackson,* 143 Fed. 783; *Hoyt Metal Co. v. Atwood,* 289 Fed. 453; *Spitzer v. Healy,* 218 N. Y. 737." *Travelers Ins. Co. v. Ohler,* 119 Neb. 121, 227 N. W. 449. See, also, *Mooney v. Drainage District,* 134 Neb. 192, 278 N. W. 368.

In sustaining the demurrers to the petition and in refusing to grant plaintiffs equitable relief, the district court erred. The judgment below is therefore reversed and the cause remanded for further proceedings.

REVERSED.

NELSON-JOHNSTON & DOUDNA, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, APPELLEE.

291 N. W. 558

FILED APRIL 12, 1940. No. 30703.

1. **Municipal Corporations.** A district organized under the provisions of articles 10 and 11, ch. 14, Comp. St. 1929, is a public corporation empowered to perform functions usually performed by cities of the metropolitan class and is, in its broader sense, a municipal corporation.
2. ———. A municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted and those essential to the declared objects and purposes of a municipality.
3. ———. Statutes granting powers to municipalities are to be strictly construed, and where doubt exists such doubt must be resolved against the grant.
4. ———. But where a power is granted to a municipality in its proprietary capacity, such as the power to manufacture, sell and distribute gas, the power is implied to do whatever is reasonably necessary to effectuate the purposes and objects for which the grant of power was made.
5. ———. The authority given a municipality to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances.
6. ———. A municipal corporation having the power to manu-

facture, sell and distribute gas to its inhabitants has the implied power to engage in the selling of gas appliances, such business being intimately connected with and incidental to the sale and distribution of gas, in that it directly and proximately tends to accomplish the general purpose and object for which the primary power was granted.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Leon, White & Lipp, for appellant.

Dana Van Dusen, contra.

A. G. Humphrey, J. R. Mueller, Beeler, Crosby & Baskins, Paul C. Holmberg, J. C. Reavis, Thomas Stibal, A. J. Denney, John E. Mekota, Clyde Barton, Harry K. Livingston, C. R. Stasenka, P. M. Everson, John Ferneau, C. A. Sorensen and *C. N. McElfresh, amici curiæ.*

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS, District Judge.

CARTER, J.

This is an appeal from a decree of the district court for Douglas county sustaining defendant's general demurrer to plaintiff's petition filed to secure an injunction against alleged unlawful trading on the part of the Metropolitan Utilities District of the city of Omaha. The plaintiff refused to plead further and plaintiff's petition was thereupon dismissed. Plaintiff appeals.

The plaintiff is a corporation with its principal place of business within the territory served by the Metropolitan Utilities District, a taxpayer of the city of Omaha and a patron and user of the gas and water facilities of the district. The defendant is a municipal corporation created and existing under the laws of the state of Nebraska (Comp. St. 1929, secs. 14-1001 to 14-1030 and 14-1101 to 14-1105) and empowered by such laws to engage in the business of supplying the inhabitants of the city of Omaha and surrounding territory with water and gas, and to manufacture and produce coke and by-products in connection with the

operation of its gas plant, and to sell and deliver the same to its customers.

The record shows that plaintiff is now and for many years has been engaged in the sale at retail of gas ranges, gas stoves, gas heaters, mechanical refrigerators and other household appliances in the city of Omaha. Plaintiff further alleges that the defendant district is now operating a retail appliance store in the city of Omaha and is selling and offering for sale gas stoves, gas ranges, gas heaters, mechanical refrigerators and other household appliances, that defendant carries on an extensive advertising campaign, including the giving to its customers free merchandise and articles used in connection with the cooking and preparation of foods, and that it extends to its patrons unusual and long terms of credit on merchandise sold which private competitors cannot meet. It is further alleged that there are numerous private mercantile establishments engaged in the gas-appliance business in the city of Omaha, that there is no scarcity of such appliances and that there is no price fixing by dealers, combinations or trusts to stifle competition or thwart the beneficent results of free enterprise.

Plaintiff contends that defendant is unlawfully engaging in the gas-appliance business contrary to the statutory law of this state and to the damage of the plaintiff, and that it is entitled to an injunction restraining the unlawful acts of this defendant in carrying on such gas-appliance business.

The defendant is a municipal corporation created by statute to take over, control and operate the artificial gas system of the city of Omaha, and other public utilities. *Keystone Investment Co. v. Metropolitan Utilities District*, 113 Neb. 132, 202 N. W. 416. A noted text-writer defines a municipal corporation as follows: "We may, therefore, define a municipal corporation in its historical and strict sense to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regula-

tion with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper. The phrase 'municipal corporation' is used with us in general in the strict and proper sense just mentioned; but sometimes it is used in a broader sense that includes also public or quasi corporations, the principal purpose of whose creation is as an instrumentality of the state, and not for the regulation of the local and special affairs of a compact community." 1 Dillon, Municipal Corporations, 59. While the Metropolitan Utilities District does not have all the attributes of a municipal corporation strictly defined, yet it performs the functions of a municipal corporation and in its broader sense is a municipal corporation.

The rule has long been established in this state that a municipal corporation "possesses, and can exercise, the following powers, and no others; First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable." *Christensen v. City of Fremont*, 45 Neb. 160, 63 N. W. 364. See, also, *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N. W. 643; *Schroeder v. Zehrung*, 108 Neb. 573, 188 N. W. 237.

The right to own and operate a water plant was first granted to the city of Omaha by special enactment of the legislature. Subsequently, the control and management was lodged with the defendant district. The right to own and operate a gas-manufacturing plant and distribution system was likewise added to the powers and duties of the district. The effect of these statutes is to create a governmental agency which has for its purposes the control and operation of the proprietary functions which ordinarily would have been performed by the city of Omaha. It seems to us, therefore, that the powers of the district must be tested on the same basis as if being performed by the city itself. It is conceded that there is no power granted by express provi-

sion of any statute permitting the district to engage in the sale of gas appliances. The question resolves itself into one as to whether the right to engage in the sale of gas appliances can fairly be implied from the powers granted. In other words, does the fact that the district is authorized to manufacture, sell and distribute gas to the inhabitants of the district imply the power to sell gas appliances?

The powers granted to a municipal corporation can be divided into two general classes,—the one including those which are legislative, public or governmental, and import sovereignty; the second, those which are proprietary or quasi private, conferred for the private advantage of the inhabitants and the city itself as a legal entity. Where the legislature creates a separate municipal corporation to perform the functions of a city usually regarded as proprietary, such municipal agency is just as much engaged in proprietary functions as if the city was doing it itself. We must, therefore, construe the granted powers as proprietary in character as distinguished from a governmental grant of authority. We think that a grant of power to a municipal corporation in its proprietary capacity stands upon the same footing as a similar grant to a private corporation by its charter. The grant of power to control and operate a public utility necessarily implies all the incidental powers to do anything that any business man or corporation ought to do in operating a successful business enterprise. Certainly, a private corporation engaged in the manufacture and distribution of gas may sell gas appliances to the purchasing public. The sale of such appliances by private utility companies tends to increase the volume of gas sales and thereby increases the economic efficiency of the corporation. Such results are likewise necessary to the proper operation of a municipally owned business. Applying the same rule to the proprietary powers of a municipal corporation as to the powers enjoyed by a private corporation, we conclude that the defendant district has the implied power to engage in the gas-appliance business. Whether such municipal corporation in its proprietary capacity may engage in the sale

of such appliances at a loss, or where it will create an indebtedness against the district, or permanently impair the income of the district derived from the sale of gas, we do not find it necessary to answer in this case. We merely hold that under the facts presented to us the defendant district has the implied power to engage in the gas-appliance business.

It has been held that a municipality authorized to own and operate an electric-light plant has the implied power to sell electrical appliances. *Andrews v. City of South Haven,* 187 Mich. 294, 153 N. W. 827. It has also been held that a municipality engaged in operating a power and light plant may sell its excess steam and install the appliances necessary to enable it to meet the demand. *Milligan v. City of Miles City,* 51 Mont. 374, 153 Pac. 276. A municipality, in installing electric wiring in private houses for purposes of furnishing electricity for electric ranges, stoves, etc., is governed by the same laws and could exercise the same rights as a private corporation engaged in the same business. *Hamler v. City of Jacksonville,* 97 Fla. 807, 122 So. 220.

In *Henry v. City of Lincoln,* 93 Neb. 331, 140 N. W. 664, this court said: "In the light of the above authorities, we conclude that in the installation and management of its waterworks system defendant must be treated as a private corporation engaged in a purely business enterprise, as separate and distinct from the performance of its governmental functions and corporate duties as if it were not a municipal corporation at all, and that its liability to plaintiff must be determined solely under the law and procedure applicable to a private corporation and its employee." The rule was subsequently followed in *City of University Place v. Lincoln Gas & Electric Light Co.,* 109 Neb. 370, 191 N. W. 432, and *Cook v. City of Beatrice,* 114 Neb. 305, 207 N. W. 518. We think this is a clear indication of the rule to be applied in the instant case.

When a municipal corporation engages in a business enterprise which is reasonably necessary to the performance of its public duty, or which materially advances it, or even

where the enterprise merely affords the public greater convenience in the use of the municipality's facilities, the participation in such an enterprise is, by the weight of authority, held to be a power implied from or incidental to its expressly granted powers. Certainly no private company could await the initiative of its prospective customers, nor the efforts of others, to sell appliances before doing business. It would have to rely upon its own efforts in this respect. A municipality engaged in the gas business must meet the same problems. Until the district is equipped with gas appliances, there could be no gas business.

We think the correct rule is: If a municipal corporation legally acquires a public utility plant, with the right to operate it for the benefit of its inhabitants, it would likewise acquire by implication the right to do all the things that a private owner might do in order to economically and efficiently furnish to the citizen the product in which he deals. The sale of gas-appliances by the defendant district is intimately connected with and incidental to the sale of gas, and is, therefore, an implied power of such district because it directly and proximately tends to accomplish the general purpose for which the district was established and operated. This, in our judgment, states the more modern rule adopted by a majority of the states which have passed on the question.

We have examined the cases arriving at a contrary conclusion, including *MacRae v. Selectmen of Town of Concord,* 6 N. E. (2d) (Mass.) 366; *Keen v. Mayor of Waycross,* 101 Ga. 588, 29 S. E. 42; *Attorney General v. Corporation of Leicester* (1910) 2 Ch. Div. (Eng.) 359; *In re Opinion of the Justices,* 14 N. E. (2d) (Mass.) 392, and *Adie v. Mayor of Holyoke,* 21 N. E. (2d) (Mass.) 377. These cases invoke the strict construction usually applied to grants of governmental powers to a municipality. We are unwilling to follow so strict a construction in dealing with statutes granting powers to a municipality in its proprietary capacity.

We conclude therefore that the trial court properly sustained the demurrer to plaintiff's petition.

AFFIRMED.

ELI C. BURKE, APPELLANT, V. WESTERN UNION TELEGRAPH COMPANY, INC., APPELLEE.

291 N. W. 555

FILED APRIL 12, 1940. No. 30815.

1. **Commerce.** By enactment of federal statutes on the subject (36 U. S. St. at Large, 539, and 48 U. S. St. at Large, 1064), congress has occupied the entire field of interstate business of telegraph companies so as to exclude state action, except where specifically authorized.
2. **Courts.** Where the supreme court of the United States has interpreted and construed an act of congress, the meaning placed thereon by that court governs the action of state courts.
3. **Damages.** The applicable rule announced by the federal courts is that no recovery of damages can be had for mental pain and anguish where no injury is done to person, property, health or reputation.
4. **Telegraphs and Telephones.** No recovery can be had for mental pain and anguish growing out of the negligent failure of a telegraph company to deliver an interstate telegram, for the reason that the federal courts do not permit a recovery for such injuries.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Charles E. Foster, Henry G. Peterson and *Foster & Yates*, for appellant.

Francis R. Stark and *Ellick, Fitzgerald & Smith, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

CARTER, J.

This is an action to recover damages for the nondelivery of a telegram sent to the plaintiff announcing the death of his father and requesting his attendance at the funeral. At the close of plaintiff's evidence the trial court directed a verdict against the plaintiff and dismissed the action. Plaintiff appeals.

The record discloses that on July 22, 1938, Gladys Duesler, a sister of the plaintiff residing at Oklahoma City, Oklahoma, filed a telegram with the defendant company at its

office in Oklahoma City, which in substance said: "Father died today. Come at once." The telegram was never delivered and plaintiff was not informed of his father's death until July 30, 1938, after the funeral had been held. Plaintiff alleges and offered evidence to prove that the negligence of the defendant in failing to deliver the message caused a severe shock to his nervous system and great mental pain and anguish for which he asked for damages. It is the contention of the defendant that the case is controlled by federal laws which preclude a recovery for mental anguish or for physical suffering growing out of mental anguish. The trial court adopted this view and directed a verdict against plaintiff.

It is not disputed that the telegram was filed with the defendant company in Oklahoma City, Oklahoma, and not delivered to the plaintiff in Omaha, Nebraska, as directed. That it was an interstate message cannot be questioned. *Western Union Telegraph Co. v. Czizek,* 264 U. S. 281, 44 S. Ct. 328, 68 L. Ed. 682; *Postal Telegraph-Cable Co. v. Eubanks,* 121 Miss. 530, 83 So. 678; *Western Union Telegraph Co. v. King,* 188 Ga. 95, 2 S. E. (2d) 909.

Congress has the power under the Constitution of the United States to regulate commerce among the several states. U. S. Const. art. I, sec. 8. In 1910 congress exercised its constitutional power by passing an act regulating interstate communications by telegraph. 36 U. S. St. at Large, 539. The supreme court of the United States subsequently construed this act in *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.,* 251 U. S. 27, 40 S. Ct. 69, 64 L. Ed. 118, and *Western Union Telegraph Co. v. Esteve Bros. & Co.,* 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094, and determined that an action for damages for failure to deliver an interstate telegram was governed exclusively by the federal law. This holding was recognized and followed by this court in *Dunning v. Western Union Telegraph Co.,* 108 Neb. 422, 187 N. W. 890, wherein we said: "The federal government being supreme in the control of interstate commerce, as held by the supreme court of the United States, the state

cannot of course interfere with that control. And it may be added that the act is so far-reaching that the receiver of an interstate telegram, as well as the sender, comes within its meaning."

Congress has, under the Communications Act of 1934 (48 U. S. St. at Large, 1064), continued to occupy the field of interstate business of telegraph companies to such an extent that state action is excluded unless there be an express exception. *Western Union Telegraph Co. v. Boegli*, 251 U. S. 315, 40 S. Ct. 167, 64 L. Ed. 281; *Western Union Telegraph Co. v. Priester*, 276 U. S. 252, 48 S. Ct. 234, 72 L. Ed. 555; *Western Union Telegraph Co. v. King*, 188 Ga. 95, 2 S. E. (2d) 909.

When the supreme court of the United States has construed an act of congress, the interpretation made by that court controls the action of the state courts. *Dunning v. Western Union Telegraph Co.*, 108 Neb. 422, 187 N. W. 890.

The purpose of the congress in occupying the field of the interstate business of telegraph companies is well expressed in *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094, wherein the court said: "Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed." The supreme court of the United States expressed the same view in *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 40 S. Ct. 69, 64 L. Ed. 118, wherein it was said: "The act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the act to regulate commerce to establish, a purpose which would be wholly destroyed if, as held by

the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws." See, also, *Western Union Telegraph Co. v. Priester,* 276 U. S. 252, 48 S. Ct. 234, 72 L. Ed. 555. We therefore conclude that the instant case comes within the field occupied by the congress of the United States and that a proper conclusion can be reached only by the application of rules of law announced by the federal courts.

The rule appears to be well settled in the federal courts that pain and suffering and mental anguish are too vague for legal redress where no injury is done to person, property, health or reputation. *Southern Express Co. v. Byers,* 240 U. S. 612, 36 S. Ct. 410, 60 L. Ed. 825; *Western Union Telegraph Co. v. Speight,* 254 U. S. 17, 41 S. Ct. 11, 65 L. Ed. 104; *Western Union Telegraph Co. v. Lee,* 174 Ky. 210, 192 S. W. 70. In the latter case, the court said: "But before Congress took control of the subject of interstate telegrams, state laws could incidentally affect them; since the act of 1910, they cannot. The whole subject of interstate telegrams, including the terms of the contract and the character of the recovery, are now controlled by the federal law; and, as above shown, Lee's telegram was an interstate telegram. It follows, therefore, that the circuit court erred in sustaining the demurrers to the answer which sought to limit the company's liability under the contract, and in permitting a recovery for mental anguish."

Other cases in point are *Ey v. Western Union Telegraph & Cable Co.,* 298 Fed. 357; *Jones v. Western Union Telegraph Co.,* 233 Fed. 301; *Mees v. Western Union Telegraph Co.,* 55 Fed. (2d) 691.

We conclude therefore that a recovery cannot be had for mental pain and anguish under the applicable rules announced by the federal courts.

The trial court correctly directed a verdict for the defendant and dismissed the action.

AFFIRMED.

CLYDE D. MACOMBER V. STATE OF NEBRASKA.
291 N. W. 674

FILED APRIL 12, 1940. No. 30473.

1. **Statutes.** Penal statutes are inelastic and must be strictly construed, and may not be extended by implication.
2. **Kidnaping.** Strictly construing section 28-417, Comp. St. 1929, a guide to the meaning of the statute is found in the evil which it is designed to remedy, and it is the duty of the court to review the contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body at the time of the enactment of the statute.
3. **Statutes.** When a statute is required to be construed strictly, such statute should have a sensible construction. The general terms contained therein should be so limited in their construction as not to lead to injustice, oppression or an absurd consequence.
4. ———. In a strict construction of a penal statute, it is presumed that the legislature intended exceptions to its language which would avoid results of injustice, oppression or an absurd consequence. The reason of the law in such case prevails over its letter.
5. **Kidnaping.** Section 28-417, Comp. St. 1929, is not all-inclusive, to cover several other offenses provided for by different sections of the Criminal Code, and warrants the strict construction that the legislature did not so intend such statute at the time of its enactment.
6. ———. The evidence in the instant case, examined and considered in its entirety, fails to prove beyond a reasonable doubt the crime of kidnaping, within the meaning of the language used in and contemplated by section 28-417, Comp. St. 1929.
7. **Criminal Law.** Section 20-1207, Comp. St. 1929, subjecting a witness to a physical examination, to be offered with reference to his physical or mental condition or the alleged cause thereof, applies only to parties to an action.
8. ———. "A conviction of a lesser offense than that for which the accused was informed against is not a bar to a prosecution for a greater offense if the accused is granted a new trial." *Pembrook v. State*, 119 Neb. 417, 229 N. W. 271.

ERROR to the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Reversed.*

Hoagland, Carr & Hoagland, Beeler, Crosby & Baskins and *Robert B. Crosby*, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Milton C. Murphy, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

The defendant, Clyde D. Macomber, was charged in the district court for Lincoln county, with Albert A. Hastings and Joseph R. Baskins, with robbing Sam I. Pappas of $275 (this count was dismissed); with unlawful assault, with intent to inflict great bodily harm, on Sam I. Pappas, resulting in the conviction of defendant Macomber of assault and battery, for which he was sentenced to 60 days in jail; and in count one of the information with the crime of kidnaping. The language constituting this charge is substantially as follows:

Albert A. Hastings, Clyde D. Macomber and Joseph R. Baskins (late of Lincoln county), on or about November 21, 1937, did unlawfully and feloniously carry off, decoy, entice away, secrete and imprison Sam I. Pappas for the purpose of compelling Sam I. Pappas, forcibly and against his will, to confess and admit that he had committed the crime of sodomy. The maximum penalty for sodomy, under section 28-920, Comp. St. 1929, is 20 years in the penitentiary. Macomber was convicted of kidnaping, and, upon the overruling of the motion for a new trial, sentenced to serve the remainder of his natural life in the penitentiary. As plaintiff in error, he presents to this court for review the record of his conviction. The record contains 107 assignments of error and nearly 2,000 pages of other matter.

Plaintiff in error contends that the verdict of the jury finding defendant Macomber guilty of kidnaping is contrary to the evidence and the law. The record discloses:

On the evening of November 13, 1937, Glenn Hardenbrook, a boy 17 years of age, was caught in the act of committing the crime of sodomy with another young boy at the Union Pacific depot in North Platte. An arrest was made by police officers Westphal, Lindekugel and Macomber. The

Hardenbrook boy was taken to the city police station and subsequently questioned with reference to becoming a moral pervert. It developed that he had first been taught by a man in Denver and later had such relations with one Sam Pappas, employed in a restaurant and known as "Coney Island" Sam Pappas. Hardenbrook remained in the city jail, and on Saturday evening, November 20, 1937, he talked to Albert A. Hastings, a defendant, who conducted an insurance and loan business in North Platte and who was active in city politics. His presence at the police station was accounted for in that he had been called by Officer Lindekugel on November 17, 1937, and learned about the case from such officer and from Amiel Traub, desk sergeant. The record discloses an offer to prove, as part of the defense, that one of the police officers had talked to the county attorney, and it was suggested by the latter that Hastings had become interested in procuring evidence in the case. It is shown in the record that a conversation was had between Hastings and the county attorney in the latter's office "about ways and means of clearing up this case, about the parties that had been getting this boy started, and I (the county attorney) mentioned the fact if Al Hastings heard about this he would probably like to work on the case, he had been trying to get the Greek for so long." The county attorney denied making any statement to Officer Traub about contacting Hastings to get him to assist. The substance of the county attorney's testimony, with respect to Hastings participating in the case, is: "Hastings had volunteered himself into the case, I could not very well, whether I wanted him in or not, tell him not to go ahead with the case."

On Saturday morning Hastings contacted Louis Kelly, a newspaper man, and asked him if he wanted a good story. Kelly and Hastings met the Hardenbrook boy in the office of the police judge Saturday night. Hastings introduced himself to the boy and told him he wanted to help the officers and other boys and informed him of the seriousness of the crime. He agreed to help the boy, but not in a finan-

cial way. Hardenbrook testified that Hastings told him he could get a parole and benefit financially. A trap was then set to catch Sam Pappas; Hastings, Kelly and Lindekugel to be witnesses. The Hardenbrook boy was to contact Sam Pappas and induce him to go to a rooming house and have relations with him. There they were to be caught in the commission of the crime. This scheme failed.

By way of explanation, there are two persons in North Platte, each connected in some manner with the restaurant business, by the name of Sam Pappas: Sam A. Pappas, known as "Coney Island" Sam Pappas, and Sam I. Pappas, the proprietor and owner of the Union cigar store and restaurant, who was also known as a local gambler, who had permitted card playing for money in his cigar store. The defendant Hastings, as well as the police officers and others, claimed to know only one Sam Pappas; that is, Sam I. Pappas. Hastings knew Sam A. Pappas as "Tom," and Sam A. Pappas testified that Hastings always referred to him as "Tom." The fact that Tom Gladdis was employed with Sam A. Pappas might have led to the confusion in distinguishing the two men.

Defendant Macomber, 26 years of age, was employed by the city in the capacity of a regular patrolman. He worked four hours in the afternoon and four hours at night, until midnight. He was the driver of the cruiser car, answered red lights and patroled alleys and streets. He drove the cruiser at the time the Hardenbrook boy was apprehended, and testified that Hardenbrook told him at the police station that he had committed the crime of sodomy with one Sam Pappas, who operated a restaurant, and with his brother Gus. Sam I. Pappas also had a brother named Gus, who managed the Union restaurant, while he, Sam I., managed the Union cigar store. Macomber knew only one Pappas and that was Sam I. Pappas. Macomber saw Albert A. Hastings at the police station on the night of November 19, 1937, and he claimed to have had a conversation on the street the morning of November 20 with the county attorney, who is purported to have told him to engage Sam Pap-

pas in conversation and to attempt to have him, Pappas, commit the crime of sodomy with him, Macomber; also to procure two witnesses. All of such testimony is in conflict and rebutted. Macomber testified that he saw Sam I. Pappas at about 8 o'clock in the evening of November 21, and induced him to ride with him in the police cruiser; that during the course of the ride Macomber suggested to Pappas that he, at some future date, indulge in sodomous relations with him, to which he claimed Pappas assented. Sam I. Pappas and witnesses for the state are far from being in accord on this testimony.

On the day in question Sam I. Pappas had dinner at the beet farm which he owned, a few miles distant from North Platte. Later in the day he went to the funeral of a friend in town and stopped at the Union café and had coffee, later returning to the farm. Mrs. Anna Simek, a sister-in-law of Sam I. Pappas, with whom he lived, testified that early in the evening Macomber knocked on a window in her home; she went to the door, and Macomber asked to see Sam, and, when informed he was not at home, told her that when he returned to put a light on in the house and tell Sam that the boys wanted to see him about a card game and wanted to tell him something "for his own good." Later in the evening Sam returned home and had been there a short time when Macomber appeared, about 11:30 o'clock, met Sam and asked him to come along, and Pappas readily consented. Baskins, a city councilman and chairman of the police commission, was seated in the car. It had been his habit to ride evenings in the cruiser, and on this evening he was picked up by Macomber. At this time they all greeted each other pleasantly. Macomber asked Pappas if he was armed; he replied that he was not and never carried a gun. After getting into the car, they drove around for a short time, then stopped at the Ritner Hotel where Macomber lived, occupying room 25. The three men went into the lobby of the hotel together and up a stairway to the first landing, where Macomber called a night clerk and told him to take Baskins and Pappas up to his room and

stay there until he returned. Macomber then left to use the telephone in the lobby and was heard to call Hastings' residence. Finally Hastings appeared, and he and Macomber went up to room 25, and the clerk left. When they entered the room Hastings slipped the bolt on the door, and said "Hello" to both Baskins and Pappas and shook hands with them. This evidence is in conflict. The defendant's witnesses testified that the door was at all times ajar. Finally, Macomber asked Pappas to tell Baskins and Hastings what Pappas wanted to do to him. Pappas is purported to have replied, in substance, that he might have been only fooling, and Macomber stated he knew he was not fooling. Macomber threatened to arrest him and take him to jail; Pappas replied: "There wasn't enough cops on the force to take him." Pappas then attempted to get away and struck Macomber. The exact conversations that took place in the room are at a variance. The version of Pappas is as follows:

After they were seated in the room Macomber said: "Sam, do you know what we got you up here for?" Pappas replied, "No." Macomber said: "You tell us what you done with that boy." Pappas replied that he did not know what Macomber was talking about. Macomber disputed him; Pappas replied: "You are talking to the wrong man altogether, * * * I don't know what you are talking about. * * * If you fellows think I have done something, take me down to the police station or the sheriff's office and I will tell you if I know something." Hastings said: "Come on now cough up." Macomber said: "You are getting smart are you? * * * You had better talk." Pappas replied that he was not going to talk, and Macomber said: "I am going to make you talk." Pappas replied: "If you think you can, hop to it; go ahead." Then Macomber struck him.

Hastings' version of the conversation between Macomber and Pappas is substantially the same as Macomber's; that Macomber told Pappas that he was under arrest and he could go to the police station, but that Pappas replied that if he went to the police station he would go with the sheriff;

that there were not enough policemen on the force to take him. Macomber stated he could take him. Pappas then called Macomber a liar, Macomber got up, Pappas got up and struck at Macomber's mouth and nose; Macomber then struck Pappas, and a fight ensued. Baskins' version of the conversation corroborates both Macomber and Hastings. Pappas claimed that Hastings and Baskins held his arms; that Hastings lost his hold on his arm and held Pappas by his clothing; that Macomber, using vile language, informed Pappas: "You * * * Greeks aint going to run this town, the white people are going to run this town." This language was heard by a guest at the hotel in an adjoining room. He heard the commotion and heard the statement, purported to have been made by Macomber to Pappas, to "sit down * * * I am running this thing." He also heard this language: "Don't hold me, Curley, don't hit me again." With reference to the order to "sit down," the witness heard Pappas say: "I will, I will sit down, I will." He stated that the commotion lasted five or ten minutes.

Pappas testified that Macomber kept striking him in and about the face and head; he did not remember striking Macomber but was attempting to get away. Finally, he did get outside of the room and was standing up against the wall, being pounded by Macomber. There is evidence that Pappas was up against the side of the wall, with his hands down at his side, and his knees sagging, and that he kept saying "all right;" that Macomber kept pounding Pappas with his fists. There is also evidence that Hastings came out into the hall, and that he said: " 'Chet, Chet,' in a serious, cautious way," cautioning him that he was being observed, and that Macomber, after he was warned, "kept on punching; he said, 'I am doing this, I am handling this.' " When Pappas made the attempt to escape from the room, he was apparently dragged back into the room and told to sit down. The striking of Pappas in the hall is testified to by one witness, who also stated he saw Baskins in the hall; that Baskins merely shook his head, did not say anything, and returned to the room.

The testimony for the defense is that Pappas, in attempting to retreat from the room, tripped on the carpet, and that the injuries sustained to his head were caused by his falling against a radiator. The location of bloodstains, of the furniture, and of the radiator in the hall is all detailed extensively in the record and will not be here reviewed. The testimony as to the time actually spent in the room is at variance, the defendant and his witnesses claiming that it did not exceed two minutes.

Finally, the men went downstairs. Pappas was bleeding profusely and wiping blood from his nose and other parts of his head with a handkerchief. He asked to be able to "wash up" but was prevented from doing so. Here, again, the evidence is in conflict as to whether Macomber made a statement that he was the "boss" and was going to take Pappas to jail; whether he struck and pushed Pappas and demanded that he get into the back seat of the cruiser with Hastings, or whether Pappas went voluntarily. When the men arrived at the city jail the Hardenbrook boy was brought out. It is claimed, and denied, that Hastings, Baskins and Macomber remarked to him: "This is the man, this is Sam Pappas," to which the boy replied that Sam I. Pappas was not the man; that it was "a different man altogether, Sam Pappas works in the Coney Island." Macomber and Hardenbrook went for "Coney Island" Sam and returned with him, and the boy stated that he was the man. Then it was suggested by Macomber that he should have a warrant for Sam I. Pappas for resisting an officer, and also for the offense of sodomy based on Macomber's statement, and Hastings said it would be all right for both of the boys to go, meaning Sam A. and Sam I. Pappas; that they would come when they were wanted, and it was suggested that Sam I. Pappas and Macomber shake hands and forget all about the incident. Officer Traub testified that Macomber shook hands with Pappas and "patted him on the shoulder," and he was sent home free, without any police record against him; that while at the police station Pappas said: "Hastings and Baskins treated him like a gentleman," and that Officer Macomber was only doing his duty.

When Sam I. Pappas arrived home, Mrs. Semik awakened her two daughters. They, with Pappas, contacted the sheriff and then went immediately to the hospital, where Pappas remained for eight or nine days. The injuries sustained by him as the result of the assault, and as testified to by the examining physician, may be summarized as follows: Face badly bruised; eyes swollen shut; deep cut, with ragged edges, an inch long over the left eye; slighter cut over same eye; nose skinned; lip cut on right side; inside of cheek bruised on upper right side; lacerations close to the lips; right side of face puffed with air, passing under the tissues and extending over the entire side of head and face to margin of collarbone; portion of air breathed passed through torn tissues under the skin, over the side of the face and neck; lachrymal bone fractured; whites of both eyes red; bump on head back of ear; stitches required to close wounds.

Macomber testified that he at no time struck Pappas with his closed fist. The assault on Pappas, as shown by all of the testimony, was brutal, unwarranted and unnecessary. Throughout the record the insinuation is prominent that Hastings, with the use of his political influence, desired to have charge of the community, and purposely, and in conspiracy with others, sought to drive Sam I. Pappas out of the gambling business and perhaps out of the city for his, Hastings', own personal aggrandizement. We here concern ourselves with the part this defendant played in the case. The use of the third degree, applied by police officers to persons in their custody, can never be tolerated, and confessions obtained thereby are necessarily invalidated because of the nature of the means employed to obtain them. This practice has been condemned by nearly all of the courts, and courts generally are in agreement on this subject. See *Stagemeyer v. State*, 133 Neb. 9, 273 N. W. 824.

That this plaintiff in error was guilty of conduct which richly deserves the condemnation of all good people is not to be denied, but the question for us to decide, and for the state to prove beyond a reasonable doubt, is whether de-

fendant Macomber kidnaped Sam I. Pappas, in violation of the strict terms of the statute and as charged in the information.

"In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law." *Lane v. State,* 120 Neb. 302, 232 N. W. 96. See, also, *State v. De Wolfe,* 67 Neb. 321, 93 N. W. 746; *State v. Pielsticker,* 118 Neb. 419, 225 N. W. 51. "It is elementary that penal statutes are inelastic and must be strictly construed. They are never extended by implication." *Weber v. State,* 122 Neb. 369, 240 N. W. 429; *Preston v. State,* 106 Neb. 848, 184 N. W. 925. See also section 29-106, Comp. St. 1929. The foregoing Nebraska cases definitely determine the manner of construing the provisions of criminal statutes in this state.

Section 28-417, Comp. St. 1929, in its entirety, contains possibly four separate divisions that may be stated as follows: First: "Whoever shall kidnap or forcibly or fraudulently carry off or decoy out of this state any person or persons or shall arrest or imprison any person or persons, with the intention of having such person or persons carried out of the state, unless it be in pursuance of the laws thereof, shall be confined in the penitentiary not less than three nor more than seven years." This part of the statute,—take by force and carry off any person into another state for the purpose of imprisonment,—carries a penalty of not to exceed seven nor less than three years. The second provision of this section of the statute is: "Whoever shall unlawfully carry off or decoy, entice away, secrete or imprison any person, for the purpose of extorting from such person or from his or her relatives or friends any money, * * * or for the purpose of compelling the performance of any act by such person," shall be imprisoned in the penitentiary for and during the period of his natural life. The third provision, carrying the same language as the second, contains the further statement, "in furtherance of any such purpose,

do or threaten to do any injury to the person so carried off," etc., shall be imprisoned in the penitentiary for the period of his natural life. The fourth part of said section provides: "Whoever shall threaten to carry off, entice away, secrete or imprison any person for the purpose of extorting money from such person, or from his or her relatives or friends," shall be imprisoned in the penitentiary for not less than one nor more than 20 years.

The dominating element of the offense of kidnaping is the intent with which the acts enumerated in the statute are done. The purpose of the enactment of statutes prohibiting kidnaping is to secure the personal liberty of citizens, to protect the custody of parents or guardians, or other persons having lawful custody of children, also the children. The present statute (Comp. St. 1929, sec. 28-417) was passed in this state immediately after the kidnaping of young Edward Cudahy, where the kidnapers sought ransom for the return of the boy. We find no case that is of direct assistance in determining the adaptability of the facts in the instant case to section 28-417, *supra*. It is apparent that when the legislature enacted section 28-417 it had in mind the unlawful carrying away, decoying, enticing, or imprisoning of any person for the purpose of extorting from such person, relatives or friends any money, property or promise, and for the purpose of compelling the performance of any act by such person.

The state's contention is that the taking of Pappas in an effort to procure a confession, or in an effort to get him to confess to the crime of sodomy, was sufficient when any force was used upon him in that connection. The word "purpose" means that which one sets before him to accomplish. To "compel," within the contemplation of section 28-417, *supra*, means to force; and "performance" means, as the term implies, such other fulfilment of a duty as puts an end to obligation by leaving nothing to be done. While there is apparently great force in the reasoning in the state's brief, we do not believe that the legislature intended, considering the history of the enactment of this

law and the reason therefor, to include a state of facts as exists in the instant case within the section of the statute herein discussed.

In *Holy Trinity Church v. United States,* 143 U. S. 457, 12 S. Ct. 511, it was said: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. * * * This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." And on page 463 we find this language: "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body." Citing *United States v. Union P. R. Co.,* 91 U. S. 72, 79. In the latter case it was said: "But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge v. Williams,* 3 How. 24; *Preston v. Browder,* 1 Wheat. 120."

In *State v. Clark,* 29 N. J. Law, 96, the court said: "If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed. 1 Kent's Com. 462; *Commonwealth v. Kimball,* 24 Pick. 370; *United States v. Fisher,* 2 Cranch, 400; 1 Bl. Com. 60." And in *United States v. Kirby,* 7 Wall. (U. S.) 482, it was said: "All laws should receive a sensible construction. General terms should

be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." The circumstances under which the statute in question was passed and the purposes to be accomplished by it, in its scope and effect, are inconsistent with the position taken by the state.

It would seem apparent that section 28-417, Comp. St. 1929, is not all-inclusive; that is, to cover other offenses provided for by different sections of the statute, and the application of its provisions to the facts in the case at bar meets this objection raised by the plaintiff in error. With the severity of the penalty we are not concerned, and we acknowledge that it is privileged only to the legislature; but the intent of the legislature in enacting section 28-417 is of immediate concern, and it does not contemplate the crime of kidnaping, considered in the light of the facts in the instant case.

The only case to reach this court since the enactment of section 28-417, *supra*, is *Brown v. State*, 111 Neb. 486, 196 N. W. 926. Both plaintiff in error and the state cite this case as sustaining their respective contentions. Briefly, the facts are these: Brown picked up two young women; they requested that he let them off at Krug Park. He intentionally took them several miles beyond Krug Park to his shack; there chained and imprisoned them in a hole, four feet deep, six feet long, and two feet wide, for the purpose of compelling the women to have sexual relations with him. Under such circumstances he completed the act of sexual intercourse. He then permitted his captives to go into the attic of the shack and threatened their lives if they made an outcry. They saw a person passing nearby, made an outcry and pursuit of Brown followed. He was apprehended, charged with and convicted of kidnaping under section 28-417, Comp. St. 1929. It is noted that Brown, by his act, completed every necessary element of the offense charged

under said section of the statute. Again referring to the statute, it indicates clearly that the person perpetrating the act has the commission of a crime or an unlawful act in mind at the time. Otherwise, this statute must of necessity catch the innocent as well as the guilty. The evidence in the instant case does not warrant the conclusion that the assault on Pappas was planned by, intended, or was within the original contemplation of, Macomber, on duty and fully uniformed as a police officer, at the time he asked Pappas to accompany him and later took him to the Ritner Hotel. What Macomber intended was to give Pappas the third degree and endeavor to have him confess to the crime of sodomy in the presence of two witnesses, Baskins and Hastings. It is claimed that his reward would be the enhancement of his prestige in clearing up this offense and have a tendency to advance him in the police service of the city. The evidence does not warrant the conclusion that when the men entered the hotel room they intended to detain and assault Pappas until such time as they finally forced a confession to the crime of sodomy. Pappas voluntarily stayed in the room for some period of time when he would have been privileged to leave. He finally escaped from the room, was free for a time in the lobby of the hotel, accompanied the men to the police station, and there he was released and returned home.

For the reasons given, we conclude that the charge of kidnaping should not have been submitted to the jury, and in its submission the trial court erred.

With reference to the assignment of error as to compelling the complaining witness, Sam I. Pappas, to submit to a puncture of his spine, fluid to be taken therefrom and subjected to a chemical analysis for the purpose of determining the extent of the effect and the ravages of the disease of syphilis on his nervous system, and as affecting his sight and hearing, examination was permitted by the court and was made, with the exception of the spinal test. The physician said that the examination was not complete without such a test and that it would be harmless. Pappas

refused to submit to the test. A request was made to the court to compel him to so submit. Then the evidence discloses the history of the syphilis suffered by him, as found by the Mayo Clinic, and that Pappas did not object to its use. The contention of the defendant is that he was entitled to prove by a spinal test that the defects in the eyesight and hearing were caused by the disease and not by the assault, on the theory that, when plaintiff in error offered evidence as to the physical or mental condition of Pappas, section 20-1207, Comp. St. 1929, applied.

The trial court, under the prevailing rule, has the power to require the plaintiff in a personal injury action to undergo a physical examination at the request of the defendant. Such right on defendant's part is not considered absolute, and the matter is within the discretion of the trial court when such discretion is free from palpable abuse. See *Ziskovsky v. Miller*, 120 Neb. 255, 231 N. W. 809.

We next refer to the charge of assault with intent to inflict great bodily harm, which resulted in a conviction of assault and battery against the defendant. This court in *Pembrook v. State*, 119 Neb. 417, 229 N. W. 271, said: "The precise question is whether a conviction of a lesser offense than that for which the accused was informed against is a bar to further prosecution for the greater offense if the accused is granted a new trial. Nebraska is committed to the position that the defendant cannot benefit by the verdict of the jury, if he chooses to appeal from it." This court held: "A conviction of a lesser offense than that for which the accused was informed against is not a bar to a prosecution for a greater offense if the accused is granted a new trial." See, also, *Clarence v. State*, 89 Neb. 762, 132 N. W. 395. The fact that the above cases are homicide cases does not alter the principle of law, in so far as it affects the subject-matter of the count, in the instant case, of assault with intent to inflict great bodily harm, and incorporated therein assault and battery.

Other assignments of error need not be discussed in view of our holding. Upon a retrial of this case, we believe the

court will correct such errors that may be apparent, and that defendant will have a fair and impartial trial.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ROSE, J., dissenting.

The information was in proper form and accused defendant of violating the kidnaping law, which provides that whoever unlawfully entices away, secretes or imprisons any person for the purpose of compelling the performance of any act by such person, is, upon conviction, punishable for kidnaping by imprisonment for life. Comp. St. 1929, sec. 28-417.

When this law was enacted, contemporaneous history showed that the art of kidnaping had progressed to the point where a helpless victim was tortured by the threat his eyes would be gouged out if he failed to write and sign a letter containing the threat and address it to parent, brother, sister or other relative. The law was intended to protect the victim, his relatives and the public generally. The penalty for kidnaping was adapted to the atrocity of the crime.

In this prosecution competent evidence proves beyond a reasonable doubt the following facts or proper inferences therefrom as found by the jury in their verdict of guilty: The three defendants named in the information, Macomber, a policeman of North Platte, Baskins, a member of the city council, and Hastings, a boss in city politics, conspired together to compel Sam I. Pappas, who had been permitted by them to operate a gambling den, to confess to a felony of which he was innocent—a confession which, if made, might subject him to imprisonment in the penitentiary for 20 years and perhaps for life. The motive for the purpose to compel the confession was to get rid of Pappas and procure profits from gambling. Macomber and Baskins drove to the home of Pappas in a police cruiser not long before midnight, Sunday, November 21, 1937. Macomber intimated that something for the good of Pappas was con-

templated and the latter readily consented to leave home in the cruiser with the city officials. He had not been accused of any offense and there had been no warrant for his arrest. He was not told he was under arrest. He was taken to Macomber's room 25, in the Ritner Hotel, without knowledge of what was in store for him there. Hastings was promptly called to the hotel by telephone and, while the four men, Macomber, Baskins, Hastings and Pappas, were in room 25, with the door closed and bolted on the inside, Macomber made a demand on Pappas to confess his guilt of a lawless act of degeneracy. The latter asserted his innocence and refused to confess. Threats to make him do so were loud and profane. To compel such a confession Baskins and Hastings held Pappas while Macomber beat him. Pappas tried to escape, unbolted the door and got into the hall outside, was beaten there, dragged back into the room where the beating was continued. These inhuman atrocities did not compel Pappas to confess guilt. After the beating and turmoil ceased in room 25 with the departure of the four occupants, there was blood on the walls, on the floor, on a rug in front of the bed, on the bedspread, on the drapes, on the walls of the hall and on the radiator. Physical injuries inflicted on Pappas as described by an examining physician and as related in the majority opinion were:

"Face badly bruised; eyes swollen shut; deep cut, with ragged edges, an inch long over the left eye; slighter cut over same eye; nose skinned; lip cut on right side; inside of cheek bruised on upper right side; lacerations close to the lips; right side of face puffed with air passing under the tissues and extending over the entire side of head and face to margin of collarbone; portion of air breathed passed through torn tissues under the skin, over the side of the face and neck; lachrymal bone fractured; whites of both eyes red; bump on head back of ear; stitches required to close wounds."

Unsteady on his legs, his face smeared with gore, Pappas was denied the privilege of washing away the blood and in that condition was taken to the police station and

confronted with the pervert who was asked to identify him as a companion in criminal depravity. The identification was refused. Pappas was not the guilty man. He was released, taken home and to the hospital without being accused of any violation of law.

The defense that what occurred in room 25 was a fist fight started by Pappas is too preposterous for belief and the jury wisely disregard testimony in support of it. Macomber at the time was a police officer in uniform and was armed. He was assisted by Baskins, a member of the city council, and by Hastings, a political boss who gave orders to police officers at the police station—orders that were obeyed. Pappas was known in advance to be unarmed. His eyesight was impaired and he was weakened by a disease of long standing. He was imprisoned by these enemies of law and order and was helpless in their presence. Officialdom and bossism gave them no immunity from their lawlessness. In legal conduct of public duty officers of the law are not in danger of prosecution for kidnaping. The facts narrated and the necessary inferences therefrom were clearly shown beyond reasonable doubt by competent evidence which the jury believed.

My understanding of the facts and the law is that the state in the prosecution of Macomber proved beyond a reasonable doubt every element of kidnaping as defined by statute—enticing Pappas away from home, transporting him to room 25 in the Ritner Hotel, imprisoning him therein and beating him in the manner indicated for the purpose of compelling him against his will to confess guilt of a felony. Each of these acts was unlawful and all together with criminal intent amounted to kidnaping. Such a confession, if compelled, would have been an "act" within the meaning of that word as used in the kidnaping statute. Pappas evidently preferred death to the making of such a confession. The accomplishment of the unlawful purpose of Macomber to compel a confession was not necessary to a conviction. On the issue of felonious purpose or intent in a criminal prosecution, an adult sane person may be presumed

to intend the natural and probable consequences of his voluntary acts. Criminal intent or felonious purpose was proved by circumstances and acts of accused in furtherance of the felony charged. The length of time kidnapers detain or imprison their victim, forcibly and against his will, is immaterial in a prosecution for kidnaping.

The kidnaping statute is in plain, unambiguous language and needs no construction. I do not agree with the majority that enforcement of the kidnaping statute according to its literal terms led to injustice, oppression or absurdity invalidating the conviction. I examined the entire record with care and I did not find any error in the proceedings below or in the sentence of the district court to justify the acquittal of Macomber on the charge of kidnaping.

EARL CONRAD ET AL., APPELLANTS, V. WILLIAM C. KAUP, APPELLEE.

291 N. W. 687

FILED APRIL 19, 1940. No. 30810.

1. **Injunction.** An injunction is a command to refrain from a particular act.
2. ———. The remedy by ordinary injunction is wholly preventive, prohibitory, or protective.
3. ———. "Since the purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, not being used for the purpose of punishment or to compel persons to do right but merely to prevent them from doing wrong, rights already lost and wrongs already perpetrated cannot be corrected by injunction." 32 C. J. 45.
4. **Action.** The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning of the litigation, but at the time the decree is entered.
5. ———. Courts are not required to issue useless orders or enter futile decrees.

APPEAL from the district court for Cuming county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

Robins & Yost, for appellants.

John J. Gross, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

SIMMONS, C. J.

In this action, plaintiffs sought to enjoin the defendant from engaging in the seed business within the trade territory of West Point, Nebraska. Plaintiffs' action is founded on a written instrument, dated December 18, 1937, expiring November 1, 1938. Plaintiffs are in the wholesale and retail seed business. The contract related to the sale of seeds produced or marketed by the plaintiffs. The contract, among other clauses, provided: "Upon termination of this agreement, second party (defendant) agrees that he will not engage in the sale of, nor solicit for, the sale of any other seeds, either directly or indirectly, except that of Yager Seed Co. (plaintiffs) anywhere within the trade territory of first party (plaintiffs), within one year from the date of termination of this agreement."

Plaintiffs filed their petition herein on March 15, 1939, alleging a breach of the contract by the defendant, and praying that defendant be enjoined "from either directly or indirectly engaging in the sale of or soliciting for sale of seeds other than the seeds of Yager Seed Company anywhere within the trade territory of and within the vicinity of West Point, Nebraska, under the terms of the contract * * * up to and including the first day of November, 1939; that a temporary injunction issue herein, and that the plaintiffs have such other relief as may be just and equitable, including the costs and damages herein." April 18, 1939, defendant filed a demurrer. It was overruled May 3, 1939. At the same time, the trial court denied a temporary injunction. The defendant answered May 20, 1939. The case was heard June 5, 1939. At the close of plaintiffs' case in chief, defendant moved that the cause be dismissed for the reason that the pleadings and the evidence were insufficient to entitle plaintiffs to the relief prayed for in their petition. The motion was sustained, and the action dis-

missed. August 21, 1939, plaintiffs filed a notice of appeal to this court. The transcript and bill of exceptions were filed herein on September 2, 1939. Based on a stipulation of the parties, defendant's brief day was extended and his brief filed herein on November 4, 1939. The case was submitted to this court by oral argument on March 7, 1940.

By the provisions of section 20-1925, Comp. St. 1929, this matter is before this court for trial *de novo*. An injunction is a command to refrain from a particular act. Comp. St. 1929, sec. 20-1062. The remedy by ordinary injunction is wholly preventive, prohibitory, or protective. 4 Pomeroy, Equity Jurisprudence (4th ed.) 3206, sec. 1337. "Since the purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief, not being used for the purpose of punishment or to compel persons to do right but merely to prevent them from doing wrong, rights already lost and wrongs already perpetrated cannot be corrected by injunction." 32 C. J. 45. See *Bishop v. Huff*, 81 Neb. 729, 116 N. W. 665; *Vogel v. Rawley*, 85 Neb 600, 123 N. W. 1037. We do not decide the merits of plaintiffs' case.

From an examination of plaintiffs' petition, the prayer thereof, and the evidence offered, it is obvious that the only relief this court could afford, were we so disposed, would be to enjoin the defendant from doing the acts complained of "up to and including the first day of November, 1939." Under the conditions here existing, we are called upon to determine the rights of the parties existing at the time of the determination of the suit in this court. 21 C. J. 663; 19 Am. Jur. 283, sec. 411; 19 Am. Jur. 50, sec. 21; 14 R. C. L. 308, sec. 6.

The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning of the litigation, but at the time the decree is entered. *Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 809, 108 Pac. 545; *Randel v. Brown*, 2 How. (U. S.) 405; *McCormick v. Oklahoma City*, 203 Fed. 921; *Hanscom v. Malden & Melrose Gas Light Co.*, 220 Mass. 1, 107 N. E.

426; *Baker v. Salzenstein*, 314 Ill. 226, 145 N. E. 355; *Hale v. Jenkins*, 55 Misc. 119, 106 N. Y. Supp. 282; *Brown v. Cole*, 105 N. Y. Supp. 196; *Alsager v. Peterson*, 31 S. Dak. 452, 141 N. W. 391.

"When, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for the appellate court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief, the court will not proceed to a formal judgment, but will dismiss the appeal." *Mills v. Green*, 159 U. S. 651, 16 S. Ct. 132. See *Tennessee v. Condon*, 189 U. S. 64, 23 S. Ct. 579.

Courts are not required to issue useless orders or enter futile decrees.

Plaintiffs' petition is dismissed at their costs.

AFFIRMED.

ERMA A. PRINGLE, APPELLEE, V. ARTHUR L. SMITH ET AL., APPELLANTS.
291 N. W. 673

FILED APRIL 19, 1940. No. 30820.

Mortgages. "Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud." *Lemere v. White*, 122 Neb. 676, 241 N. W. 105.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Paul W. White, for appellants.

Sterling F. Mutz, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

EBERLY, J.

This is a suit in equity in which Erma A. Pringle is plaintiff and Arthur L. Smith and Bertha L. Smith, his wife, are

defendants. It involves the enforcement of a contract of sale of certain real estate in the city of Lincoln, after admitted default in its terms on part of the defendants. In this appeal, the defendants challenge the correctness of the ruling of the trial court overruling their objections to a public sale of the premises involved, made May 23, 1939, pursuant to the decree entered in said cause, to Erma A. Pringle for the sum of $15,000, and also to the confirmation thereof by such court. It appears that this bid was subject to unpaid taxes on the property. Defendants' objections are based wholly on the inadequacy of the sale price.

The following is a summary of appellants' evidence by experts on the subject of value, viz.: Lawrence F. Farrell, $22,500; John M. Alexander, $22,000; Jess Nickles, $22,500; Clarence Dixon, $22,000; Conrad Schaaf, $20,000; John J. Bogan, $22,000; W. F. Etmund, $20,000; Average appraisal, $21,571.43.

Appellee's similar evidence may be summarized as follows: E. M. Forsyth, $17,000; William F. Steele, $17,250; Harvey Rathbone, $17,250; Average appraisal, $17,166.67.

In addition, the record discloses two public sales, properly conducted, at which the highest bid was $15,000 (subject to unpaid taxes). There is no evidence in the record that would support the conclusion that a third sale would secure a greater price than that bid at the second sale. The amount bid at this sale, under the circumstances set forth in this record, is competent evidence of value. *Douglass v. Hill*, 29 Kan. 527.

Under all the evidence presented, the action of the district court for Lancaster county was clearly correct. No possibility of fraud exists. The facts involved are clearly within the rule this court has often announced that mere inadequacy of price in a foreclosure sale will not warrant the court's refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud. *Lemere v. White*, 122 Neb. 676, 241 N. W. 105; *Wallace v. Clements*, 124 Neb. 691, 248 N. W. 58; *First Trust Co. v. Rathbone*, 132 Neb. 211, 271 N.

W. 428; *Erwin v. Brunke*, 133 Neb. 745, 277 N. W. 48; *Fox v. Nelson*, 133 Neb. 903, 277 N. W. 795; *Fremont Joint Stock Land Bank v. Satterfield*, 133 Neb. 904, 277 N. W. 797; *Conservative Savings & Loan Ass'n v. Mancuso*, 134 Neb. 779, 279 N. W. 725; *Weir v. Smith*, 135 Neb. 447, 282 N. W. 260; *Metropolitan Life Ins. Co. v. Suverkrubbe*, 135 Neb. 865, 284 N. W. 342.

The action of the district court being in all respects correct, its judgment is

AFFIRMED.

FRANK HARRIS ET AL., APPELLEES, V. W. C. HEETER, APPELLANT.

291 N. W. 721

FILED APRIL 19, 1940. No. 30772.

Judgment. A decree of foreclosure of a tax lien against unknown owners of land, rendered upon service by publication against unknown owners and the land itself, is of no effect as against the persons who were at the time in actual possession of and farming the land, and who were not made parties defendant in the action and had no notice or knowledge thereof.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Waldron & Newkirk, for appellant.

Thomas F. Hamer, George C. Holdrege and *William J. Schall, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an equitable action brought by Frank Harris and Edward Harris, plaintiffs, to quiet title in them to three lots in the suburbs of Omaha. The defendant filed a cross-action, in which he sought to have the title quieted in himself as against plaintiffs. The trial court entered a decree quieting title in the plaintiffs, and defendant appeals.

The evidence discloses that these three lots are located in the bottoms in the northeast part of Omaha. The plaintiffs are truck farmers, and have lived in the neighborhood of this land for 35 years. In 1922 they purchased about 100 acres of bottom farm land lying along the Missouri river, built their home there, and have continued farming since that time. Their farm consists, in part, of blocks 18, 19, 20, 21, 22, 27, 28 and 29 in Bogg's addition to the city of Omaha. The lots involved in this suit are lots 20, 21 and 22, in block 29 in Bogg's addition to the city of Omaha. They fenced in and farmed all the ground around these lots, and farmed them too, every year from 1922 up to the present time.

The three lots are not alone inclosed by fences, but there are fences around a large field, with the nearest fence along the bank of the river, about a block and a half from these lots. No buildings of any kind have ever been erected on these three lots, so no one has ever resided on them. The plaintiffs live in a house located about one-half mile to the east of the lots in question, and prior to this suit there was nothing appearing in the record title of these lots showing any claim of title by the plaintiffs, as their sole claim of title is based upon adverse possession since 1922.

On May 13, 1929, the county of Douglas began a tax foreclosure suit under the provisions of section 77-2039 *et seq.*, Comp. St. 1929, for the foreclosure of the statutory lien for delinquent taxes for the years 1910 and prior thereto, and for all subsequent years up to and including 1927. It is understood, of course, that Douglas county included a large number of other tracts of land in addition to these three lots. In this tax lien foreclosure suit, the last record owners of these lots were made defendants. One of them, Emma C. Peterson, the last record owner of lots 21 and 22, was served personally with summons in Douglas county. Lewis J. Spitzbart, the last record owner of lot 20, was not personally served. The lots, by proper description, were made defendants, and notice was published against all persons

having or claiming any interest in any of the real estate described in the petition. The application for service by publication was made July 31, 1929, followed by order for publication, and a proof thereof. On January 20, 1930, a decree of foreclosure was entered, and on an order of sale the sheriff sold the three lots to W. C. Heeter, the defendant in the case at bar. This sheriff's sale was held May 13, 1930, the sheriff's return showing that lot 20 was bid in by W. C. Heeter for $5, and lots 21 and 22 were bid in by him for $3, and the sale was confirmed May 17, 1932. The sheriff's deed to W. C. Heeter, defendant, was dated June 13, 1932. It thus appears that the tax foreclosure proceedings were regular and complete in every particular, except as to these adverse claimants.

The plaintiffs had been in open and notorious adverse possession of the property since the year 1922, and had continuously farmed these lots with the rest of their property. They had planted sweet potatoes, sweet corn, Irish potatoes, or other crops each year on these lots, with the surrounding ground, beginning with the year 1922, and from the fact that they planted sweet potatoes in 1922 they fixed the date of their possession as beginning on April 7, 1922, and on the day of trial, April 7, 1939, Frank Harris testified that nobody had ever notified them about the lots, or tried to collect rents or anything else, although they had been in possession then for 17 years that day. It further appears that the Harris brothers had been in possession of the property for ten years and two months when the defendant, Heeter, secured his sheriff's deed on June 13, 1932.

Judge Dineen, of the district court, found generally for the Harris brothers, plaintiffs, for the reason that service in the tax foreclosure action was not had upon the Harris brothers, either by name, or by publication, or personally, and that the proceedings, so far as they were concerned, were null and void, and by reason of the open, notorious and adverse possession of the plaintiffs for more than ten years last past the title was quieted in them, and he canceled the sheriff's deed of record as against these lots.

In support of the decree entered for the plaintiffs, quieting the title in them, it is claimed that one who is in possession of real estate, and acquiring title thereto by adverse possession, is claiming title thereto within the meaning of the tax foreclosure statute, section 77-2043, Comp. St. 1929. Plaintiffs further claim that a judgment rendered on service by publication against a resident of this state on whom personal service might have been had is absolutely void. *Hassett v. Durbin,* 132 Neb. 315, 271 N. W. 867.

"A judgment foreclosing a tax lien against unknown owners of land rendered upon a citation served by publication is not binding upon persons in actual possession of the land at the time of the filing of the suit and the rendition of the judgment, but not served with citation." *Sellers v. Simpson* (1909) 115 S. W. 888 (53 Tex. Civ. App. 205). In this case the court entered a judgment affirming the lower court, and awarding title to defendants, who claimed by adverse possession against the plaintiff, who claimed under a sheriff's deed resulting from the foreclosure of a tax lien by the state. At the time of the filing of said suit, and the rendition of said judgment for taxes, all of the defendants who pleaded the statute of limitations were in actual visual possession of the parts of the land claimed by them in their several answers, and none of them were made parties to the suit.

Where claimants have continued in adverse possession of Nebraska land for over ten years, the fact that during their occupancy there was a sale and conveyance of the premises for taxes, without notice to them, does not constitute an interruption of their possession. See *Harrison v. Dolan,* (1899) 172 Mass. 395, 52 N. E. 513, in which case Justice Oliver Wendell Holmes, who was then sitting as a judge of the supreme court of Massachusetts, and wrote the opinion, said: "Adverse possession is pure matter of fact, to be interrupted only by interrupting the possessor's exclusion of adverse claimants, an abandonment of his claim, or a change in his intent."

It appears to the court that the situation in the case at

bar is adequately discussed by the text-writer, Freeman, in the following quotation: "A judgment pronounced without service of process, actual or constructive, and without the defendant's knowing that a court has been asked to adjudicate upon his rights, is regarded with such disfavor at law that a variety of motions, writs and proceedings are there provided to overthrow it; and in many courts it is at all times and upon all occasions liable to be entirely disregarded upon having its jurisdictional infirmity exposed. But proceedings in equity are peculiarly appropriate for the exposure of this infirmity. They permit of the formation of issues upon the question of service of process, and of the trial of those issues, after full opportunity has been given to those who seek to sustain as well as to those who seek to avoid the judgment. If at such trial it satisfactorily appears that the defendant was not summoned, and had no notice of the suit, a sufficient excuse is shown for his neglect to defend, and equity will not allow the judgment, if unjust, to be used against him, no matter what jurisdictional recitals it contains." 3 Freeman, Judgments (5th ed.) 2553, sec. 1228.

A careful examination of the record discloses no prejudicial error, and the decree of the lower court is hereby

AFFIRMED.

ANNA BETHSCHEIDER, APPELLANT, V. CITY OF HEBRON, APPELLEE.

291 N. W. 684

FILED APRIL 19, 1940. No. 30742.

1. **Municipal Corporations.** Section 17-582, Comp. St. 1929, construed. *Held*: The primary purpose of the statute is to afford to the municipal authorities prompt notice of the accident and injury (as distinguished from mere notice of the defect) in order that the public officials may have an opportunity to make an investigation of the facts bearing on the injury and claim while the occurrence is still fresh.
2. ———. In cases falling within the scope of the statute, the

notice as specified must be given in accordance with the requirements of the statute as a condition precedent to an action on the claim, and this must be done regardless of whose negligent act created the defective condition.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Baldwin & Baldwin and *Robert B. Waring*, for appellant.

Walter C. Weiss, contra.

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and ELLIS, District Judge.

ELLIS, District Judge.

In this case the plaintiff below and appellant here filed her petition seeking to recover for personal injuries sustained as a result of falling into an open sewer ditch which had been dug at right angles to the paved portion of a street in defendant city and across a footpath paralleling the pavement.

The petition alleges that the ditch was dug by the defendant through its agents and that it was negligently left open and unguarded by the defendant. The petition contained other allegations appropriate in an action of this kind, but did not allege that any notice, either of the defect in the public way or of plaintiff's accident, injury and claim, was ever given to the public officials of the defendant. To this petition the defendant interposed a general demurrer which was sustained by the trial court. From this ruling plaintiff has appealed.

The ruling of the trial court was expressly based on the failure of the petition to allege the giving of notice provided for in section 17-582, Comp. St. 1929, or excuse for not having done so. Plaintiff in her brief frankly concedes that, if the notice provided for in the statute was required to be given in the situation alleged, the ruling of the trial court was correct.

It thus appears that the disposition of this appeal depends upon interpretation and applicability of section 17-

582. Our problem is to determine the legislative intent and purpose as expressed in this statute. Plaintiff contends that, because of the fact that the defendant city itself created the defect and, having done so, left it unguarded, the statute does not apply and notice was not a condition precedent to plaintiff's right to sue.

Without quoting the statute in full, it requires notice in writing "of the *accident* or *injury*" with a statement "of the *nature* and *extent* thereof, so far as the extent of the *injury* is known at the time, and of the time when and the place where the same occurred." (Italics ours.) The statute also provides for extension of the 30 days allowed where the injured person is disabled by the injury from giving the notice. The statute also provides that no costs shall be recovered against the city on claims allowed in part unless the recovery by action shall be for a greater sum than that allowed with interest thereon.

From an examination of the cases involving liability of municipalities for negligence, it appears that the matter of notice as a condition precedent to suit has been considered under two different types of statute or charter provisions—the one type requiring notice of the defect before occurrence of the injury and the other requiring notice after the event. The matter of notice has also been considered where the negligence occurred as a result of operations of the municipality in the governmental and corporate fields on the one hand and in the nongovernmental or proprietary field on the other hand.

McQuillin in his work on Municipal Corporations, Vol. 6 (2d ed.) 1277, sec. 2887, says: "It is necessary to keep in mind that notice of the defect before the accident is one thing, and notice of the accident is another and entirely different thing."

The case of *Enyeart v. City of Lincoln,* 136 Neb. 146, 285 N. W. 314, involved a charter provision requiring notice of the defect five days before the occurrence of such injury or damage. It was held in that case that where the ground of the action was positive misfeasance on the part of the

city (it appearing from the evidence that the city had constructed the walk) notice was not essential. This decision followed the holding of this court in *Updike v. City of Omaha*, 87 Neb. 228, 127 N. W. 229. In the latter case the court held that undoubtedly the real purpose of requirement of notice of the defect before the accident was to enable the city to prevent accidents by repairing or guarding the defect, and therefore the statute had no application where the act of the city itself created the dangerous condition, since knowledge of its existence was inherent in the creative act itself. In that case the court discussed a statute like the one involved in the principal case and said: "The object of the statute was to enable the city officials to *properly investigate* the nature and validity of the *claim* presented." (Italics ours.) This case and those preceding it clearly point out the reason for exemption from the requirement of notice of the *defect* where created by the acts of the municipality.

Plaintiff cites language from *Randall v. City of Chadron*, 112 Neb. 120, 198 N. W. 1020, immediately preceding citation of *Tewksbury v. City of Lincoln*, 84 Neb. 571, 121 N. W. 994, and *City of Omaha v. Jensen*, 35 Neb. 68, 52 N. W. 833. It will be observed that in the *Randall* case the action was for damages from flood waters overflowing from streets and it was held that the statute here involved did not apply. The *Tewksbury* case involved a charter provision requiring notice before the injury or damage, and in the *Jensen* case no charter provision appears from the opinion to have been involved and the case turned on the matter of notice of the defect before the injury. It therefore appears that the language cited could not have application to and constitutes no precedent in a situation like that now before us.

In *McCollum v. City of South Omaha*, 84 Neb. 413, 121 N. W. 438, Justice Rose, in discussing a charter provision requiring notice of the accident and injury, said: "The lawmakers in requiring prompt notice of claims for damages arising from defective sidewalks evidently had in mind the

necessity of information and the opportunity of investigation at a time when knowledge of the facts relating to accidents can be ascertained. Information of this character is essential to the interests of the city in adjusting claims and in defending suits."

In *Pasold v. Town of DeWitt,* 198 Ia. 966, 200 N. W. 595, the court said: "The purpose of the statute in requiring notice of the time, place, and circumstances, is to permit the city to investigate the matter while it is fresh." That court points out the distinction between this type of case and those involving statutes requiring notice of the defect itself prior to the injury, in which it is held that notice is not required where the defect is created by the corporation itself.

This very statute was before this court in *Chaney v. Village of Riverton,* 104 Neb. 189, 177 N. W. 845, and the court in considering the intention of the legislature said: "The object of the statute was to enable city officials to properly investigate the nature and validity of such claims at a time when knowledge of the facts relating to the accident could be ascertained, and such information preserved for use by such officials as might be in charge of the city's affairs when the matter later came up or the case was tried or defended, and in order that spurious or unmeritorious claims might be avoided."

In *Henry v. City of Lincoln,* 93 Neb. 331, 140 N. W. 664, this court pointed out the distinction between the duties and liabilities of municipalities in the governmental and corporate fields on the one hand and in the private business or proprietary field on the other hand and held that a statute similar to the one involved here did not apply to claims resulting from operations in the latter field. In discussing the similar statute the court said: "The object of the notice, when required, is well understood to be to give the municipality an opportunity to investigate, and to protect against fictitious claims."

The liability of municipalities in this type of case has its basis in statutory duties and powers imposed and granted

by the legislature. It necessarily follows that the legislature may impose conditions precedent to the enforcement of such liability. Upon the wisdom of conditions imposed we have no right to pass, although in cases of this kind it does seem that a fresh opportunity to ascertain all the facts surrounding the occurrence of the accident and injury would be conducive to more adequate protection of the public interest. Knowledge of an admittedly dangerous condition may involve notice that an accident or injury is likely to follow, but that is not notice that it has happened. It is quite apparent that knowledge of the operation out of which the defect arose would not involve knowledge of contributory negligence which might be a complete defense to the claim and proof of which might become more difficult or impossible upon long delay on assertion of the claim. Likewise, knowledge of the operation would not involve knowledge of intervening acts of third persons which might materially and substantially affect the liability of the municipality. Many other considerations suggest themselves and constitute ample support for a legislative purpose to require notice of injury and claim therefor.

Considering the specifications in the statute of the information which must be contained in the notice—*the accident or injury—the nature and extent thereof*—as well as the previous expressions of this court, we conclude that its primary purpose was to afford to the municipal authorities prompt notice of the accident and injury in order that an investigation may be made while the occurrence is still fresh and the municipal authorities placed in a position to intelligently consider the claim, allow it if deemed just, or in the alternative to adequately protect and defend the public interest.

Having come to this conclusion, the argument that the city having by its own act created the defect should be held to have knowledge of its existence and the requirement of notice avoided is not persuasive. To extend the rule of the *Updike* and similar cases to include the notice statute here involved would be to extend the rule beyond the rea-

son therefor so clearly pointed out in those cases. The plaintiff's cause of action falls within the scope of cases to which the statute is applicable, and since we hold that the purpose of the statute is to give notice of the accident and injury, as distinguished from mere notice of the defect, it follows that the notice must be given in accordance with the requirements of the statute as a condition precedent to an action on such a claim and that this must be done regardless of whose negligent act created the defective condition.

We have examined the case of *Hughes v. City of Fond du Lac,* 73 Wis. 380, 41 N. W. 407, cited by the plaintiff as well as subsequent decisions of the Wisconsin court and think that the distinction between that case and cases like the principal one is pointed out by that court in its subsequent decisions. We think the rule in that state is in accord with our conclusion herein.

Without further discussion, we are of the opinion that the demurrer was properly sustained.

The judgment is

AFFIRMED.

SIMMONS, C. J., and MESSMORE, J., dissent.

INDEX

Acknowledgment.

A notary public, who is a stockholder and officer of a corporation, is not disqualified to take acknowledgment to a mortgage on a homestead merely because the mortgagor intends to use part of the proceeds to pay an indebtedness to the corporation. *Federal Farm Mtg. Corporation v. Fischer* 559

Action.

1. The relief grantable in a proceeding for a declaratory judgment extends to construction or validity of a statute, where there is a justiciable, determinable controversy between parties in respect to rights or penalties thereunder. *Dill v. Hamilton* 723
2. Plaintiffs seeking a declaratory judgment are not required to violate a penal statute as a condition of having it construed or its validity determined. *Dill v. Hamilton* 723
3. Jurisdiction of a court to pronounce a declaratory judgment is not lacking merely because the construction or validity of a penal statute is necessary to a decision. *Dill v. Hamilton* 723
4. The relief granted in equity is such as the nature of the case, the law, and the facts demand at the time the decree is entered. *Conrad v. Kaup* 900
5. Courts are not required to issue useless orders or enter futile decrees. *Conrad v. Kaup* 900

Adoption.

When it appears that a parent's conduct evidences a settled purpose to forego all parental duties and relinquish all parental claims to his child, a decree of adoption may be awarded without the parent's consent. *In re Adoption of Carlson* 402

Annuities.

1. The fact that a deed and a contract for an annuity are executed simultaneously will not charge the land with payment of annuity as a reservation where the contract is not referred to in the deed. *Federal Farm Mtg. Corporation v. Fischer* 559
2. Where contract for annuity is not mentioned in deed accompanying it, the contract for annuity, to constitute a charge on the land, must itself contain language effectual to creat a lien. *Federal Farm Mtg. Corporation v. Fischer* 559

Appeal. SEE CRIMINAL LAW. TRIAL.
1. The filing of a transcript within time is jurisdictional. *Dobesh v. Associated Asphalt Contractors* 1
2. Where a jury is called in a guardianship proceeding, the verdict being only advisory, reversible error cannot be predicated on the admission of incompetent or immaterial evidence, or on instructions given or refused. *In re Guardianship of Warner* 25
3. The rule that a verdict will not be disturbed when there is evidence tending to support it is inapplicable where the verdict is opposed to the undisputed physical facts, does not apply where there is reasonable dispute as to the pertinent physical facts. *Hill v. Interstate Transit Lines* 110
4. Hearsay evidence tending to prove a material fact, if admitted without objection, may sustain a finding of the existence of that fact; the probative force of the evidence being for the trial tribunal. *Maul v. Iowa-Nebraska Light & Power Co* 128
5. An immaterial or harmless error of the trial court is not a ground for reversal. *Long v. Guilliatt* 199
6. In an action for injuries against a carrier, an instruction as to shifting of burden of proof was prejudicially erroneous. *Olson v. Omaha & C. B. Street R. Co* 216
7. The district court did not err in permitting an answer to be withdrawn and a general demurrer to be filed, where the petition failed to state a cause of action. *Markel v. Glassmeyer* 243
8. When an appeal was dismissed solely because transcript did not show facts sufficient to give the supreme court jurisdiction on appeal due to mistake in preparation of transcript, and appellant was not apprised of such defects in transcript until judgment was entered dismissing appeal, the supreme court will, on timely application, accompanied by showing of such mistake, vacate order of dismissal and permit correction of record by filing of supplemental transcript. *Dobesh v. Associated Asphalt Contractors* 342
9. Where a reversal is entered in the supreme court on appeal, and the record discloses that facts in issue had not been fully developed or definitely settled at trial, the trial court, on remand, in absence of specific directions to the contrary, should accord to litigants a retrial generally. *Parish v. County Fire Ins. Co* 385
10. A judgment will not be reversed for errors, where complainant would not be entitled to succeed in any event. *Holberg v. McDonald* 405

11. To predicate error on a ruling refusing to permit a witness to testify, the record must show an offer to prove the facts sought to be elicited. *Gugelman v. Kansas City Life Ins. Co.* ... 411

12. Exclusion of testimony was not error, where the same testimony was later admitted. *Gugelman v. Kansas City Life Ins. Co.* ... 411

13. On appeal, the proceedings in the district court are presumed to be free from error, in absence of a record showing the contrary. *Federal Farm Mtg. Corporation v. Hughes* ... 454

14. A verdict based on conflicting evidence will not be disturbed on appeal unless clearly wrong. *Spangler v. Brown* ... 510
Carnes v. DeKlotz ... 787
Whittaker v. Omaha & C. B. Street R. Co. ... 800

15. A remittitur can be ordered if the clear preponderance of the evidence shows the verdict to be excessive. *Pearse v. Loup River Public Power District* ... 611

16. Where, in action for injury to guest in automobile collision, there was no evidence of plaintiff's contributory negligence, it was reversible error to submit issue of contributory negligence to the jury. *Blank v. Omaha & C. B. Street R. Co.* ... 632

17. On appeal from judgment in an action tried to the court, the only question presented is whether the court's findings and judgment are predicated on sufficient evidence. *Batth v. Metropolitan Life Ins. Co.* ... 676

18. In a law action tried to the court, the court's findings have the same effect as a verdict. *Batth v. Metropolitan Life Ins. Co.* ... 676

19. Ordinarily, it is not error to permit an eyewitness to estimate the speed of an automobile, though the usual foundational requirements have not been in all respects met, where there is other evidence sufficient to sustain a finding of excessive speed. *Carnes v. DeKlotz* ... 787

20. In action for negligence against carrier, an instruction containing the word "unnecessary," in referring to a sudden, violent jerk of a street car, was not prejudicially erroneous. *Whittaker v. Omaha & C. B. Street R. Co.* ... 800

21. Rules of practice of a district court will not be considered in the supreme court where not incorporated in the bill of exceptions. *Federal Farm Mtg. Corporation v. Hughes* ... 820

22. In the absence of a bill of exceptions containing the evidence, an order of the district court confirming sale of realty is presumed to be supported by sufficient evidence. *Federal Farm Mtg. Corporation v. Hughes* 820

Attachment.

In a civil action for recovery of money, property of a nonresident defendant may be attached at or after commencement of the action. *Federal Farm Mtg. Corporation v. Hughes* 454

Attorney and Client.

1. The supreme court possesses inherent power to punish for contempt any person assuming to practice law within the state without having been duly licensed so to do. *State, ex rel. Wright, v. Hinckle* 735
2. The practice of law includes legal advice and counsel and preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in court. *State, ex rel. Wright, v. Hinckle* 735

Attorney General.

1. The statutes dealing with the powers and duties of the attorney general, including the duty to appear and defend actions against the state, are insufficient to permit the attorney general to enter a voluntary appearance in the compensation court and bind the state thereby. *Anstine v. State* 148
2. The attorney general cannot waive the immunity of the state from suit or the issuance and service of summons, and enter a voluntary appearance for the state, unless authorized by statute. *Anstine v. State* 148

Automobiles.

1. In an action for personal injuries sustained in a collision of motor vehicles, plaintiff is not entitled to recover if the evidence shows that he had the last clear chance to avoid injury and negligently failed to do so, or if the drivers of both vehicles were contemporaneously and actively at fault. *Long v. Guilliatt* 199
2. The driver of a motor truck, stopping on or adjacent to the traveled portion of a highway at nighttime, must immediately place flares. *Gleason v. Baack* 272
3. The word "immediately," as used in the statute requiring placing of flares by drivers stopping trucks on highways, means with reasonable and proper diligence, or promptly, under the circumstances. *Gleason v. Baack* 272

4. Whether driver of truck placed flares "immediately," as required by statute, was a question for jury. *Gleason v. Baack* 272
5. Whether a motor vehicle should have been parked on the shoulder of a highway under the circumstances was a question for the jury. *Gleason v. Baack* 272
6. The driver of a motor vehicle must have headlights on the vehicle that under normal atmospheric conditions and on a level road produce a driving light sufficient to render clearly discernible a person 200 feet ahead. *Gleason v. Baack* 272
7. Violation of statutes regulating the use and operation of motor vehicles on a highway is not negligence *per se*, but merely evidence of negligence that may be taken into consideration in determining whether negligence is established. *Gleason v. Baack* 272
8. Duty of a guest riding in an automobile, stated. *Gleason v. Baack* 272
9. A servant may on the same trip combine both his own and his master's business, and if, while on such a trip, the servant negligently causes injury, the master is liable. *Vanderlippe v. Midwest Studios* 289
10. In order to establish negligence of a motorist, it is not necessary that eyewitnesses of the accident be produced, since negligence may be proved by circumstantial evidence. *Vanderlippe v. Midwest Studios* 289
11. The regulation of the sale of motor vehicles under the state's police power to prevent fraud and promote the general welfare is a proper subject for legislative action. *Nelsen v. Tilley* 327
12. In an action for injuries sustained in automobile collision, evidence of reputation of party as a driver was irrelevant and inadmissible to prove or disprove negligence. *Holberg v. McDonald* 405
13. In guest's action for injuries sustained in automobile collision, evidence was insufficient to show defendant guilty of gross negligence. *Holberg v. McDonald* 405
14. Gross negligence is an entire failure to exercise care, or the exercise of so slight a degree of care as to justify belief that there was indifference to safety of others. *Larson v. Storm* 420
15. Continued failure of automobile driver to maintain a proper lookout while driving at high speed in the nighttime on a country road is a fact which the jury should consider in determining whether gross negligence has been proved. *Larson v. Storm* 420

16. Where evidence and circumstances fail to disclose that either party was at fault in case of an accident, the accident was unavoidable and no recovery could be had. *Meyers v. Neeld* 428
17. The mere fact that an accident occurs raises no presumption that either party thereto was negligent. *Meyers v. Neeld* 428
18. Under guest law of Kansas, automobile guest cannot recover for injury unless injury resulted from gross or wanton negligence of driver. *McCown v. Schram* 498
19. To constitute gross and wanton negligence under automobile guest law of Kansas, conduct of driver must evince willingness that harm might result therefrom, or reckless unconcern as to safety of guest. *McCown v. Schram* 498
20. In action by automobile guest for injury, liability of driver was question for jury in view of the evidence. *McCown v. Schram* 498

Bankruptcy.

Whether a creditor had reasonable cause to believe his debtor insolvent is a question of fact, and in determining this question the creditor is chargeable with notice of such facts as a reasonable inquiry might fairly be expected to disclose. *Horn v. Goldberg* 813

Bills and Notes.

1. In an action on a note, it is sufficient to produce a copy of the note with credits and indorsements on it, and to state that there is due thereon a specified sum with interest. *Federal Farm Mtg. Corporation v. Hughes* 454
2. The burden of proof is on one who pleads payment as a defense to an action on a note. *Federal Farm Mtg. Corporation v. Hughes* 454
3. Payment of a check by drawee bank does not make the bank a holder in due course. *Kuhns v. Live Stock Nat. Bank* 459
4. The services of an investment company in securing extension of mortgage debt were sufficient consideration for note given by mortgagors for the services. *Ricketts v. Geil* 531

Charities.

1. One who acquired stock in a hospital corporation only for the purpose of bringing suit to compel its officers to perform obligations of a charitable trust *held* to be a mere interloper and entitled to no relief. *Reils v. Nicholas* 19

2. Equity exercises extensive supervisory jurisdiction over charitable trusts to protect them and enforce their execution; but where trustees have reasonably, fairly and honestly exercised their discretion in attempting to comply with terms of the trust, equity will not substitute its own discretion for that of the trustees. *Reils v. Nicholas* 19
3. A testamentary gift of residuary estate to a church was a "present gift," with right of possession and enjoyment conditionally postponed, and hence not violative of the rule against perpetuities. *Reithmiller v. Carr* 284
4. Failure of church to complete church building for a period of nine years after testator's death did not, under the circumstances, constitute a renunciation or defeasance of a gift. *Reithmiller v. Carr* 284

Commerce.

Under federal statutes, congress has occupied the entire field of interstate business of telegraph companies. *Burke v. Western Union Telegraph Co* 878

Constitutional Law.

1. Where a regulatory statute prohibits price discriminations made with the intent substantially to lessen competition, or to injure or destroy the business of a competitor, constitutional inhibitions are not infringed. *Nelsen v. Tilley* 327
2. The survey provisions of the act regulating sales of motor vehicles are advisory and of a regulatory nature not inimical to constitutional provisions. *Nelsen v. Tilley* 327
3. A provision in a regulatory statute limiting issuance of a motor vehicle dealer's license for sale of new cars to persons enfranchised by manufacturers of new motor vehicles is an unlawful restriction on the right of a person to adopt and follow a lawful industrial pursuit. *Nelsen v. Tilley* 327
4. A section of a regulatory statute which authorizes the administrator to deny an application or revoke a license on proof of applicant's unfitness is not unconstitutional as conferring arbitrary power, where appeal to the courts is provided. *Nelsen v. Tilley* 327
5. The right to engage in a lawful occupation cannot be taken away under the guise of regulation, but such an occupation may be subjected to regulation in the public interest, even though such regulation involves limitation on exercise of the right regulated. *Nelsen v. Tilley* 327
6. Liberty, as used in the state and federal Constitutions, implies absence of arbitrary restraint, not immunity from

reasonable regulations and prohibitions imposed in the interests of the community. *Nelsen v. Tilley* 327
7. Whether an occupation is charged with such a public interest as to warrant its regulation is a legislative question with which the courts ordinarily will not interfere. *Nelsen v. Tilley* 327
8. Borrowers of money under congressional acts cannot question the validity of those acts. *Federal Farm Mtg. Corporation v. Hughes* 454
9. The statute which makes a stay bond a judgment against the surety does not conflict with the due process clauses of the state and federal Constitutions. *Baker Steel & Machinery Co. v. Ferguson* 578
10. Whether housing authority acts will accomplish their object is a legislative matter and not for the courts. *Lennox v. Housing Authority of City of Omaha* 582
11. The provisions of the housing authority act providing for conveyance of property to the federal government for slum clearance and low-rent housing projects are invalid. *Lennox v. Housing Authority of City of Omaha* 582
12. Where constitutional restrictions are not imposed, the legislature may by curative act validate any proceeding which it might have lawfully authorized in the first instance. *Lennox v. Housing Authority of City of Omaha* 582
13. The legislature cannot by curative act destroy vested rights or impair obligations of contracts. *Lennox v. Housing Authority of City of Omaha* 582
14. Where the legislature passed legislation remedying alleged defects in a prior housing authority act, and it does not appear that a judicial determination of unconstitutionality has intervened, that vested rights were infringed, or that obligations of contracts were impaired thereby, alleged defects in prior act are immaterial. *Lennox v. Housing Authority of City of Omaha* 582
15. Statutes creating housing authorities to operate for slum clearance and construction of dwellings for persons of low income, and granting the housing authority the right of eminent domain for the accomplishment of such public purpose, are not violative of the due process clauses of the state and federal Constitutions. *Lennox v. Housing Authority of City of Omaha* 582
16. The housing authority acts are not violative of the constitutional provisions prohibiting the taking or damaging of private property for public use without compensation. *Lennox v. Housing Authority of City of Omaha* 582

17. The housing authority acts do not grant special privileges to those entitled to housing benefits, since they involve a public purpose. *Lennox v. Housing Authority of City of Omaha* 582
18. The granting of administrative discretion is not an unconstitutional delegation of a legislative function, where adequate standards to guide the exercise of such discretion are provided for by the statute authorizing it. *Lennox v. Housing Authority of City of Omaha* 582
19. The housing authority acts do not delegate legislative functions to the housing authority. *Lennox v. Housing Authority of City of Omaha* 582
20. The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact on which the law intends to make its own action depend. *Lennox v. Housing Authority of City of Omaha* 582
21. The habitual criminal law does not contravene the Constitution. *Davis v. O'Grady* 708
22. The making of a public exhibition of religious worship in the form of a seance in public for gain is not a religious liberty guaranteed by the Constitution. *Dill v. Hamilton* 723
23. A state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions on them. *Jewel Tea Co. v. City of Geneva* 768
24. Where contractual and vested rights are created pursuant to statute, they cannot be destroyed by a subsequent act of the legislature. *Ritter v. Drainage District* 866
25. A legislative act will not operate retrospectively to invalidate contracts or interfere with vested rights. *Ritter v. Drainage District* 866

Contempt.

1. Where a contempt proceeding is instituted by information and a rule to show cause, defendant must file answer if he desires to traverse the facts charged, and failing to so do, the court may treat the facts alleged in the information as confessed. *State, ex rel. Wright, v. Hinckle* 735
2. Contumacious refusal of witness before a referee to answer a legal and proper interrogatory was properly punished by imprisonment. *State v. Degele* 810

Contracts.

1. A written contract, couched in clear, unambiguous language, is not subject to construction, and the intent of the parties must be deduced from the language used in the contract. *Hompes v. Goodrich Co* 84
2. A contract whereby a manufacturer gives a jobber a sales agency in a specified territory, and whereby the jobber agrees to purchase a definite amount of manufacturer's products each year and to press their sale to the exclusion of other competing lines, is not void for want of mutuality. *Ansbacher-Siegle Corporation v. Miller Chemical Co* 142
3. Where a contract has no fixed duration, the law implies a reasonable time, and what constitutes a reasonable time must be determined from the nature and circumstances of the case. *Ansbacher-Siegle Corporation v. Miller Chemical Co.* 142
4. An express contract requires a meeting of minds of the contracting parties on the terms and conditions of the contract and an intention to contract with reference thereto. *Wrede v. City of David City* 194
5. A transaction between a father and an adult son does not presumptively create a confidential or fiduciary relation between them with reference thereto. *Martindale v. Panter* 522
6. Where an optionee fully performs an option agreement and the optionor receives and accepts all benefits provided in the option contract, the optionor is estopped to assert that the acceptance thereof has not been made within the time provided in the agreement. *In re Estate of Lee* 567
7. An instrument wherein A states "I owe B $1,300" is an unconditional admission of an existing debt. *Miller v. Jones* 605

Corporations.

1. Generally, subsequent stockholders have no standing to attack prior mismanagement of the corporation. *Reils v. Nicholas* 19
2. The right of a stockholder to sue directors for corporate wrongs exists because of special injury to him for which he is otherwise without redress; but if his interest is trifling and the injury is of no consequence, he cannot sue to compel righting of wrongs to the corporation. *Reils v. Nicholas* 19
3. A resolution by directors of a corporation authorizing a bank to honor checks drawn to order of certain offi-

cers named therein does not, as a matter of law, relieve the bank from making inquiry where an officer of the corporation offers to pay his individual notes to the bank with a check on the corporation account therein, since, if it is an unauthorized use of corporation funds, the bank may be held liable therefor. *Kuhns v. Live Stock Nat. Bank* 459

Costs.

Under section 20-1708, Comp. St. 1929, costs are allowed plaintiff on a judgment in actions for recovery of money only. *Shellenbarger v. Shellenbarger* 762

Counties.

1. The amount of a county treasurer's salary depends upon the population of the county for the year in question. *Shambaugh v. Buffalo County* 434
2. The population of a county for a particular year must be determined by competent evidence. *Shambaugh v. Buffalo County* 434

Courts.

1. Jurisdiction of the subject-matter is to be tested by the authorized extent of the powers of the court in respect of the cause of action before it. *In re Guardianship of Warner* 25
2. In a court of record, if the record does not show want of jurisdiction, jurisdiction will be presumed. *In re Guardianship of Warner* 25
3. In the administration of the federal employers' liability act, pertinent opinions of the federal courts are binding on state courts. *Bocian v. Union P. R. Co.* 318
4. County courts have equity powers in matters within their exclusive original jurisdiction. *In re Estate of Lee* 567
5. A construction by the United States supreme court of an act of congress controls the action of state courts. *Burke v. Western Union Telegraph Co.* 878

Creditors' Suit.

1. Where other remedies are inadequate, an equity court has power to take unexempt property of a debtor and apply it to the payment of the owner's debts. *Meyer v. Platt* 714
2. The beginning of a creditors' suit, issuing of process and serving thereof give a specific lien on the property which it is sought to reach. *Hilton v. Clements* 791
3. The filing of a creditors' bill and service of process is a lien on the equitable assets of a judgment debtor, without issuance of a restraining order. *Hilton v. Clements* 791

Criminal Law.

1. In a prosecution for rape, the trial court did not err, in absence of a request, in failing to instruct as to the lesser offenses of assault and assault and battery. *Haynes v. State* 69
2. In a prosecution for rape, it is not prejudicial error for the trial court to set out verbatim in his instructions the charging part of the information, where the court follows the instruction with an instruction in its own language as to the material elements of the offense. *Haynes v. State* 69
3. If an act be an offense against the state and also against a municipality of the state, it may constitute an offense against both, and both may punish it without infringing any constitutional right. *State v. Hauser* 138
4. A conviction may rest on uncorroborated evidence of an accomplice when, considered with other evidence, it satisfies the jury beyond a reasonable doubt of guilt of accused. *Ruzicka v. State* 473
5. In a prosecution for larceny, uncorroborated evidence of an accomplice who had wilfully sworn falsely in regard to material matters, and whose evidence was generally unreliable, was insufficient to sustain verdict of guilty. *Ruzicka v. State* 473
6. Comment of county attorney to jury that "defendant does not get on the stand to tell you about this case" was ground for reversal of judgment under the statute. *Bruntz v. State* 565
7. A plea of guilty waives any defect which is not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement. *Thompson v. O'Grady* 641
   State, ex rel. Gossett, v. O'Grady 824
8. The constitutional right of accused to have assistance of counsel may be waived, and a waiver will be implied where accused fails to demand counsel. *Alexander v. O'Grady* 645
9. Accused may, by confession of guilt, waive rights secured to him by the Constitution. *Alexander v. O'Grady* 645
10. The provision of the Civil Code providing what shall be stated in a judgment applies to civil proceedings only. *Dunham v. O'Grady* 649
11. The fact that an accomplice has been guilty of wilfully false-swearing on a material matter is a circumstance that may make his testimony unworthy of belief. *Millslagle v. State* 664

12. Though an accomplice may have been guilty of a conscious falsehood on a material matter, and though his testimony is lacking in corroboration, it may not be utterly unworthy of belief, and an accused's rights will be protected if the jury are instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has wilfully sworn falsely in regard to a material matter they should be hesitant to convict on his uncorroborated testimony. *Millslagle v. State* 664
13. A conviction based on the uncorroborated testimony of an accomplice will only be set aside on appeal, where on its face it produces an irresistible conviction of pervading taint or of inherent moral weakness. *Millslagle v. State* 664
14. Conviction for cattle stealing is set aside for improper admission, on rebuttal, of immaterial and incompetent testimony carrying a direct implication of defendant's guilt. *Millslagle v. State* 664
15. The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the guilt and justifies heavier penalties. *Davis v. O'Grady* 708
16. The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused fails to demand that counsel be assigned him. *Davis v. O'Grady* 708
17. A person charged with crime may, by a judicial confession of guilt, waive all rights secured him by the Constitution. *Davis v. O'Grady* 708
18. A statute authorizing imprisonment for violation of its provisions imposes no restrictions on conduct except those specifically enumerated in the statute. *Dill v. Hamilton* 723
19. Where evidence is produced tending to show a common plan by several persons to commit a crime, the statements of each looking toward the carrying out of the plan are competent against the others. *Balis v. State* 835
20. In a prosecution for forgery, county attorney's statement on cross-examination of accused as to other forgeries was prejudicial error. *Balis v. State* 835
21. A declaration by the prosecuting attorney that it is his personal belief that defendant is guilty is highly improper unless such belief is given as a deduction from the evidence. *Balis v. State* 835
22. If the prosecuting attorney's improper conduct is so flagrant that neither rebuke nor instructions to the jury to disregard it can remove its sinister influence, a mistrial should be declared. *Balis v. State* 835

23. The statute subjecting a witness to physical examination to be offered with reference to his physical or mental condition or alleged cause thereof applies only to parties to an action. *Macomber v. State* 882
24. Conviction of a lesser offense than that for which accused was informed against is not a bar to prosecution for a greater offense if accused is granted a new trial. *Macomber v. State* 882

Damages.

Under federal court rules, damages cannot be recovered for mental pain and anguish where no injury is done to person, property, health or reputation. *Burke v. Western Union Telegraph Co.* 878

Death.

A presumption of death arises from the continued and unexplained absence of a person for seven years. *Batth v. Metropolitan Life Ins. Co.* 676

Deeds.

1. In a suit to set aside a conveyance of realty on the ground that grantor lacked mental capacity, the burden is on plaintiff to establish that the grantor's mind was so weak at time of conveyance that he could not comprehend the purport of what he was doing. *Lund v. Woodward* 689
2. Undue influence sufficient to avoid a conveyance of realty is an unlawful and fraudulent influence which controls the will of the grantor. *Lund v. Woodward* 689

Descent and Distribution.

An equitable lien may be impressed on an unexempt portion of the distributive share of an heir, who is a judgment debtor, in an estate in process of administration. *Hilton v. Clements* 791

Dismissal and Nonsuit.

The trial court did not abuse its discretion in permitting voluntary dismissal of a landowner from a suit to enjoin maintenance of a diversion dam and for damages from flooding, brought by the landlord and his tenant, and to allow the tenant to file an amended petition at law for damages to his leasehold. *Thies v. Platte Valley Public Power and Irrigation District* 344

Divorce.

1. The court will consider the child's welfare in awarding its custody. *Crandall v. Luhnow* 13

2. Generally, a court should keep minor children of divorced parents within its jurisdiction. *Crandall v. Luhnow* 13
3. The trial court, granting an absolute divorce, may assign between the parties property acquired during marriage by their joint efforts, as equity may require. *Resnick v. Resnick* 256
4. In a supplemental proceeding in a divorce suit to reform the divorce decree to allow alimony, the district court was without jurisdiction to substitute as a party a special administratrix for a deceased husband who had procured the divorce, where no claim for alimony was made in the original suit. *Kelkenney v. Getsey* 416
5. Evidence that former wife became employed after obtaining divorce and that the husband has remarried was not sufficient basis for modification of allowance for wife and child support, in absence of showing as to the extent of her earnings. *Morris v. Morris* 660
6. On granting an absolute divorce, the court may enter decree in regard to property acquired during marriage by joint efforts of parties as equity demands. *Swanson v. Swanson* 699
7. In awarding custody of a child in a divorce suit, the primary concern of the court in its sound discretion is the welfare of the child, having due regard of the rights of the parents. *Swanson v. Swanson* 699
8. Grant of $14,400 alimony approved. *Swanson v. Swanson* 699

Domicile.

1. One's residence is where he has his established home, and to which, when absent, he intends to return. *In re Estate of Meyers* 60
2. To effect a change of domicile, there must not only be a change of residence, but an intention to permanently abandon the former home. *In re Estate of Meyers* 60
3. The fact that an individual had voted for 50 years in a certain county and, when absent therefrom, either returned in person to vote or voted an absentee ballot, was convincing and persuasive in determining his domicile. *In re Estate of Meyers* 60
4. A person who moves from his place of residence to benefit his health is merely temporarily absent, though actual time spent in the new residence may be long. *In re Estate of Meyers* 60
5. A person who removes from his place of residence in

order to educate a minor child does not thereby usually effect a change of domicile. *In re Estate of Meyers* 60

Drains.

1. It is a duty of the board of supervisors of a drainage district organized under the legislative act of 1905 to repair ditches which become ineffective. *Ritter v. Drainage District* 866
2. The incorporation of a drainage district and construction of a drainage system and the obligations of landowners to pay assessments for drainage create contracts between the district and the landowners. *Ritter v. Drainage District* 866

Elections.

1. An election to a public office, secured by a candidate by means of offers to the voters to perform the duties of the office for less than the legal salary or fees, constitutes a species of bribery which will invalidate an election. *State, ex rel. Burkett, v. Swanson* 704
2. A person becomes a candidate for office when he announces that he will seek election to the office. *State, ex rel. Burkett, v. Swanson* 704
3. A candidate who has become disqualified to hold the office he seeks is necessarily ineligible to run for the office. *State, ex rel. Burkett, v. Swanson* 704

Eminent Domain.

1. Damages recoverable in a condemnation proceeding are only those arising as a consequence of the condemnation. *In re Platte Valley Public Power and Irrigation District* 313
2. Evidence as to value of land taken and damaged by condemnation must be based on its value in condition in which it was at time of condemnation. *In re Platte Valley Public Power and Irrigation District* 313
3. Liability to respond in damages arises from the nature of the acts, not from the identity of the parties. *In re Platte Valley Public Power and Irrigation District* 313
4. Accretions are property within the section of the Constitution providing that the property of no person shall be taken or damaged for public use without just compensation therefor. *Thies v. Platte Valley Public Power and Irrigation District* 344
5. The state was not deprived of its right to appeal from a condemnation award by the act of an unauthorized agent of the state. *Peterson v. Department of Roads and Irrigation* 354

6. The federal government has no power to take or condemn private property for low-rent housing and slum clearance projects, since such purpose is not a public use within the purview of the federal Constitution. *Lennox v. Housing Authority of City of Omaha* 582
7. While there is merit in giving short instructions, elaboration can be overlooked in an instruction dealing with the measure of damages in condemnation proceedings. *Pearse v. Loup River Public Power District* 611
8. Judgment for $1,883 in condemnation proceedings was reduced to $1,200. *Pearse v. Loup River Public Power District* 611

Evidence.

1. Cogent reasons that strengthen the opinion of an expert witness as to a scientific fact may determine the issue. *Maul v. Iowa-Nebraska Light & Power Co* 128
2. Nebraska courts may take judicial notice of federal statutes and proclamations of the president. *Federal Farm Mtg. Corporation v. Hughes* 454
3. Any witness with a knowledge of time and distance is competent to give an estimate of the speed of an automobile. *Carnes v. DeKlotz* 787
4. Where a witness had no reasonable time or opportunity to formulate a basis for an opinion as to the speed of an automobile, his testimony was insufficient to sustain a finding of excessive speed. *Carnes v. DeKlotz* 787
5. The supreme court will not take judicial notice of rules of practice of a district court. *Federal Farm Mtg. Corporation v. Hughes* 820

Executors and Administrators.

1. Essential averments of a petition for administration are that deceased died intestate, and was at time of death a resident or inhabitant of the county where the petition is filed or, if a nonresident, that he left an estate in the county to be administered. *In re Estate of Sheerer* 374
2. In proceeding for appointment of administrator, wherein a petition was filed and notice was given, and objector had actual knowledge of pendency of the proceeding, he could not, more than one year after appointment of administrator, object to the court's jurisdiction on the ground that administrator was not legally married to deceased or had no beneficial interest in the estate. *In re Estate of Sheerer* 374
3. After 30 days from death of deceased, no right of preference for appointment as administrator exists in favor

of the widow or next kin of deceased, or the person designated by them. *In re Estate of Sheerer* 374
4. The functions of a special administrator are to possess, control and preserve the estate of a deceased until granting of letters testamentary or of administration. *Kelkenney v. Getsey* 416

Exemptions.

The statute exempts from execution or attachment 90 per cent. of wages of a judgment debtor. *Live Stock Nat. Bank v. Jackson* 161

Forgery.

In a prosecution for forgery, a variance between an instrument described in the information and the evidence is not fatal unless it is material to the merits of the case or prejudicial to the rights of the accused. *Balis v. State* 835

Fraudulent Conveyances.

1. Conveyance from judgment debtor to son *held* fraudulent. *Farmers State Bank of Ewing v. Dierks* 442
2. Transactions between a brother and sister, by which property is transferred by one who is unable to pay his debts, should be carefully scrutinized, and are presumptively fraudulent, so as to impose the burden on one asserting good faith thereof to prove it. *Hilton v. Clements* 791
3. The question of fraudulent intent is a question of fact. *Hilton v. Clements* 791
4. Where testimony relied on to show good faith is given by interested relatives, the reasonableness or unreasonableness of their evidence bears considerable weight in arriving at a just conclusion. *Hilton v. Clements* 791

Garnishment.

In garnishment in aid of execution, only answer and evidence of garnishee are admissible in response to the summons. *Searcey v. Badgett* 185

Habeas Corpus.

1. On an application for a writ of habeas corpus, errors or irregularities in the criminal trial which are not jurisdictional will not be considered. *Hawk v. O'Grady* .. 639
2. To obtain release by habeas corpus, the judgment or sentence must be an absolute nullity. *Hawk v. O'Grady* 639
State, ex rel. Gossett, v. O'Grady 824

3. Habeas corpus will not lie to discharge one serving a penal sentence, if the court imposing sentence had jurisdiction of the offense and the person, and to impose sentence. *Alexander v. O'Grady* 645
4. Section 29-2814 of the habeas corpus statute is limited to cases where one is in custody by virtue of a warrant or commitment of a magistrate, and has no application to cases where persons are imprisoned under sentence imposed by courts of record. *Dunham v. O'Grady* 649
5. Section 83-935 of the habeas corpus statute is applicable to one who is confined in the state penitentiary. *Dunham v. O'Grady* 649
6. Habeas corpus is a collateral and not a direct proceeding, when regarded as a means of attack on a judgment sentencing a defendant. *Davis v. O'Grady* 708
7. The judgment or sentence of a court of record in a criminal case is supported by the usual presumptions of validity and regularity, when attacked in a habeas corpus proceeding. *Davis v. O'Grady* 708
8. To obtain release from a sentence of imprisonment by habeas corpus, the sentence must be absolutely void. *Davis v. O'Grady* 708
9. Where an information charges distinct offenses in two or more counts, a defendant cannot complain in a habeas corpus proceeding of a sentence on a general verdict imposing a penalty applicable to either offense without designating on which count it is based. *Davis v. O'Grady* 708
10. Habeas corpus is never allowed as a substitute for an appeal or proceeding in error. *Davis v. O'Grady* 708
11. Habeas corpus is a collateral proceeding, when regarded as a means of attack on a judgment sentencing a defendant. *State, ex rel. Gossett, v. O'Grady* 824

Hawkers and Peddlers. SEE MUNICIPAL CORPORATIONS, 13, 15, 16. NUISANCE, 5.

Health.

1. Statutes creating housing authorities for slum clearance and low-rent dwellings constitute a proper exercise of the police power. *Lennox v. Housing Authority of City of Omaha* 582
2. The elimination of unsafe and dilapidated tenements by replacement with safe, sanitary, low-rent dwellings is a legitimate object for the exercise of the police power. *Lennox v. Housing Authority of City of Omaha* 582

Homestead.

1. Though a homestead cannot be claimed in two separate properties at the same time, homestead claimants who were about to lose their homestead as result of foreclosure proceedings could abandon it and establish a new homestead in other property. *Hawley v. Arnold* 238
2. A building consisting of a single structure under one roof was a "dwelling-house" within the meaning of the homestead statute, though it was divided into two parts by a solid wall and one-half was rented. *Hawley v. Arnold* 238
3. In a suit to have a judgment declared not a lien on premises claimed as a homestead, evidence sustained finding that there was no equity in the property above encumbrances and homestead exemption. *Hawley v. Arnold* 238
4. The extent of a homestead is not to be determined from the fee-simple value of the land, but from the value of the homestead claimant's interest therein. *Hawley v. Arnold* 238
5. A wife cannot by will dispose of the life estate of her husband in the homestead, in absence of waiver by him. *Abboud v. Boock* 652
6. The right of a surviving husband to a life estate in the homestead is fixed by statute, and any disposal thereof must be in strict compliance with the statute. *Abboud v. Boock* 652
7. A surviving husband is not estopped from asserting his life estate in the homestead because he entered into a joint will with his wife without mentioning the homestead, or because he qualified as executor of her will. *Abboud v. Boock* 652
8. Generally, where a homestead right of exemption has attached to realty, the homestead property may be exchanged for another homestead and the right of exemption will follow and attach to the new homestead. *Meyer v. Platt* 714
9. The statutory protection to proceeds of sale of a homestead applies to property received in exchange for the homestead, not exceeding in value the amount of the exemption. *Meyer v. Platt* 714
10. The fact that the owner of realty denies his title will not deprive him of the benefit of homestead exemption laws. *Meyer v. Platt* 714
11. A formal declaration that certain land has been selected

as a homestead is not a necessary element in establishment of a homestead right. *Meyer v. Platt* 714
12. Where a judgment had become a lien against realty, and subsequently a right of homestead attached thereto, the judgment lien was paramount to the claim of a homestead exemption. *Welch v. Falk* 764

Homicide.

1. In a prosecution for shooting with intent to kill or wound, the trial court erred in instructing the jury that the law warranted the presumption that a person intends the consequences which ordinarily follow an intentional act, where witnesses were present at time of shooting and testified fully thereto and to attendant circumstances. *Vallas v. State* 250
2. In a prosecution for shooting with intent to kill or wound, intent is an essential element, and a presumption of law does not take the place of testimony of witnesses who were present and testified to details of the shooting and attendant circumstances. *Vallas v. State* 250

Indictment and Information.

1. A deputy county attorney may sign a criminal information. *Thompson v. O'Grady* 641
2. When the right of a person to sign an information as deputy county attorney is questioned for the first time after arraignment and plea of guilty, his appointment and qualification will be presumed. *Thompson v. O'Grady* 641
3. One who aids in the commission of a crime may be charged in simple and direct terms as if he were the principal offender, but a statement of the manner of his alleged participation in the crime, though unnecessary, does not make the information bad. *Millslagle v. State* 664
4. Criminal informations may be verified by the county attorney, complainant, or some other person. *State, ex rel. Gossett, v. O'Grady* 824
5. Words descriptive of the character of affiant in the verification of a criminal information may be disregarded. *State, ex rel. Gossett, v. O'Grady* 824
6. Where an objection to an information is not made at the time prescribed by law, the objection is waived. *State, ex rel. Gossett, v. O'Grady* 824
7. Where accused failed to object to information, on ground that it was not signed by county attorney, before plea to the merits, there was a waiver of the alleged error. *State, ex rel Gossett, v. O'Grady* 824

Injunction.

1. The state could enjoin threatened diversion of realty by a religious association and a mortgagee of the realty which had been dedicated by the state to the association for church purposes. *State, ex rel. Hunter, v. Home Savings & Loan Ass'n* 231
2. An injunction is a command to refrain from a particular act. *Conrad v. Kaup* 900
3. The remedy by injunction is wholly preventive, prohibitory, or protective. *Conrad v. Kaup* 900
4. Rights lost and wrongs perpetrated cannot be corrected by injunction. *Conrad v. Kaup* 900

Insane Persons.

1. The rules as to collateral attack are applicable with full force to proceedings *in rem* and *quasi in rem*, such as adjudications of insanity and determinations of mental incompetency. *In re Guardianship of Warner* 25
2. Admissions, declarations, and facts inconsistent with mental soundness are admissible on the issue of sanity. *In re Guardianship of Warner* 25

Insurance.

1. Evidence in action on insurance policy did not show as a matter of law that insured was not in good health at time of issuance and delivery of policy. *Gugelman v. Kansas City Life Ins. Co* 411
2. The usual rules for construction of contracts apply to fire insurance policies. *Peony Park v. Security Ins. Co* 504
3. Any fair doubt as to meaning of words of a policy should be resolved against the one who prepares it. *Peony Park v. Security Ins. Co* 504
4. If provisions of an insurance policy are clear and unambiguous, the rule of strict construction against insurer does not apply. *Peony Park v. Security Ins. Co.* 504
5. A fire insurance policy will not be extended to cover property not clearly within the express terms of the policy. *Peony Park v. Security Ins. Co* 504
6. Under a fire insurance policy covering contents of a dance pavilion "and additions," a refreshment stand built some 42 feet from the pavilion was not "an addition" to the main dance pavilion, although used in connection therewith. *Peony Park v. Security Ins. Co* ... 504
7. Where a fire policy covers contents of a building, the word "contents" is a term which should have some

fixed relation to the building in which "contents" is located. *Peony Park v. Security Ins. Co* 504
8. Where personal property insured as contents of a dance pavilion was removed therefrom to a new building which was covered by a separate policy, such personal property was no longer protected as "contents" of the dance pavilion. *Peony Park v. Security Ins. Co* 504
9. A benefit thrift certificate containing a savings feature was *held* to be an insurance contract within the law governing insurance contracts. *State, ex rel. Smrha, v. Cosmopolitan Old Line Life Ins. Co* 742
10. Under a contract containing both thrift and term insurance features, where the premium paid was made for both features of the contract, the fund created by premium payments was liable for all the company's obligations. *State, ex rel. Smrha, v. Cosmopolitan Old Line Life Ins. Co* 742
11. Where life insurer attempts to set up property rights and benefits out of premiums which it collects on its integrated obligations, terms and conditions of such benefits must comply with statute governing life and endowment policies, including provision for three-year reinstatement. *State, ex rel. Smrha, v. Cosmopolitan Old Line Life Ins. Co* 742
12. Holder of benefit thrift certificate *held* entitled to statutory right to reinstatement. *State, ex rel. Smrha, v. Cosmopolitan Old Line Life Ins. Co* 742

Judgment.

1. Error in holding the petition sufficient will not render the judgment subject to collateral attack. *In re Guardianship of Warner* 25
2. Omission of allegation of a jurisdictional fact is cured by proof of its existence, and where the judgment is silent as to such fact, jurisdiction will be presumed. *In re Guardianship of Warner* 25
3. A collateral attack on a judicial proceeding is an attempt to avoid or deny its force and effect in some manner not provided by law. *In re Guardianship of Warner* 25
4. When a judicial order, judgment or proceeding is offered in evidence in another proceeding, an objection thereto on account of judicial errors is a collateral attack. *In re Guardianship of Warner* 25
5. Evidence sustained judgment denying application to vacate a default decree. *Drake v. Ralston* 72

6. Objection to revivor of dormant judgment on ground that judgment was void was properly overruled. *Kinyoun v. Reinsh* 325
7. In a suit to vacate or modify a decree on the ground of fraud, plaintiff must prove due diligence at the former trial, and that his failure to plead his defense was not attributable to his own fault. *Martindale v. Panter* 522
8. After courts have determined issues presented in an action and time for direct action has expired, litigants cannot maintain a collateral action to set aside those proceedings so they can present in the original action issues which could have been raised in that litigation. *Clayton v. Evans* 574
9. A stay bond given to obtain a stay of execution, when recorded, is a judgment within the purview of statutes providing for revivor of dormant judgments. *Baker Steel & Machinery Co. v. Ferguson* 578
10. A dormant judgment may be revived at any time within ten years after it becomes dormant. *Baker Steel & Machinery Co. v. Ferguson* 578
11. The only defenses available against an application to revive a dormant judgment are that there is no judgment to revive, that the judgment is void, or that the judgment was paid or otherwise discharged. *Baker Steel & Machinery Co. v. Ferguson* 578
12. The validity of an assignment of a dormant judgment may not be adjudicated in a proceeding to revive it. *Baker Steel & Machinery Co. v. Ferguson* 578
13. A judgment of dismissal in a criminal prosecution cannot be given in evidence in a civil action to establish the truth of the facts on which it was rendered. *Hampton v. Westover* 695
14. In a suit in equity, relief to which plaintiff is entitled under his petition and proofs may be granted pursuant to his general prayer. *Hilton v. Clements* 791
15. Under a prayer for general and special relief, the court may give such relief as the case warrants. *Hilton v. Clements* 791
16. A decree of foreclosure of a tax lien against unknown owners of land rendered on service by publication is of no effect as against persons in possession of the land who were not made parties to the suit and had no notice thereof. *Harris v. Heeter* 905

Judicial Sales.

An unconfirmed judicial sale is not a nullity, and, as against a collateral attack, will be treated as valid. *Marker v. Scotts Bluff County* 360

Jury.

1. In a guardianship proceeding, the issues involved not being triable to a jury as a matter of right, the verdict is only advisory. *In re Guardianship of Warner* 25
2. A trial by jury cannot be demanded as a constitutional right, in proceedings for the appointment or removal of guardians, in absence of a statute providing therefor. *In re Guardianship of Warner* 25
3. In proceedings not within the application of constitutional provisions, the fact that an appeal is allowed does not entitle the parties to demand a jury trial. *In re Guardianship of Warner* 25
4. The interposition of a jury in trials of appeals from probate courts to district courts is mandatory only when the inherent nature of the issues to be determined, in the light of constitutional and code provisions or express statute, so require. *In re Guardianship of Warner* 25
5. The interposition of a jury in trials of appeals from county courts to district courts, where there is involved only the appointment or refusal to appoint guardians for incompetents, is a matter of discretion and not a matter of right. *In re Guardianship of Warner* 25
6. The purpose of constitutional provisions guaranteeing right of trial by jury was to preserve the right as it existed at common law and under statutes in force when the Constitution was adopted. *State v. Hauser* 138
7. The legislature may prescribe that petty offenses, not recognized as crimes by the statutory or common law existing at time of adoption of the Constitution, may be determined without the intervention of a jury without offending constitutional provisions on the subject. *State v. Hauser* 138
8. Where the offenses of drunkenness and driving a motor vehicle while intoxicated are created by ordinance, with a fine of $50 fixed as the maximum penalty for violation of either, they will be classed as petty offenses which may be determined by a police magistrate without a jury. *State v. Hauser* 138
9. On appeal to the district court from a judgment of the municipal court imposing a penalty for violation of a

city ordinance, defendant is entitled to a jury trial under the statute. *State v. Hauser* 138

Kidnaping.

1. A guide to construction of the kidnaping statute is found in the evil which it is designed to remedy, in the light of contemporaneous events. *Macomber v. State* 882
2. The kidnaping statute is not all-inclusive, and does not cover several other offenses provided for by different sections of the Criminal Code, and warrants the strict construction that the legislature did not so intend such statute at the time of its enactment. *Macomber v. State* 882
3. Evidence was insufficient to sustain conviction for kidnaping. *Macomber v. State* 882

Landlord and Tenant.

Evidence in action by lessee against lessor for pasturage and hay sustained judgment for defendants. *Thomas v. Sheldon Co.* 181

Licenses.

1. The power to regulate includes authority to license and to collect a reasonable license fee. *Nelsen v. Tilley* 327
2. The sale of new motor vehicles is a lawful business which any person has a right to pursue, subject only to reasonable regulation. *Nelsen v. Tilley* 327

Limitation of Actions.

1. The defense of limitations, if not raised by demurrer or answer, is waived. *Hadley v. Corey* 204
2. An action for assault and battery is barred in one year. *Markel v. Glassmeyer* 243
3. A promise to pay a debt founded on written contract, to prevent running of limitations, must be in writing. *Brainard v. Hall* 491
4. Absence from the state will not extend the time in which a real estate mortgage foreclosure may be brought against a nonresident. *Brainard v. Hall* 491

Lis Pendens.

1. After filing of notice of *lis pendens*, subsequent purchasers or encumbrancers are bound by all proceedings thereafter taken in an action. *Hadley v. Corey* 204
2. The purpose of the rule as to *lis pendens* is to prevent third persons during pendency of the litigation from acquiring interests in the land which would preclude the court from granting the relief sought. *Hadley v. Corey* 204
3. If a purchaser or encumbrancer, subject to *lis pendens*,

becomes a party to the action, he may question the plaintiff's right to recover in the same manner as the original defendant. *Hadley v. Corey* 204

Master and Servant.

1. Child of divorced wife and deceased husband *held* not entitled to recover compensation from employer of deceased father, who during his employment contributed nothing to the child's support. *Meyer v. Nielsen Chevrolet Co* 6
2. Evidence established that a laborer suffered an injury arising out of and in course of employment. *Maul v. Iowa-Nebraska Light & Power Co* 128
3. Injury from strain due to employee's physical condition predisposing employee to injury *held* compensable. *Maul v. Iowa-Nebraska Light & Power Co* 128
4. Evidence in compensation case sustained district court judgment that findings of fact on rehearing before the compensation court were not supported by the record. *Wrede v. City of David City* 194
5. The statute does not require that appellant from award of compensation court sitting *en banc* serve transcribed copy of testimony taken on opposing party before filing same in district court. *Wrede v. City of David City* 194
6. Each case, wherein it is sought to hold the master liable for the wrongful act of his servant, must be determined with a view to surrounding circumstances, character of the employment, and nature of the wrongful act. *Vanderlippe v. Midwest Studios* 289
7. Whether an act of a servant was within the scope of his employment is ordinarily one of fact for the jury. *Vanderlippe v. Midwest Studios* 289
8. In action for death in collision, questions of negligence and of deceased's contributory negligence under the comparative negligence statute were for the jury. *Vanderlippe v. Midwest Studios* 289
9. Under the federal employers' liability act, an interstate carrier is not liable for an assault by a section foreman upon a member of the section crew, unless the negligent act was committed within the scope of the foreman's employment, or was directed or authorized by the carrier. *Bocian v. Union P. R. Co* 318
10. The law that permits a conductor on a passenger car to make a reasonable assault on a dangerous person, when necessary for the protection of passengers, does not apply to a wrongful assault by the foreman of a section crew on a member thereof. *Bocian v. Union P. R. Co* 318

11. Under the federal employers' liability act, liability of an interstate carrier is not created by conduct of the wrong-doer, if he was impelled by motives wholly personal to himself. *Bocian v. Union P. R. Co.* 318
12. Under the federal employers' liability act, the burden of proving an actionable injury resulting from negligence of an officer, agent or employee of an interstate carrier, while the wrong-doer was acting within the scope of his employment, is on the one claiming damages as the proximate cause of such negligence. *Bocian v. Union P. R. Co.* 318
13. A proceeding to modify a compensation award, payable periodically for more than six months, and to recover additional compensation for an increase in disability can only be brought within one year from time employee knows or is chargeable with knowledge that there has been a substantial increase in his disability. *Scott v. State* 348
14. In action for compensation against county, evidence showed that compensation claimant was a county employee. *Steward v. Deuel County* 516
15. Where evidence was insufficient to determine extent of compensation claimant's disability, the cause was remanded for purpose of procuring evidence to determine extent of disability and amount of award. *Steward v. Deuel County* 516
16. Where a reasonable controversy exists as to liability under the compensation law, the employer is not liable for penalty for waiting time pending action in the courts. *Steward v. Deuel County* 516
17. The liability imposed by the federal employers' liability act is liability for negligence of any officer, agent or employee of the carrier, or for any defect or insufficiency due to carrier's negligence in its equipment. *Christenson v. Union P. R. Co.* 538
18. In an action under the federal employers' liability act for damages for personal injuries sustained prior to amendment of act, assumption of risk is a complete defense, if there was no violation of statute enacted for safety of employees contributing to the injury. *Christenson v. Union P. R. Co.* 538
19. In an action for death under the federal act, an employee of mature years will be held to have assumed the risk of dangers normally and necessarily incident to the occupation in which he was engaged. *Christenson v. Union P. R. Co.* 538

20. If an employee knew or ought to have known of unusual and extraordinary risks connected with his employment under the federal act, he will be held to have assumed them. *Christenson v. Union P. R. Co.* 538
21. Directions of a superintendent to an employee to hurry does not preclude the defense of assumption of risk. *Christenson v. Union P. R. Co.* 538
22. The rule requiring an employer to provide reasonably safe places and structures for employees to work does not extend to structures being constructed or demolished, where the successive temporary conditions through which they must pass during such operations are from their nature dangerous. *Christenson v. Union P. R. Co.* 538
23. The failure of an employer to use the safer of two recognized methods of construction is not of itself negligence. *Christenson v. Union P. R. Co.* 538
24. Where it appears that claimant may have sustained partial loss of use of his leg, while testimony in record is directed to question of general industrial disability only, the cause may be remanded for determination whether any impairment of physiological functions of the leg exists, and, if so, the extent thereof, or whether the purported loss of use is wholly affected. *Schmidt v. City of Lincoln* 546
25. A demand for payment of medical expenses is a claim for compensation within the compensation law. *Schmidt v. City of Lincoln* 546
26. A demand for payment of medical expenses within six months after injury is sufficient to support an employee's right to institute proceedings within a year to recover every benefit which has accrued under the compensation law. *Schmidt v. City of Lincoln* 546
27. Where any finding of fact on which the award of the district court in a compensation case depends is not conclusively supported by the evidence, it is the duty of the supreme court on appeal to consider the entire cause *de novo* on the record. *Schmidt v. City of Lincoln* 546
28. A compensation claimant who suffered a permanent partial loss of the use of his left hand and left leg is entitled to recover such proportion of the compensation allowed for total disability as the extent of his loss would bear to the total loss of such members. *Fallis v. Vogel* 598
29. Allowance for temporary total disability followed by

permanent partial disability of employee is fixed by statute. *Fallis v. Vogel* 598
30. The statute providing for appeals from district court to the supreme court in compensation cases containing no provision as to time for filing a bill of exceptions in the supreme court, the general law relating to bills of exceptions for the purpose of appeal from the district court to the supreme court applies. *Fallis v. Vogel* 598
31. An injury is not compensable under the workmen's compensation law, where employee on his own initiative leaves his line of duty for purposes of his own and is killed. *Burlage v. Lefebure Corporation* 671
32. On appeal from compensation court after rehearing before the whole court, filing of petition and transcript in district court within 14 days lodges jurisdiction of the case in district court. *Henderson v. Wilson* 693
33. No præcipe need be filed nor copy of petition served in district court to give it jurisdiction of a compensation case on appeal from award of whole compensation court on rehearing. *Henderson v. Wilson* 693
34. It is the duty of the clerk of the district court under the compensation law to issue a copy of petition for service on adverse party within seven days, on appeal from award of compensation court sitting *en banc* on rehearing, but failure of clerk to so do does not deprive a litigant of his right of appeal. *Henderson v. Wilson* 693

Monopolies.

1. A volume bonus, which provides for a discount to a dealer in accordance with the amount of purchases he makes, is lawful, unless an intent be shown to grant it as a means of injuring or destroying the business of another. *Hompes v. Goodrich Co* 84
2. A conspiracy between two or more persons to destroy the business of another, if carried into effect, is a violation of the statute dealing with unlawful restraint of trade. *Hompes v. Goodrich Co* 84
3. A conspiracy to unlawfully restrain trade may be proved by indefinite acts, conditions and circumstances. *Hompes v. Goodrich Co* 84
4. Where alleged overt acts are in themselves lawful, and the evidence does not tend to show an unlawful intent to conspire against and injure the business of another, an action for unlawful restraint of trade must fail for want of proof. *Hompes v. Goodrich Co* 84

5. A person may refuse to do business with another, whether the refusal is based on reason, whim or prejudice. *Hompes v. Goodrich Co.* 84
6. One engaged in business may meet competitive prices of merchandise without violating the statute dealing with unlawful restraint of trade. *Hompes v. Goodrich Co.* 84
7. Injuries resulting from fair competition are not protected against by either the state or federal Constitutions. *Nelsen v. Tilley* 327
8. The legislature, under guise of regulation, may not indulge in arbitrary price fixing, destruction of lawful competition, or creation of trade restraints tending to establish a monopoly. *Nelsen v. Tilley* 327

Mortgages.

1. Where a deed and contract of defeasance are executed as part of the same transaction, they will be construed as one instrument in determining their effect and the intention of the parties. *Ashbrook v. Briner* 104
2. Where a deed absolute in form is given as security for payment of money, legal title passes to the grantee. *Ashbrook v. Briner* 104
3. Where a deed absolute in form is given as security for payment of money and is accompanied by a defeasance in writing, legal title does not pass to the grantee, and the transaction constitutes a mortgage. *Ashbrook v. Briner* 104
4. Confirmation of mortgage foreclosure sale, approved. *Federal Land Bank v. Price* 188
5. The owner of the equity of redemption had authority to bind mortgaged property by an unrecorded extension agreement in writing, and a cause of action did not accrue on the mortgage, nor the statute of limitations commence to run, until after termination of the stipulated extension period. *Hadley v. Corey* 204
6. The holder of a note secured by a mortgage may maintain an action at law on the note, where neither note nor mortgage contains stipulations making the mortgaged property primarily liable for the debt. *Federal Farm Mtg. Corporation v. Hughes* 454
7. In absence of an agreement by mortgagee to look primarily to his security for satisfaction of the debt, a foreclosure of the mortgage is not a condition precedent to an action at law on the secured claim. *Federal Farm Mtg. Corporation v. Hughes* 454
8. Filing of stipulation reducing amount of judgment in

mortgage foreclosure decree does not vacate decree nor change date thereof. *Alexander v. Oman* 495
9. Filing of request for stay of sale under mortgage foreclosure decree must be filed within 20 days after rendition of decree. *Alexander v. Oman* 495
10. A sale under mortgage foreclosure decree will not be set aside for irregularities or errors not prejudicial to the party complaining. *Alexander v. Oman* 495
11. On appeal from an order confirming a judicial sale of realty, the supreme court must be satisfied that the property was sold for fair value, or that a subsequent sale would not realize a greater amount. *Federal Farm Mtg. Corporation v. Popham* 529
12. The district court may authorize an action at law on a note secured by a mortgage. *Federal Farm Mtg. Corporation v. Cramb* 553
13. A mortgagee may foreclose his mortgage or sue on the note, but he can pursue only one remedy at a time. *Federal Farm Mtg. Corporation v. Cramb* 553
14. After a mortgage foreclosure, the district court may authorize the mortgagee to sue on the note for any deficiency. *Federal Farm Mtg. Corporation v. Cramb* 553
15. In construing a note and mortgage, provisions of each will be given such effect as will carry out the intent of the parties. *Federal Farm Mtg. Corporation v. Cramb* 553
16. The statute providing that, when a petition shall be filed for satisfaction of a mortgage, the court shall have power only to decree delivery of possession of the premises to the purchaser does not abolish action at law on the note. *Federal Farm Mtg. Corporation v. Thiele* 626
17. After suit to foreclose a mortgage is begun, no action at law for recovery of the debt can be had, unless authorized by the court. *Federal Farm Mtg. Corporation v. Thiele* 626
18. Rentals paid under the provisions of the moratory law must be distributed as provided by the act. *Fremont Joint Stock Land Bank v. Morse* 659
19. In suit to foreclose mortgage, mortgagor was allowed $740 as rent for part of premises occupied by mortgagee. *Wood v. Burkhardt* 685
20. Mere inadequacy of price will not preclude confirmation of foreclosure sale, unless the inadequacy is so great as to evidence fraud. *Pringle v. Smith* 903

Municipal Corporations.

1. Where an appointing power is given unconditional author-

ity to remove a public officer or employee in its discretion, it may do so without a hearing. *State, ex rel. Fischer, v. City of Lincoln* 97
2. Where the power of removal of a public official is not expressly conferred, generally, a grant of power to appoint is construed to carry with it, by necessary implication, a grant of unconditional power to remove, if the term of office is not fixed by law and the right to remove is not restricted. *State, ex rel. Fischer, v. City of Lincoln* 97
3. The purpose of the home rule charter provisions of the Constitution was to render cities as nearly independent as possible of state legislation. *State, ex rel. Fischer, v. City of Lincoln* 97
4. The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state means simply that, on matters of such general concern to the people of the state as to involve a public need or policy, the charter must yield to state legislation. *State, ex rel. Fischer, v. City of Lincoln* 97
5. The legislature cannot, even by a general law, affect the powers of a city under its home rule charter over matters which are purely of local concern, or which only indirectly or remotely affect the people of the state outside the particular municipality. *State, ex rel. Fischer, v. City of Lincoln* 97
6. The right of a city to provide for a particular form of government in a home rule charter is in no way dependent on whether the legislature by statutory enactment has authorized such a form, nor is it subject to the statutory conditions and limitations upon which the legislature may have authorized a city to adopt it. *State, ex rel. Fischer, v. City of Lincoln* 97
7. The city council of Lincoln, under the provisions of its home rule charter, may discharge one of its firemen without a hearing before the council. *State, ex rel. Fischer, v. City of Lincoln* 97
8. The business of maintaining and operating a municipal electric plant and selling current therefrom being outside the governmental powers and functions of a city, the place of furnishing or receiving the electric current is not controlled by the situs with reference to the corporate boundaries of the cities involved in the transaction. *City of Curtis v. Maywood Light Co* 119
9. Where a city had power to furnish electric current beyond its corporate limits, it had a right to provide service

within the corporate boundaries of another municipality, and hence a contract therefor was not *ultra vires*. *City of Curtis v. Maywood Light Co.* 119
10. A prosecution for violation of a city ordinance, though in form a criminal prosecution, is in fact a civil proceeding to recover a penalty. *State v. Hauser* 138
11. Public funds of a city may be used to aid in establishment of a housing authority. *Lennox v. Housing Authority of City of Omaha* 582
12. Exercise of police power by a municipal corporation must have a rational relation to protection of a basic interest of society and must be reasonable and free from arbitrariness. *Jewel Tea Co. v. City of Geneva* 768
13. The only power which a city has to declare house-to-house solicitation of customers a nuisance is to find that it interferes with the health, peace, order, and good government of the city. *Jewel Tea Co. v. City of Geneva* 768
14. A city ordinance which attempts to prevent one from engaging in a lawful occupation can be impeached as unreasonable, unconstitutional and void. *Jewel Tea Co. v. City of Geneva* 768
15. A city ordinance designed to prevent peddling on private premises *held* invalid. *Jewel Tea Co. v. City of Geneva* 768
16. Municipal power encroaching on individual rights does not exist, unless plainly conferred by law. *Jewel Tea Co. v. City of Geneva* 768
17. A metropolitan utilities district is a municipal corporation. *Nelson-Johnston & Doudna v. Metropolitan Utilities District* 871
18. A municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted, and those essential to the declared objects and purposes of a municipality. *Nelson-Johnston & Doudna v. Metropolitan Utilities District* 871
19. Statutes granting powers to municipalities are to be strictly construed. *Nelson-Johnston & Doudna v. Metropolitan Utilities District* 871
20. Where a power is granted to a municipality in its proprietary capacity, such as the power to manufacture, sell and distribute gas, power is implied to do whatever is reasonably necessary to effectuate the objects for which the grant is made. *Nelson-Johnston & Doudna v. Metropolitan Utilities District* 871

21. The authority given a municipality to engage in a business enterprise carries with it power to conduct it in the manner in which a private corporation would deal with its property under similar circumstances. *Nelson-Johnston & Doudna v. Metropolitan Utilities District* 871
22. A municipal corporation having the power to manufacture, sell and distribute gas to its inhabitants has the implied power to engage in the selling of gas appliances. *Nelson-Johnston & Doudna v. Metropolitan Utilities District* 871
23. The purpose of the statute dealing with liability of a city for injury resulting from defect in a street and notice of the injury is to afford to the city prompt notice of an accident and injury, as distinguished from mere notice of the defect. *Bethscheider v. City of Hebron* 909
24. The statute requires that notice of an injury resulting from defect in a street must be given as a condition precedent to an action on a claim, regardless of whose negligent act created the defective condition. *Bethscheider v. City of Hebron* 909

Negligence.

1. If facts proved establish a more reasonable probability of actionable negligence, a case cannot be withdrawn from the jury. *Corkle v. Fenton* 54
2. While the question of ordinary negligence is one of fact, yet if, on an examination of the entire evidence, only one inference can be drawn, then it is a question of law for the court. *Corkle v. Fenton* 54
3. Where a pedestrian moved from a place of safety into the path of a moving street car and was struck, he was guilty of more than slight contributory negligence. *Travinsky v. Omaha & C. B. Street R. Co* 168
4. The burden of proving a defendant's negligence rests on the plaintiff and never shifts to the defendant. *Olson v. Omaha & C. B. Street R. Co* 216
5. Though plaintiff may have negligently exposed himself to injury, nevertheless, if defendant, after discovering his exposed situation, negligently injures him or is guilty of negligence in not discovering his dangerous position in time to avoid the injury, and injury results therefrom, plaintiff may still recover. *Carnes v. DeKlotz* 787

New Trial.

Where amount of damages allowed by a jury is clearly inadequate, it is error for the trial court to refuse to set aside the verdict. *Dolen v. Beatrice Restaurant Co*..... 247

Nuisance.

1. A place kept for gambling purposes is a public nuisance. *State, ex rel. Hunter, v. The Araho*..... 389
2. The constitutional provision and statutes permitting parimutuel betting on horse races in Nebraska did not authorize gambling on horse races held outside the state. *State, ex rel. Hunter, v. The Araho*..... 389
3. The fact that a public nuisance against which equitable relief is sought constitutes a criminal act does not preclude a court of equity from enjoining the same. *State, ex rel. Hunter, v. The Araho*..... 389
4. The equitable relief of enjoining a nuisance is purely preventive and equity does not punish the defendant for what he has done, such punishment being left to the criminal courts. *State, ex rel. Hunter, v. The Araho*.... 389
5. The act of soliciting orders for goods at private residences without consent of owners or occupants is not a "public nuisance," and may not be punished as a crime or misdemeanor. *Jewel Tea Co. v. City of Geneva*..... 768

Pleading.

1. A demurrer to the petition is not a proper part of the answer and should be disregarded. *Hadley v. Corey*..... 204
2. The sufficiency of a petition cannot be raised by incorporating a demurrer in the answer. *Hadley v. Corey* 204
3. By pleading to the merits, the defect that the petition does not state a cause of action is not waived. *Markel v. Glassmeyer*..... 243
4. By moving for judgment on the pleadings, plaintiff admits facts well pleaded by defendant. *Shambaugh v. Buffalo County*..... 434
5. Failure to demur or filing of an answer does not waive the right to object to a petition as not stating a cause of action. *Martindale v. Panter*..... 522
6. Pleading in action founded on an instrument for the unconditional payment of money is governed by statute. *Miller v. Jones*..... 605

Principal and Agent.

1. Where a manufacturer contracts to make a jobber his agent to sell his goods exclusively, in consideration of purchase of a certain amount of such goods within a

specified time, a breach of the contract by such manufacturer subjects him to liability for damages. *Ansbacher-Siegle Corporation v. Miller Chemical Co*..... 142

2. Where continuance of a sales contract is dependent on payment for purchases of merchandise as they become due, the making of a renewal contract by the parties after payments for merchandise become delinquent is waiver of the breach. *Ansbacher-Siegle Corporation v. Miller Chemical Co*..... 142
3. The measure of damages for breach of a sales contract is such an amount as will compensate the injured party for all damage or detriment proximately caused by the breach, including profits lost, which can reasonably be proved, during the life of the contract. *Ansbacher-Siegle Corporation v. Miller Chemical Co*..... 142

Rape.

In a prosecution for rape, it is not essential to a conviction that prosecutrix be corroborated by testimony of other witnesses as to the particular act constituting the offense, but it is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. *Haynes v. State*..... 69

Schools and School Districts.

1. The power of a school board to employ a teacher implies the power to dismiss him for cause. *Arehart v. School District*..... 369
2. Members of a school board act as representatives of the school district and not as individuals. *Arehart v. School District*..... 369
3. In determining a school-teacher's fitness for continued service, a school board acts in a quasi-judicial capacity, and its dismissal will generally be upheld. *Arehart v. School District*..... 369
4. In absence of a statute authorizing dismissal of a school-teacher at the school board's pleasure, dismissal without sufficient cause may be redressed in an action for damages for breach of contract. *Arehart v. School District*..... 369
5. A school board was justified in dismissing the superintendent of schools for engaging in a fight with a teacher in a school building. *Arehart v. School District*..... 369

Specific Performance.

In a suit to rescind a contract for sale of land, wherein

defendant sought specific performance, evidence sustained decree for specific performance. *Union Central Life Ins. Co. v. Cover* 260

States.

1. A statute giving a court jurisdiction in actions against the state is sufficient authority for bringing an action without a special statute giving consent of the state to be sued. *Anstine v. State* 148
2. In the compensation law, the state has waived its sovereignty and has consented to be sued in actions arising under the law. *Anstine v. State* 148
3. The department of banking is a governmental agency of the state, and a suit against it is a suit against the state. *Anstine v. State* 148
4. In a compensation case, service of summons on the state, pursuant to provision of the general statute, was void. *Anstine v. State* 148
5. Where an appropriation for salaries and maintenance in the office of the attorney general vested in the attorney general and the state engineer a discretionary power in the expenditure of the fund, there must be an affirmative determination by both officials before an expenditure can be made from the fund, and approval of the expenditure by the state engineer was indicated when he required and received legal advice and service from the attorney general. *State, ex rel. Johnson, v. Tilley* 173
6. The state's special appearance in compensation case objecting to jurisdiction sustained, no provision for service of process on the state being provided by the compensation law. *Callen v. State* 192
7. A legislative act dedicating realty to use of a church *held* a grant of an estate in fee simple defeasible with a limitation on its use. *State, ex rel. Hunter, v. Home Savings & Loan Ass'n* 231

Statutes.

1. In construing a statute, the legislative intent is to be gathered from the necessity or reason for its enactment, and its provisions should be construed together. *Anstine v. State* 148
2. As to issuance and service of summons on the state, the state is not bound by a statute providing for service in general terms. *Anstine v. State* 148
3. An act complete in itself may amend or modify provisions of existing statutes without controverting con-

stitutional provisions relating to amendments. *Live Stock Nat. Bank v. Jackson* 161
4. Separable invalid portions of an act which were not an inducement to its passage may be rejected and valid portions upheld. *Nelsen v. Tilley* 327
5. If a statute is subject to more than one construction, one of which makes it constitutional and the other unconstitutional, courts must adopt the construction which makes it constitutional. *Nelsen v. Tilley* 327
6. A section of a regulatory statute providing that the administrator may deny an application or revoke a license for wilfully discriminating in favor of one purchaser of a motor vehicle against another is void for indefiniteness, where the element of wrongful intent is not included, since all wilful discriminations are not unlawful. *Nelsen v. Tilley* 327
7. Where unconstitutional portions of an act can be separated from the valid portions, and the invalid portions did not constitute an inducement to passage of the valid parts, the invalid portions may be rejected and the valid portions upheld. *Lennox v. Housing Authority of City of Omaha* 582
8. The housing authority acts are not broader than their titles. *Lennox v. Housing Authority of City of Omaha* .. 582
9. Statutes *pari materia* must be construed together so as to give effect to all, if possible. *Lennox v. Housing Authority of City of Omaha* 582
10. Statutes should be so construed as to give effect to the legislature's intention, and if a statute is plain and unambiguous, there is no room for construction. *Federal Farm Mtg. Corporation v. Thiele* 626
11. Penal statutes must be strictly construed. *Macomber v. State* 882
12. While a penal statute is required to be construed strictly, it should be given a sensible construction. *Macomber v. State* 882
13. In a strict construction of a penal statute, the presumption exists that the legislature intended exceptions to its language which would avoid results of injustice, oppression or an absurd consequence. *Macomber v. State* 882

Subscriptions.

A donation to a university, payable after donor's death, is subject to the implied condition that it is not to be paid until debts of donor's estate have been satisfied. *In re Estate of Luce* 846

Taxation.

1. Matters which might have rendered an unconfirmed tax sale voidable in a scavenger suit on the ground of fraud cannot be made the subject of a collateral attack. *Frank v. Carpenter* 357
2. Tax sale certificates in a scavenger proceeding may be surrendered for cancelation at any time in order to clear the public records and give effect of a redemption from the sale, even after expiration of time in which the purchaser can acquire title to the property. *Frank v. Carpenter* 357
3. A decree in a tax scavenger suit will not be held void at plaintiff's instance merely because notice is not directed to "All Whom It May Concern." *Marker v. Scotts Bluff County* 360
4. A sale in a tax scavenger suit was not void because proof of notice of sale was not filed in the office of the clerk of the district court before the sale was held. *Marker v. Scotts Bluff County* 360
5. A statutory provision that the holder of a certificate of tax sale in a scavenger suit may surrender it to the county treasurer with request for its cancelation, and that such cancelation shall have the effect of a redemption from the tax sale, is not a provision for release or commutation of taxes. *Marker v. Scotts Bluff County* 360
6. "Actual value" of property for purposes of taxation means "its value in the market in the ordinary course of trade." *Nebraska State Bldg. Corporation v. City of Lincoln* 535
7. The valuation of property for purpose of taxation as fixed by the board of equalization is final, unless shown by clear proof to be erroneous. *Nebraska State Bldg. Corporation v. City of Lincoln* 535
8. An erroneous and excessive valuation of property for purpose of taxation, as fixed by the board of equalization on complaint of the owner, may be corrected in a proceeding in error. *Nebraska State Bldg. Corporation v. City of Lincoln* 535
9. The housing authority is a governmental subdivision and its property and bonds are exempted from taxation. *Lennox v. Housing Authority of City of Omaha* 582

Telegraphs and Telephones.

Under federal court rules, recovery cannot be had for mental pain and anguish arising out of negligent failure of a

telegraph company to deliver an interstate telegram. *Burke v. Western Union Telegraph Co.* 878

Theaters and Shows.

1. An act prohibiting "all public exhibitions of hypnotism, mesmerism, animal magnetism, or so-called psychical forces, for gain," does not prohibit spiritualistic seances, unless they are public and open and for gain. *Dill v. Hamilton* 723
2. The police power to prohibit public exhibitions for money-making purposes or for gain extends to harmful, immoral or indecent performances, though conducted in the name of religion. *Dill v. Hamilton* 723
3. A guaranty of $15 to remunerate a medium for conducting a spiritualistic seance as a religious ceremony and creation of the fund by voluntary contributions of communicants of the Spiritualistic Church do not constitute "gain" within the statute forbidding public seances for gain. *Dill v. Hamilton* 723

Trial. SEE APPEAL. CRIMINAL LAW.

1. In suits not triable by jury as of right, a verdict of a jury is advisory only. *In re Guardianship of Warner* 25
2. Where a litigant desires to offer all of a deposition in evidence, the proper procedure is to offer the deposition by question and answer, and thereby give the opposing party opportunity to object to the admission thereof, and also to give opportunity to the trial court to rule thereon, subject to statutory limitations applicable to depositions. *Hill v. Interstate Transit Lines* 110
3. Correct instructions to the jury do not cure prejudicial error in other misleading and contradictory instructions on the same issue. *Bocian v. Union P. R. Co.* 318
4. A judgment will not be reversed for alleged error in an instruction, where the instructions, considered in their entirety, are not prejudicial. *Spangler v. Brown* 510
5. Refusal to give proffered instruction on measure of damages was not error in view of court's instructions. *Pearse v. Loup River Public Power District* 611
6. Where the evidence is insufficient to sustain a judgment for plaintiff, it is the court's duty to sustain a motion for a directed verdict for defendant. *Redwelski v. Omaha & C. B. Street R. Co.* 681
7. Instructions defining the duties of passengers riding in a street car, approved. *Whittaker v. Omaha & C. B. Street R. Co.* 800
8. It is not error for the court in an instruction to assume

as true facts that are established by the evidence without controversy. *Whittaker v. Omaha & C. B. Street R. Co.* 800

9. Harmless error in instructions does not require reversal. *Whittaker v. Omaha & C. B. Street R. Co.* 800
10. In action for negligence against carrier, giving an instruction defining "ordinary care" and "negligence" was not prejudicially erroneous, where a proper instruction was given as to the care required of a common carrier. *Whittaker v. Omaha & C. B. Street R. Co.* 800
11. An instruction defining duties of passenger riding in street car to use reasonable care for his own safety was not prejudicially erroneous. *Whittaker v. Omaha & C. B. Street R. Co.* 800
12. An instruction that a street car company was under no obligation to keep a car immovable until passenger had reached a seat in the car was not prejudicial. *Whittaker v. Omaha & C. B. Street R. Co.* 800
13. An instruction that there was no liability on the part of a street car company for ordinary jerks and lurches incident to starting and stopping of a car was not prejudicially erroneous, where the instruction also stated that plaintiff had the burden of proving that the jerking or lurching was of an unusual character. *Whittaker v. Omaha & C. B. Street R. Co.* 800
14. In absence of a specific request, failure of the trial court to define terms used in a requested instruction is not error. *Horn v. Goldberg* 813

Vendor and Purchaser.

Where purchaser contracted to maintain buildings on premises from date fixed for performance by contract to purchase, and pending negotiations for settlement he entered into possession, purchaser was not entitled to reduction in purchase price for waste or depreciation occurring to buildings after date fixed for performance of contract and after he entered into possession. *Union Central Life Ins. Co. v. Cover* 260

Waters.

1. Charges for irrigation water sold and delivered to land are not a lien on the land, unless made so by statute or by contract. *Union Central Life Ins. Co. v. Cover* 260
2. In order to create a lien on land for charges for irrigation water by contract, the language used must by its terms be a direct declaration that such a lien is created. *Union Central Life Ins. Co. v. Cover* 260

3. The measure of damages for flooding of a leasehold is its diminution in value for the remaining term. *Thies v. Platte Valley Public Power and Irrigation District* 344
4. In an action for damages from flood waters, question of proximate cause was properly submitted to the jury. *Thies v. Platte Valley Public Power and Irrigation District* 344

Wills.

1. The intention of the testator, as ascertained from his will, must be given effect, if not prohibited by law. *In re Estate of Wantz* 307
2. Where it is apparent from the terms of the will that proper debts of a beneficiary are to be deducted from his legacy, such intent governs. *In re Estate of Wantz* 307
3. Parol evidence, including evidence of testator's conduct subsequent to execution of will, and entries properly identified in an account book and other memorandum showing amounts paid, were admissible in proof of ademption of a legacy. *In re Estate of Wantz* 307
4. Where evidence shows intention of testator to satisfy a legacy by gift or payment subsequent to execution of will, such intention is controlling, and the burden of disproving it is on the one denying it. *In re Estate of Wantz* 307
5. A devise of realty to a designated person "and his heirs forever," without power to sell, mortgage or otherwise encumber, vests such designated person with a fee simple title, the restraints against alienation being void because repugnant to the estate devised. *State Bank of Jansen v. Thiessen* 426
6. In construing a will, courts must carry into effect the testator's true intent, as determined from the whole instrument. *In re Estate of Hart* 843
7. Where there are two provisions in a will relating to disposition of the same property, relative positions of the provisions in the will are unimportant, if the testator's intent can be ascertained by construing the provisions together. *In re Estate of Hart* 843
8. Where it can be reasonably done, a court will harmonize ambiguous expressions in a will with the plain provisions to effectuate the testator's intent. *In re Estate of Hart* 843
9. Where testator's intent with reference to specific property is plain in one part of a will, a court will not, in another part relating to the same property, create an ambiguity by construction. *In re Estate of Hart* 843

Witnesses.

1. In action for damages for injuries sustained in automobile collision, permitting answer by witness that certain statement was made to a "lawyer for the insurance company" was not error, where there was no bad faith involved. *Gleason v. Baack* 272
2. When a party offers a witness, the relation of the witness to the thing in issue and his interest in the result become material as affecting his credibility. *Gleason v. Baack* 272

Work and Labor.

An implied contract results where one performs useful services for another with his knowledge and with expectation of being paid therefor, and the other party by his conduct indicates that he knew or should have known that the services were to be paid for. *Wrede v. City of David City* 194